New York County Clerk's Index No. 115867/08

Court of Appeals

of the

State of New York

U.S. ELECTRONICS, INC.,

Petitioner-Appellant,

– against –

SIRIUS SATELLITE RADIO, INC.,

Respondent-Respondent.

BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

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INTRODUCTION

The Association of the Bar of the City of New York (the "Association") respectfully submits this brief as *amicus curiae*. This case presents the Court with the opportunity to elucidate the standards that should be applied by the New York state courts when asked to vacate arbitration awards under Section 10(a)(2) of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10(a)(2), for "evident partiality."

The Court has granted leave to appeal in *U.S. Electronics, Inc. v. Sirius Satellite Radio, Inc.*, 73 A.D.3d 497, 901 N.Y.S.2d 202 (1st Dep't 2010), in which the First Department affirmed the judgment of the Supreme Court, New York County (Commercial Division) denying a petition to vacate an arbitration award. In the arbitration, U.S. Electronics, Inc. ("USE") sought to recover damages arising from the alleged breach by Sirius Satellite Radio ("Sirius") of USE's contract rights as a distributor of Sirius radio receivers. Arbitration proceedings were commenced in May 2006 and concluded with the issuance of an award in August 2008. *U.S. Elecs., Inc. v. Sirius Satellite Radio, Inc.*, No. 115867/08, Verified Petition to Vacate Arbitration Award, ¶¶ 10, 18. The arbitration involved nineteen days of hearings during which each side presented a number of witnesses, hundreds of exhibits and extensive written submissions. *Id*. at ¶¶ 11, 14. On August 27, 2008, the three-member arbitral tribunal, consisting of Hon. Herman D. Michels, John H. Wilkinson, Esq., and Hon. William S. Sessions, issued a

unanimous 149-page award in favor of Sirius. *Id.* at ¶ 19. Thereafter, USE petitioned to vacate the award under C.P.L.R. § 7511 and Sirius cross-moved for confirmation under C.P.L.R. § 7510 and Section 9 of the FAA. USE sought vacatur on various grounds, including the alleged failure of the Chair of the Tribunal, William S. Sessions, to disclose purportedly material conflicts of interest involving his son, Congressman Pete Sessions. *Id.* at ¶¶ 27–46.

It is undisputed that the FAA applies to the arbitration award at issue here. The United States Court of Appeals for the Second Circuit has articulated clear standards for the vacatur of awards under Section 10(a)(2) of the FAA based on U.S. Supreme Court precedent, and there is extensive case law in the Second Circuit applying those standards. The Commercial Division, per Gammerman, J.H.O., cited and applied the leading Second Circuit cases in its decision. However, on appeal, the First Department, while affirming the judgment below, applied standards that are, in a number of respects, materially different from the standards applied by federal courts in the Second Circuit.

Although the standards used by the First Department did not result in a different outcome in this case, the Association believes that the uniform application of federal law standards for vacatur of awards under FAA Section 10(a)(2) in the State of New York is important. This Court has repeatedly recognized the importance of uniformity between state and federal courts in the

area of federal arbitration law. The Court's adoption of standards different from those established by the Second Circuit would create confusion in the application of federal arbitration law and would be detrimental to New York as a forum for domestic and international arbitration. It would also create the risk of forum shopping between federal and state courts and uncertainty concerning the finality of awards rendered in this state. The Association therefore urges the Court, in deciding this appeal, to apply the same standards used by the Second Circuit in analyzing petitions to vacate awards under Section 10(a)(2) of the FAA.

INTEREST OF THE AMICUS

The Association has a strong interest in the issues raised in this appeal. Founded in 1870, the Association is a voluntary organization of more than 23,000 attorneys. Through its standing committees, including the Arbitration Committee and the International Commercial Disputes Committee, the Association educates the Bar and the public about legal issues, including issues relating to the application of the Federal Arbitration Act in the state and federal courts of New York. The Court's decision in this case will be of great importance to the Bar, both here in New York and across the country, and may have an effect on the status of New York as a forum for domestic and international arbitration. The resolution of this case will also be of interest to companies and individuals throughout the world who may consider New York as a venue for arbitration. The

Association is well situated to offer a broader perspective on the issues in this case that impact the future of arbitration under the FAA in New York.

