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

APPELLEE'S MOTION FOR STAY OF MANDATE PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI

NORMAN L. SMITH
TANYA M. SCHIERLING
DANIEL E. GARDENSWARTZ
SOLOMON WARD SEIDENWURM & SMITH LLP
401 B Street, Suite 1200
San Diego, CA 92101
Tel.: (619) 231-0303

DAN MARMALEFSKY
MORRISON & FOERSTER LLP
707 Wilshire Blvd., Suite 6000
Los Angeles, CA 90017
Tel.: (213) 892-5200

JOSEPH R. PALMORE
SAMUEL B. GOLDSTEIN
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue NW
Washington, DC 20006
Tel.: (202) 887-6940

Counsel for Appellee Monster Energy Company

JANUARY 3, 2020

MOTION FOR STAY OF THE MANDATE

Pursuant to Federal Rule of Appellate Procedure 41(d) and Ninth Circuit Rule 41-1, Appellee Monster Energy Company respectfully requests that the Court stay its mandate pending Monster's filing of a petition for a writ of certiorari in the Supreme Court of the United States and its disposition.

Appellant Olympic Eagle Distributing has not stated a position on the requested stay of the mandate.

A stay of the mandate is justified under Rule 41(d)(1).

First, Monster's certiorari petition will involve a substantial question—this Court's split panel decision announced a new rule that directly contradicts Supreme Court precedent, conflicts with the law in other circuits, and undermines the policies embodied in the Federal Arbitration Act. Under *Commonwealth Coatings v. Continental Casualty Co.*, a court may vacate an arbitration award for evident partiality based on non-disclosure *only* if the undisclosed conflict is substantial and non-trivial. 393 U.S. 145, 150-51 (1968) (White, J., concurring).

Not surprisingly, therefore, no court has ever held that an arbitrator's ownership interest—whether in an arbitration firm that has administered other arbitrations for a party (as here) or even directly in a party—constitutes evident partiality requiring vacatur. This Court, however, has now done so, departing from Supreme Court precedent and its sister Circuits. *See, e.g.*, *Sphere Drake Ins. Ltd.*

v. All Am. Life Ins. Co., 307 F.3d 617, 621 (7th Cir. 2002) ("A judge can't even hold a single share of a party's stock, but this would not imply 'evident partiality' for purposes of [FAA] § 10(a)(2)."); *Republic of Arg. v. AWG Grp. Ltd.*, 894 F.3d 327, 335-36 (D.C. Cir. 2018) (though arbitrator was a director and shareholder in a company (UBS) that invested over $2 billion in two parties in the arbitration, vacatur for failing to disclose these facts was denied because that sum, as a percentage of all UBS investments, was "too small to suggest much significance").

Second, good cause supports staying the mandate. Without a stay, Monster will be forced to engage in time-consuming and expensive arbitration proceedings (and, likely, litigation) that will be mooted if the Supreme Court reinstates the Arbitration Award that this Court vacated. Such litigation will likely include, without limitation, a repeat challenge by Olympic disputing whether, where, and how it must arbitrate and a new, "do-over" arbitration. For Monster alone, the cost of the proceedings thus far required to compel arbitration and to conduct, complete, and confirm such proceedings amounted to more than $3,000,000. By contrast, a stay will not prejudice Olympic; it will be able to re-arbitrate its claims if and when the Supreme Court denies certiorari or affirms, and testimony of key witnesses has been preserved in the prior proceedings. "No exceptional circumstances need be shown to justify a stay." *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1528-29 (9th Cir. 1989); *see also United States v. Pete*, 525 F.3d 844,

850 & n.9 (9th Cir. 2008) (it "is *often* the case" that "the appellate mandate [is] stayed" while a party "seek[s] review by the Supreme Court of an adverse appellate decision" (emphasis added)).

STATEMENT OF THE CASE

Pursuant to two distribution agreements executed in 2006 and 2007, Monster appointed Olympic as the exclusive distributor of Monster-branded beverages in part of Washington state. The agreements had 20-year terms but permitted Monster to terminate earlier without cause upon payment of an agreed severance. The agreements also provided that any dispute "shall be settled by binding arbitration conducted by JAMS."

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. Monster demanded arbitration and moved in district court to compel arbitration. Olympic opposed, arguing the arbitration provision was unconscionable. The court rejected Olympic's challenge—including based on the fact of Olympic's "obvious sophistication" as an experienced beverage distributor—and compelled arbitration before JAMS.

Pursuant to JAMS's standard rules and procedures, JAMS appointed the Honorable John W. Kennedy, Jr. (Ret.) as Arbitrator. The Arbitrator provided

disclosures using JAMS's standard form, which included the statement that "[e]ach JAMS neutral, including me, has an economic interest in the overall financial success of JAMS." The Arbitrator did not state, and no party inquired, what the nature or extent of the plainly disclosed economic interest was or whether it included an ownership interest.