ARGUMENT

I. THE UNITED STATES SUPREME COURT HAS LEFT THE DEVELOPMENT OF STANDARDS TO APPLY TO CLAIMS OF "EVIDENT PARTIALITY" UNDER SECTION 10(a)(2) OF THE FAA TO THE LOWER FEDERAL COURTS

The starting point for any discussion of Section 10(a)(2) of the FAA is the decision of the U.S. Supreme Court in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968). There, the Supreme Court vacated an arbitral award where the third arbitrator—"the supposedly neutral member of the panel"—had failed to disclose a prior business relationship between himself and one of the parties. *Id.* at 146. The third arbitrator, an engineering consultant, had provided consulting services to the prime contractor, who was the respondent and prevailing party in the arbitration. "[T]he prime contractor's patronage was repeated and significant, involving fees of about $12,000 over a period of four or five years, and … include[d] the rendering of services on the very projects involved in this lawsuit. An arbitration was held, but the facts concerning the close business connections between the third arbitrator and the prime contractor were unknown to petitioner and were never revealed to it by this arbitrator, by the prime contractor, or by anyone else until after an award had been made." *Id.*

There was no majority opinion in *Commonwealth Coatings*.[1] In concluding that the failure to disclose this relationship warranted vacating the award, Justice Black, writing for himself and three other justices, suggested that arbitrators, like Article III judges under the Canons of Judicial Ethics, "must avoid even the appearance of bias." *Id.* at 150.

> 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.

Id. at 149. However, Justice White, writing for himself and Justice Marshall in a concurring opinion, disagreed and made it clear that the Court's holding was limited:

> The Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges. It is often because they are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function… . This does not mean the judiciary must overlook outright chicanery in giving effect to their awards; that would be an abdication of our responsibility. But it does mean that arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial. I see no reason automatically to disqualify the best informed and most capable potential arbitrators.

[1] "A majority of circuit courts have concluded that Justice White's opinion did not lend majority status to the plurality opinion." *Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 282 (5th Cir. 2007) (*en banc*), *cert. denied*, 551 U.S. 1114 (2007) (citing cases).

* * *

> [I]t is enough for present purposes to hold, as the Court does, that 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.

Id. at 150–52. Because of the absence of a majority opinion in *Commonwealth Coatings*, lower federal courts have endeavored to deduce, from the less than "pellucid"[2] opinions in the case, what standards to apply to claims of "evident partiality" under Section 10(a)(2) of the FAA.

II. BASED ON *COMMONWEALTH COATINGS*, THE SECOND CIRCUIT HAS ARTICULATED CLEAR STANDARDS FOR THE VACATUR OF AWARDS UNDER SECTION 10(a)(2) OF THE FAA FOR "EVIDENT PARTIALITY"

A. In *Morelite*, The Second Circuit Held That Evident Partiality Within The Meaning Of 9 U.S.C. § 10 Will Be Found Where A Reasonable Person Would Have To Conclude That An Arbitrator Was Partial To One Party To The Arbitration

The leading case in the Second Circuit concerning the standards for vacatur of arbitral awards under Section 10(a)(2) of the FAA is *Morelite Construction Corp. v. New York City District Council Carpenters Benefit Funds*, 748 F.2d 79 (2d Cir. 1984). In *Morelite*, the court began by carefully examining the decision of the Supreme Court in *Commonwealth Coatings*.

[2] *Positive Software Solutions*, 476 F.3d at 281.

Regarding Justice Black's opinion, the court said:

> Justice Black, writing for a plurality of four justices, appeared to impose upon arbitrators the same lofty ethical standards required of Article III judges …. Using language that has since been seized upon by unsuccessful parties to arbitration, Justice Black concluded by writing that arbitrators, like judges, must avoid even the "appearance of bias."

Id. at 82. The court in *Morelite* observed, however, that the views expressed by Justice Black did not command a majority:

> Four justices, however, do not constitute a majority of the Supreme Court. Justice White, writing for himself and Justice Marshall, concurred in the result, but made clear the Court was not holding that arbitrators' and judges' ethical standards are coextensive … . Accordingly, much of Justice Black's opinion must be read as dicta, and we are left in the dark as to whether an "appearance of bias" will suffice to meet the seemingly more stringent "evident partiality" standard of 9 U.S.C. § 10.

Id. at 83. As the court observed in a footnote, "[b]ecause the two opinions are impossible to reconcile … we must narrow the holding to that subscribed to by both Justices White and Black." *Id.* at 83 n.3.[3]

Writing upon a "relatively clean slate," *id.* at 83, the Second Circuit in *Morelite* held that "the standard of 'appearance of bias' is too low for the

[3] *See Marks v. United States*, 430 U.S. 188, 193 (1977) (in the absence of a majority opinion, the Court's holding is "that position taken by those Members who concurred in the judgments on the narrowest grounds"). *Accord For the People Theatres of N.Y., Inc. v. City of New York,* 6 N.Y.3d 63, 79 (2005).

invocation of section 10, and 'proof of actual bias' too high." *Id.* at 84. The court stated the appropriate standard as follows:

> [W]e hold that "evident partiality" within the meaning of 9 U.S.C. § 10 will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration. In assessing a given relationship, courts must remain cognizant of peculiar commercial practices and factual variances. Thus, the small size and population of an industry might require a relaxation of judicial scrutiny, while a totally unnecessary relationship between arbitrator and party may heighten it. In this way, we believe that the courts may refrain from threatening the valuable role of private arbitration in the settlement of commercial disputes, and at the same time uphold their responsibility to ensure that fair treatment is afforded those who come before them.

Id. In *Morelite*, the court vacated an arbitration award rendered in favor of a union by a sole arbitrator whose father was the president of that union. The relationship was known to the parties prior to the commencement of the hearing and objections were made and preserved. The court said:

> [W]ithout knowing more, we are bound by our strong feeling that sons are more often than not loyal to their fathers, partial to their fathers, and biased on behalf of their fathers. We cannot in good conscience allow the entering of an award grounded in what we perceive to be such unfairness.

Id. Since *Morelite*, courts in the Second Circuit have developed strict criteria for evaluating claims of alleged bias.

As stated in a Southern District of New York case:

> The mere appearance of bias does not satisfy the standard of evident partiality … Rather, to set aside an arbitration award for arbitrator partiality, the interest or bias [of the arbitrator] ... must be direct, definite and capable of demonstration rather than remote, uncertain or speculative ... In evaluating the alleged interest and bias of an arbitrator, courts examine several factors: (1) the financial interest the arbitrator has in the proceeding; (2) the directness of the alleged relationship between the arbitrator and a party to the arbitration proceeding; and (3) the timing of the relationship with respect to the arbitration proceeding.

Transportes Coal Sea de Venez. C.A. v. SMT Shipmgmt. & Transp. Ltd, No. 05-CV-9029 (KMK), 2007 WL 62715, at *3–4 (S.D.N.Y. Jan. 9, 2007) (declining to vacate an arbitration award where a law firm in which the arbitrator's son had been a partner was hired to represent one of the parties in a separate concurrent arbitration) (internal citations and quotation marks omitted).[4]

B. In *Applied Industrial Materials,* The Second Circuit Stated The Test Under Section 10(a)(2) For Vacating An Award Based Upon The Alleged Failure Of An Arbitrator To Disclose A Relationship

From 1968, when *Commonwealth Coatings* was decided, until 2007, there was no reported case in the Second Circuit vacating an award based on the failure

[4] *See also Sanford Home for Adults v. Local 6, IFHP*, 665 F. Supp. 312, 323 (S.D.N.Y. 1987) (declining to vacate an award where, *inter alia*, the name of an attorney for one of the parties appeared as "counsel" on the arbitrator's letterhead).

of an arbitrator to disclose a relationship.[5] This was not for lack of trying by disappointed parties. Many decisions rejecting such challenges did so upon the ground that the relationship in question was "trivial" or "insubstantial" or "attenuated."[6] Another frequent ground for refusing to vacate has been that the "complaining party should have known of the relationship … or could have learned of the relationship just as easily before or during the arbitration rather than after it lost its case."[7]

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[5] *Morelite* was not based on a failure to disclose. The relationship was disclosed and objections were made and preserved.