The Arbitrator also advised that "the parties should assume" JAMS had conducted any number of arbitrations with the parties or their counsel and may do so in the future. Indeed, JAMS's website disclosed over 80 past arbitrations with Monster. The Arbitrator himself did not state, and no party inquired, how many other arbitrations JAMS conducted for Monster (or Olympic, or their respective counsel) or the amount of fees generated from such arbitrations.

After hard-fought litigation culminating in a two-week evidentiary hearing, the Arbitrator ruled for Monster, finding that Olympic did not qualify for protection under Washington's franchise law and that Monster thus properly terminated the agreements. The Arbitrator awarded Monster most of its costs and attorney's fees.

Monster petitioned to confirm the Arbitration Award. Olympic cross-petitioned to vacate, alleging "evident partiality . . . in the arbitrator[]" under the FAA, 9 U.S.C. § 10(a)(2). Olympic asserted that, after the arbitration, it learned that the Arbitrator was a part-owner of JAMS in a phone call with JAMS's

counsel. Olympic argued that failure to disclose this "ownership interest," given Monster's status as a "repeat player" in JAMS arbitrations, established evident partiality.

Monster opposed Olympic's petition to vacate on numerous grounds, including that, whatever the Arbitrator's ownership interest in JAMS may or may not have been, it was not materially different from the expressly disclosed "economic interest." Therefore, the additional granular detail of an ownership interest was, in context, trivial and insubstantial such that its non-disclosure did not warrant vacatur.

The district court confirmed the Award. It observed that "[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. The court also ruled that Olympic waived its evident partiality claim. It found that 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" and therefore waived the challenge because it failed to timely object. ER17. The court also denied as moot Olympic's discovery motion seeking documents and deposition testimony from

JAMS relating to the Arbitrator's ownership interest, compensation and other remuneration.

In a split decision, this Court reversed and vacated the Arbitration Award based on a new, vague, and far-reaching disclosure rule that creates an unprecedented presumption of bias in private arbitration. The majority held that, 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 organizations' nontrivial business dealings with the parties to the arbitration." Majority 17 (emphasis added).

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. 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 Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1110 (9th Cir. 2007)). She also recognized the new rule's disruptive impact now and in the future. In the short run, 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. In the long run, the "uncertainty created by the majority's opinion" about "the extent of disclosures required by arbitrators" will "generate endless litigation over arbitrations that were intended to finally resolve disputes outside the court system." *Id.* at 23-25.

Monster filed a timely petition for rehearing and rehearing en banc. JAMS filed a brief as amicus curiae supporting Monster's rehearing petition. That brief was "the first amicus brief JAMS has ever submitted in any case." JAMS Amicus Br. 1. The majority's new rule will be "so deleterious to efficient commercial arbitration" and was "so incorrect in [its] factual assumptions" that JAMS "ha[d] no choice but to take this extraordinary step" of filing an amicus brief. *Id.* JAMS explained that "an owner-arbitrator's interest in the revenue generated from any particular party's business is de minimis." *Id.* at 6. Moreover, "there is simply no factual or record basis to *assume* that any ownership interest in an arbitration provider creates *any* potential bias in favor of any party or lawyer, even a 'repeat player.'" *Id.* at 13. The majority's new rule also will "greatly complicate the arbitrator selection and challenge process, undermine the important goals of efficiency and finality, and invite unhappy litigants to engage in an unending effort to disrupt both pending and final arbitrations." *Id.* at 15. This concern "is not at

all speculative": "[p]arties in pending and final arbitration proceedings have already begun requesting additional information from JAMS, beyond what is required by the decision (including personal financial information of the arbitrator), seeking some basis to challenge the arbitrator or the final award." *Id.* at 17.

On December 30, 2019, this Court denied Monster's petition for rehearing. Monster intends to file a petition for writ of certiorari to the Supreme Court of the United States seeking review of this Court's decision.

REASONS FOR GRANTING A STAY

Rule 41(d)(1) authorizes this Court to stay its mandate "pending the filing of a petition for a writ of certiorari in the Supreme Court" when (1) "the certiorari petition would present a substantial question" and (2) "there is good cause for a stay." Fed. R. App. P. 41(d)(1). Both conditions are met here.

A. Monster's Certiorari Petition Will Present A Substantial Question Meriting Supreme Court Review

Monster's certiorari petition will present substantial questions. In particular, the petition will show that the panel's decision conflicts with decisions of the Supreme Court and other courts of appeals.

Commonwealth Coatings is the lone Supreme Court decision interpreting the FAA's evident partiality standard in the non-disclosure context. The panel majority recites that decision's rule—"where the arbitrator has a substantial

interest in a firm which has done more than trivial business with a party, that fact must be disclosed" (*Commonwealth Coatings*, 393 U.S. at 151-52 (White, J., concurring))—but then disregards it.