[6] *See, e.g.*, *Lucent Techs., Inc. v. Tatung Co.*, 379 F.3d 24, 31 (2d Cir. 2006) (arbitrators' "co-ownership of an airplane more than a decade ago is simply too insubstantial to require vacatur"); *Toroyan v. Barrett*, 495 F. Supp. 2d 346, 352 (S.D.N.Y. 2007) (endowment by the principal owners of one of the parties of a chair at Columbia University, where the sole arbitrator taught, was "not sufficiently significant to warrant disclosure"); *Transportes Coal*, 2007 WL 62715, at *11 (hiring of a law firm in which the arbitrator's son had been a partner to represent one of the parties in a separate concurrent arbitration was too remote and attenuated to require vacation of the award for nondisclosure); *Skyview Owners Corp. v. Serv. Emps. Int'l Union*, No. 04-CV-4643 (SAS), 2004 WL 2360021, at *1 (S.D.N.Y Oct. 19, 2004) (arbitrator's prior outside business relationship with a partner in the law firm representing the union was too "tenuous and remote to require vacatur" for nondisclosure); *Jardine Matheson & Co. v. Saita Shipping, Ltd.*, 712 F. Supp. 423, 427 (S.D.N.Y. 1989) (lease by a party's attorney of space in the office where the arbitrator worked shortly before he wrote the arbitration award was too tenuous to require vacation of the award). Courts in other circuits are in accord that the failure to disclose insignificant relationships will not result in vacatur. *See, e.g., ANR Coal Co. v. Cogentrix of N.C., Inc.*, 173 F.3d 493, 499 (4th Cir. 1999); *Positive Software Solutions*, 476 F.3d at 281.

[7] *Lucent*, 379 F.3d at 28 (declining to vacate where information concerning the relationships had been disclosed to the American Arbitration Association and could have been obtained there) (internal quotation marks omitted). *See also Toroyan*, 495 F. Supp. 2d at 352 (declining to vacate for failure by the sole arbitrator, Professor Hans Smit, to disclose contributions made by the principal owners of one of the parties to the endowment of a chair at Columbia University when such contributions were a matter of public record); *Andros Compania Maritima, S.A. v. Marc Rich & Co., A.G.*, 579 F.2d 691, 700–02 (2d Cir. 1978) (declining to vacate based on nondisclosure by chairman that he had frequently served with and been appointed chairman by

The first and only case to date in which the Second Circuit has affirmed a decision vacating an arbitration award based on nondisclosure was *Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132 (2d Cir. 2007). There, Applied Industrial Materials Corporation ("AIMCOR") appealed from a judgment of the district court refusing to confirm an arbitration award in its favor and granting Ovalar's motion to vacate the award. The arbitration concerned a dispute about the distribution of profits from a joint venture in which AIMCOR purchased petroleum coke and transported it to Turkey for distribution by Ovalar. *Id.* at 134. The parties each appointed arbitrators who, in turn, selected as chairman Charles Fabrikant, President and CEO of Seacor Holdings, a multibillion dollar company with 50 offices in 30 countries, involved in a wide range of businesses including the transportation of goods.[8] *Id.* at 135.

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the prevailing party's arbitrator when that information was available in the published awards of the SMA); *Cook Indus., Inc. v. C. Itoh & Co. (Am.), Inc.*, 449 F.2d 106, 107 (2d Cir. 1971) (declining to vacate for nondisclosure by the arbitrator that his employer, a large corn dealer, had extensive business dealings with the prevailing party when the losing party was also a corn dealer and knew of such dealings); *Garfield & Co. v. Wiest*, 432 F.2d 849, 854 (2d Cir. 1970) ("[W]hen parties have agreed to arbitration with full awareness that there will have been certain, almost necessary, dealings between a potential arbitrator and one of the opposing parties, disclosure of these dealings is not required by *Commonwealth Coatings* inasmuch as the parties are deemed to have waived any objections based on these dealings."). *Accord Sanko S.S. Co. v. Cook Indus., Inc.*, 495 F.2d 1260, 1265 (2d Cir. 1973) (remanding determination of whether the complaining party knew or should have known of relations between the arbitrator's employer and the prevailing party).

[8] In addition to being a wealthy businessman, Fabrikant graduated from Columbia Law School in 1968 and clerked for Justice Harlan, one of the dissenting justices in *Commonwealth Coatings*. Interview with Charles Fabrikant, MARINE LOG, *available at*

In September 2003, before hearings started, AIMCOR advised the arbitrators that it was being sold to Oxbow Corporation, which might be relevant to the arbitrators' disclosure. *Id.* At that time, Fabrikant submitted a disclosure statement stating that he "ha[d] had no personal or business relationship with any of the parties to this proceeding, or their affiliates, and would reserve the right to amend or add to this disclosure should future circumstances warrant." *Id.* (internal quotation marks omitted). Hearings in the case were bifurcated into liability and damage phases. In April 2005, after commencement of the liability phase, Fabrikant advised the parties by email that he was amending his prior disclosure statement, stating:

> Gentlemen: it came to my attention yesterday, or day before yesterday that my St. Louis office, which runs our barge operation under the name SCF, has recently been engaged with Ox-Bow of Palm Beach. The subject of conversation is a contract for the carriage of petroleum coke. I had no knowledge of such conversations taking place prior to the past week. I do not participate in contract negotiations or get involved in day to day operations of SCF.

Id. There was no objection from Ovalar and no further disclosure by Fabrikant. Five months later, in September 2005, the panel issued a 2 to 1 award in favor of AIMCOR on liability. *Id.*

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http://www.marinelog.com/DOCS/fabr.html. He frequently serves as an arbitrator in maritime cases in New York.

After the issuance of the award on liability, Ovalar retained a consultant to inquire into the relationship between SCF and Oxbow. See *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 05-CV-10540 (RPP), 2006 U.S. Dist. LEXIS 44789, at *7 n.4 (S.D.N.Y. June 28, 2006). The consultant spoke to an SCF employee and a tugboat operator and was advised, among other things, that SCF had been providing barges to Oxbow for shipments of petroleum coke for about a year and had been soliciting additional business. *Id*. Armed with this information, Ovalar's lawyers wrote to the tribunal in November 2005 and asked that Fabrikant withdraw from the remaining damages phase. 492 F.3d at 135. Fabrikant declined to do so. He stated that, at the time of his disclosure of the discussions between SCF and Oxbow, he told the president of SCF that he "wished to know nothing about SCF's conversations, or be a party to information about our activities with Oxbow or be consulted concerning any business with them." *Id.* at 136. Thereafter, AIMCOR filed a proceeding to confirm the liability award and Ovalar moved to vacate.

The district court granted Ovalar's motion to vacate the award. The Second Circuit described the district court's holding as follows:

> Citing the standards of the American Arbitration Code of Ethics for Arbitrators and the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration, the district court found that "[r]eason dictates that there must be a continuous obligation on the part of the arbitrator to avoid partiality

> or the appearance of partiality." The court observed that the arbitrator's "failure to investigate the status of SCF's negotiations with Oxbow and his subsequent lack of knowledge do not excuse his lack of disclosure." Accordingly, the district court vacated the award.

492 F.3d at 136. On appeal, the Second Circuit began its analysis by stating the basis for the obligation to disclose certain relationships by relying upon the test for evident partiality established in *Morelite*:

> An arbitrator who knows of a material relationship with a party and fails to disclose it meets *Morelite*'s "evident partiality" standard: A reasonable person would have to conclude that an arbitrator who failed to disclose under such circumstances was partial to one side.[9]

Id. at 137. The Second Circuit held that the procedure used and standard applied by the district court were, therefore, wrong:

> Here, the court below did not make findings as to the nature and timing of the arbitrator's knowledge of the relationship between SCF and Oxbow. Instead, the district court focused on whether or not there was an "appearance of partiality" on the part of the arbitrator, a standard that we have made clear is too low. ... As a

[9] Prior to *Applied Industrial Materials*, a clear explanation of the statutory basis for the obligation to disclose had been lacking. As the dissenting Justices complained in *Commonwealth Coatings*, the Court did not say where in the FAA statute it found this obligation. 393 U.S. at 153 (Fortas, J., dissenting). One case in the Second Circuit described it as a requirement of "federal common law." *See Sun Ref. & Mktg. Co. v. Statheros Shipping Corp.*, 761 F. Supp. 293, 300 (S.D.N.Y. 1991), *aff'd*, 948 F.2d 1277 (2d Cir. 1991). Another described it as a matter of "fundamental fairness." *See Reed & Martin, Inc. v. Westinghouse Elec. Corp.*, 439 F.2d 1268, 1275 (2d Cir. 1971). The Court in *Commonwealth Coatings* did not say that the arbitrator's failure to disclose showed his "evident partiality." However, Justice Black seemed to imply this in his reference to the failure of the arbitrator to give the petitioner "even an intimation" of his close financial relationship with the other party over many years. *Applied Industrial Materials* appears to have adopted this view.

> result, we cannot evaluate whether the arbitrator had knowledge of the relationship that would compel a reasonable person to conclude that he was partial.

Id.

Hence, under *Applied Industrial Materials*, the appropriate inquiry under Section 10(a)(2) of the FAA when a court is faced with a petition to vacate an award based upon the alleged failure of an arbitrator to disclose a relationship is: (a) whether there is "a material relationship with a party"[10] and (b) "whether the arbitrator had knowledge of the relationship that would compel a reasonable person to conclude that he was partial" in failing to disclose it. In order to decide the second question, the court must make findings as to the nature and timing of the arbitrator's knowledge of the relationship in question.