First, the majority 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. *Second*, the majority 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.* To the contrary, as Judge Friedland observed, both owners and non-owners have "similar incentives to decide cases in a way that is acceptable to repeat player customers." Dissent 21. JAMS's amicus brief confirmed that the majority's assumptions are "unsupported" and "contradicted by the facts." JAMS Amicus Br. 10; *see supra* pp. 7-8. In fact, JAMS noted that it had administered hundreds more proceedings involving *Olympic's law firms* than involving Monster. JAMS Amicus Br. 9. Thus, "it is possible that a JAMS arbitrator would have had an incentive to please the lawyers representing Olympic" rather than Monster, "given that lawyers often help their clients choose arbitrators." Dissent 20 n.2.

The majority's decision thus creates a presumption that *any ownership interest* is necessarily substantial and must be disclosed. This presumption

conflicts with the rule in other circuits. *See, e.g.*, *Sphere Drake*, 307 F.3d at 621; *Republic of Arg.*, 894 F.3d at 335-36. Indeed, as Judge Friedland noted, no other court has vacated an arbitration award under *Commonwealth Coatings* based on an undisclosed interest "that stems from the very structure of private arbitration." Dissent 23-24.

As JAMS's amicus brief observed, this conflict is already disrupting private dispute resolution. "[A]rbitrators in this Circuit" are now subject to "vague and open-ended" disclosure requirements "beyond anything found in existing law." JAMS Amicus Br. 14-15. Parties unhappy with an arbitrator's rulings are already requesting additional information from JAMS—including some information "beyond what is required by the decision," such as "personal financial information of the arbitrator"—seeking some post-hoc basis to challenge the arbitrator or the arbitration award. *Id.* at 16-17.

To allow the majority's decision to stand will undermine Supreme Court precedent, create a split among the Circuits and reinstate 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). The Supreme Court is intensely interested in arbitration and frequently grants review in cases presenting questions under the Federal Arbitration Act. *See, e.g.*, *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019); *New*

Prime Inc. v. Oliveira, 139 S. Ct. 532 (2019); *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019). Given the substantial questions that will be presented by Monster's certiorari petition, there is a good likelihood it will do so here as well.

B. Good Cause Exists to Stay the Mandate

If the mandate is not stayed, Monster will be forced to devote substantial resources to litigation that will have been entirely unnecessary if the Supreme Court grants review and reinstates the Arbitration Award. That potentially unnecessary litigation may include not only a new, "do-over" arbitration, but also further court proceedings concerning Olympic's apparent new opposition to arbitration with *any* JAMS arbitrator. Olympic previously challenged the parties' arbitration agreements as unconscionable, seeking to avoid arbitration and litigate its claims in court in Washington state. The district court rejected that challenge and compelled arbitration with JAMS in accordance with the agreements. Although Monster submits that any renewed challenge to the arbitration agreement would be baseless, it remains likely that Olympic will pursue such a challenge.

Monster has already incurred over $3,000,000 in attorneys' fees and costs to compel arbitration and arbitrate the parties' disputes. It should not be forced to fund a second round of substantially identical litigation unless and until Olympic's challenge to the Arbitration Award is fully and finally determined in Olympic's favor, either by denial of certiorari or affirmance by the Supreme Court.

By contrast, a stay of the mandate will not prejudice Olympic. If the mandate is stayed and the Supreme Court ultimately denies review (or grants review and affirms this Court's judgment), Olympic will be in essentially the same position as it is now: free to arbitrate its claims. Nor is there is any urgency compelling immediate resolution of the parties' claims. The parties' distribution relationship terminated over five years ago and they have no ongoing business interactions.

CONCLUSION

For these reasons, Monster respectfully requests that the Court grant a stay of its mandate pending the filing and disposition of a certiorari petition.

Dated: January 3, 2020

Respectfully submitted,

s/ Joseph R. Palmore

JOSEPH R. PALMORE
SAMUEL B. GOLDSTEIN
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue NW
Washington, D.C. 20006
Tel.: (202) 887-6940

DAN MARMALEFSKY
MORRISON & FOERSTER LLP
707 Wilshire Blvd., Suite 6000
Los Angeles, CA 90017
Tel.: (213) 892-5200

NORMAN L. SMITH
TANYA M. SCHIERLING
DANIEL E. GARDENSWARTZ
SOLOMON WARD SEIDENWURM & SMITH LLP
401 B Street, Suite 1200
San Diego, CA 92101
Tel.: (619) 231-0303

Counsel for Appellee Monster Energy Company

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with Ninth Circuit Rule 27-1, namely that this motion contains 2,571 words excluding those parts authorized by Fed. R. App. P. 27(a)(2)(B) and 32(f), which, when divided by 280 as provided by Circuit Rule 32-3, yields a page count less than or equal to twenty pages as required by Circuit Rule 27-1(1)(d).

Dated: January 3, 2020 s/ Joseph R. Palmore