In *Applied Industrial Materials*, the Second Circuit concluded that because of the district court's failure to make appropriate findings as to the threshold question concerning the arbitrator's knowledge, there was no basis for determining "whether the arbitrator had knowledge of the relationship that would compel a

[10] The Court of Appeals for the Second Circuit has not yet addressed whether arbitrators must disclose relationships with anyone *other* than the parties. In *Lucent*, the court left unresolved the question whether "an undisclosed relationship between arbitrators could be cause for vacatur under certain circumstances." 379 F.3d at 31. A recent decision in the Southern District of New York appears to have answered this question in the affirmative. *See Scandinavian Reins. Co. v. St. Paul Fire & Marine Ins. Co.*, 732 F. Supp. 2d 293, 307 (S.D.N.Y. 2010) ("[T]he absence of [a financial interest in the outcome of the arbitration or a direct relationship with a party] is not dispositive as to whether a relationship is material—all of the circumstances must be considered, including the timing of the arbitrators' relationships with each other, and with witnesses to the arbitration."). *Scandinavian Re* is now on appeal to the Second Circuit.

reasonable person to conclude that he was partial." The court stated that "[w]ere this the only issue before us, we would be inclined to remand to the district court for further development of this issue." *Id.*

C. In *Applied Industrial Materials*, The Second Circuit Held That, When An Arbitrator Knows Of A Potential Nontrivial Conflict, An Award May Be Vacated Under Section 10(a)(2) For His Failure To Either Investigate The Conflict Or Disclose His Intention Not To Do So

Instead of remanding, the Second Circuit in *Applied Industrial Materials* announced a new ground for the vacatur of arbitral awards under Section 10(a)(2):

> However, our analysis does not end there. While the presence of actual knowledge of a conflict can be dispositive of the evident partiality test, the absence of actual knowledge is not. Indeed, in *Morelite*, we did not address the scope of an arbitrator's duty to investigate or disclose potential conflicts of interest. We now conclude that if we are to take seriously Justice White's statement that "arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, *or if they are unaware of the facts but the relationship is trivial*," arbitrators must take steps to ensure that the parties are not misled into believing that no nontrivial conflict exists. It therefore follows that where an arbitrator has reason to believe that a nontrivial conflict of interest might exist, he must (1) investigate the conflict (which may reveal information that must be disclosed under *Commonwealth Coatings*) or (2) disclose his reasons for believing there might be a conflict and his intention not to investigate.

Id. at 138 (internal citations omitted, emphasis in original).

Applying this test, the Second Circuit found that the threshold question for determining whether Fabrikant had a duty to investigate—whether he had knowledge of a potential conflict—was satisfied: "Once [the arbitrator] learned that a branch of his company was negotiating with Oxbow to enter into a business relationship, he knew, at a minimum, that a potential conflict existed." *Id.* Indeed, he had disclosed these discussions to the parties and had stated that he would "reserve the right to amend or add to this disclosure should future circumstances warrant it." *Id.* at 135. However, without informing the parties, he chose instead to insulate himself from any further information about those discussions by establishing a "Chinese wall." *Id.* at 136.

The Second Circuit held that Fabrikant's failure to investigate these matters or to disclose that he would make no further inquiry warranted vacating the award:

> Had he investigated the potential conflict, that investigation would have revealed that a relationship between SCF and Oxbow *already existed* and had generated $275,000 in revenue, not a trivial amount. *See Commonwealth Coatings*, 393 U.S. at 148, 89 S.Ct. 337 (finding that the arbitrator's business relationship with one of the parties was significant, even though "[t]he payments received were a very small part of [the arbitrator's] income" (internal quotation marks omitted)); *see also id.* at 151–52, 89 S.Ct. 337 (White, J., concurring) (agreeing that the business relationship was not trivial and that the arbitrator was required to disclose it). Yet the arbitrator failed to investigate those discussions or disclose that he would make no further inquiries. We believe that, given these circumstances, a

> reasonable person would have to conclude that evident partiality existed.

Id. at 139.

Applied Industrial Materials was the first case in the Second Circuit imposing upon arbitrators any sort of duty to investigate or disclose a potential conflict.[11] The Second Circuit emphasized, however, that its holding was narrow and limited:

> We emphasize that we are *not* creating a freestanding duty to investigate. The mere failure to investigate is not, by itself, sufficient to vacate an arbitration award. But, when an arbitrator knows of a potential conflict, a failure to either investigate or disclose an intention not to investigate is indicative of evident partiality.

Id. at 138 (emphasis in original.)[12]

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[11] Other circuits are split on the existence and extent of a duty to investigate potential conflicts. The D.C. Circuit and the Eleventh Circuit have unequivocally held that arbitrators have no such duty. *See Al Harbi v. Citibank, N.A.*, 85 F.3d 680, 683 (D.C. Cir. 1996), *cert. denied*, 519 U.S. 981 (1996); *Gianelli Money Purchase Plan & Trust v. ADM Investor Servs., Inc.*, 146 F.3d 1309, 1313 (11th Cir. 1998). In *Schmitz v. Zilveti*, 20 F.3d 1043, 1049 (9th Cir. 1994), the Ninth Circuit held that such a duty existed when an arbitrator's law firm represented the parent corporation of one of the parties and the rules of the arbitral body required arbitrators to make a reasonable effort to inform themselves of potential conflicts. More recently, in *New Regency Products, Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101 (9th Cir. 2007), the Ninth Circuit extended the duty beyond cases where the arbitral rules imposed such an obligation, holding that when an arbitrator took a job during the arbitration as a senior executive with a company that was negotiating with one of the parties to finance a motion picture but was unaware of those negotiations, the arbitrator had a duty to investigate the possible conflicts that might arise from his new employment and that his "failure to disclose facts that show a reasonable impression of partiality is sufficient to support vacatur, notwithstanding the lack of evidence of his actual knowledge of those facts." *Id.* at 1111. Despite the split in authority, the Supreme Court has not revisited this area of the law since *Commonwealth Coatings*.

[12] Since *Applied Industrial Materials*, there has been one other case in the Second Circuit in which an award has been vacated because of a failure to disclose. In *Scandinavian Re*, the district court, per Scheindlin, J., vacated a reinsurance arbitration award when two of the

III. THE COMMERCIAL DIVISION CITED AND APPLIED THE STANDARDS ESTABLISHED BY THE SECOND CIRCUIT FOR VACATUR OF AWARDS UNDER SECTION 10(a)(2) OF THE FAA

In his decision below, Justice Ira Gammerman began by observing that Section 10 of the FAA applied in determining whether the award should be vacated:

> Because the contracts between the parties affect interstate commerce, the contractual arbitration clauses are governed by the Federal Arbitration Act, 9 U.S.C. §1 et seq; *Matter of Diamond Waterproofing Sys., Inc. v 55 Liberty Owners Corp.*, 4 NY3d 247(2005). 9 USC §10 provides, insofar as is relevant here, that an arbitral award may be vacated "[w]here there was evident partiality or corruption in the arbitrators, or either of them" or "where the arbitrators exceeded their powers ..." 9 USC 10 (a) (2) and (4).

U.S. Elecs., Inc. v. Sirius Satellite Radio, Inc., No. 115867/08, slip op. at 1–2 (Sup. Ct. N.Y. County July 1, 2009). Justice Gammerman then set forth the standards applied by the Second Circuit for vacatur of awards under Section 10(a)(2):

> In *Morelight [sic] Constr. Co. v New York City Dist. Council Carpenters Benefit Funds,* 748 F.2d 79 (2d Cir

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arbitrators failed to disclose that they had presided in another arbitration (the "Platinum Bda Arbitration") which, *inter alia*, "overlapped in time, shared similar issues, involved related parties [and] included ... a common witness ...." 732 F. Supp. 2d at 307–08. The court held that, through their participation in the Platinum Bda Arbitration, the arbitrators were "in a position where they could receive *ex parte* information about the kind of reinsurance business at issue in the Scandinavian Re Arbitration, be influenced by recent credibility determinations they made as a result of [the common witness's] testimony in the Platinum Bda Arbitration and influence each other's thinking on issues relevant to the Scandinavian Re Arbitration." *Id.* at 308. As mentioned *supra* note 10, *Scandinavian Re* is on appeal to the Second Circuit, where oral argument was held on January 28, 2011.

> 1984), the Court held that "evident partiality," within the meaning of 9 USC §10, will be found, as it was in that case, "where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." In *Morelight* [sic], the arbitrator's [father] was an officer of one of the parties to the arbitration. In *Applied Ind. Materials Corp. v Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132 (2d Cir. 2007), the Court vacated an award and held that the failure of an arbitrator to disclose a material relationship with a party would lead a reasonable person to conclude that the arbitrator was partial to one side. In addition, the Court held that "where an arbitrator has reason to believe that a non-trivial conflict of interest might exist, he must (1) investigate the conflict (which may reveal information that must be disclosed) … or (2) disclose his reasons for believing there might be a conflict and his intention not to investigate." In that case, the arbitrator had established a "Chinese wall" between himself and a division of his company that had a commercial relationship with the parent company of one of the parties to the arbitration.

Slip op. at 3.

Justice Gammerman summarized the petitioner's allegations as follows:

> The undisclosed conflicts of interest that the petition alleges are (1) that the son of Chairman Sessions, Congressman Pete Sessions, supported the planned merger of Sirius and XM Satellite Radio (XM), in a September 27, 2007, letter to the Federal Communications Commission (FCC), and in a March 26, 2008, appearance on Bloomberg TV; and (2) that Congressman Sessions is a close political ally of, and has cosponsored several bills with, Congressman Darell Issa, the founder and a director of Directed Electronics, Inc. (DEI). USE opposed the merger of Sirius and XM, as a party in the FCC proceeding in which that merger was ultimately approved, and one of the principal contentions

> in USE's Statement of Claim is that Sirius breached its contract with USE, in the course of fostering DEI as the sole distributor of Sirius compatible receivers, while driving USE and other companies, out of the business of distributing such receivers.

Slip op. at 2–3.

Justice Gammerman found that the petitioners failed to make the threshold showings required by *Applied Industrial Materials* to trigger either (a) a duty to disclose—*i.e.*, that the arbitrator had knowledge of the relationship; or (b) a duty to investigate—*i.e.*, that the arbitrator had "reason to believe that a non-trivial conflict of interest might exist." Slip op. at 3. In this regard, Justice Gammerman concluded: "Here, because there is no evidence that Chairman Sessions was aware of his son's isolated statements in favor of the merger, there is no showing that the Chairman had any reason to believe that he might have a conflict because of his son's politica1 activities." Slip op. at 3.

Citing *Morelite*, Justice Gammerman also found that the facts shown concerning the relationship in question were not sufficient to warrant vacatur of the award for "evident partiality," observing that under *Morelite*, the appropriate inquiry was whether the relationship was such that "a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." In this regard, Justice Gammerman concluded that there was no evidence of any such relationship:

> Nor has USE shown any personal or business relationship between Chairman Sessions and Congressman Issa. Accordingly, there is no basis upon which to conclude that the Panel was infected by "evident partiality." USE argues that partiality on the part of the Panel is shown by the Panel's uncritical adoption of the proposed findings of fact and conclusions of law submitted by Sirius. While the Panel did indeed largely adopt Sirius's proposed findings and conclusions, such adoption shows no more than that the Panel agreed with Sirius's theory of the case, and with its assessment of the evidence that the parties had presented.

Slip op. at 3–4.

IV. THE FIRST DEPARTMENT, IN AFFIRMING THE DECISION BELOW, APPLIED STANDARDS DIFFERENT FROM THOSE ESTABLISHED BY THE UNITED STATES SUPREME COURT AND THE SECOND CIRCUIT

A. The First Department Stated That Under Section 10(a)(2) Of The FAA, It Is Incumbent Upon An Arbitrator To Disclose Any Relationship Which Raises Even A Suggestion Of Possible Bias—A Standard Rejected As "Too Low" By The Second Circuit

On appeal, the First Department began its analysis by stating the requirements of Section 10(a)(2) of the FAA as follows:

> Since the contract between the parties herein affected interstate commerce, the federal statute was controlling, and pursuant to 9 USCS § 10(a), an arbitration award may be vacated "where there was evident partiality or corruption in the arbitrators or either of them." It is thus "incumbent upon an arbitrator to disclose any

> relationship which raises even a suggestion of possible bias."[13]

U.S. Elecs. v. Sirius Satellite Radio, 73 A.D.3d 497, 498, 901 N.Y.S.2d 202, 202 (1st Dep't 2010). The First Department's formulation is equivalent to the "appearance of bias" and "appearance of partiality" standards for vacatur of awards ***rejected by the Second Circuit*** in both *Morelite* and *Applied Industrial Materials*.

As noted above, the Second Circuit in *Morelite* concluded that "the standard of 'appearance of bias' is too low for the invocation of Section 10." *Morelite*, 748 F.2d at 84. In *Applied Industrial Materials*, the Second Circuit held that the district court had erred in applying the "appearance of partiality" standard:

> Here, the court below did not make findings as to the nature and timing of the arbitrator's knowledge of the relationship between SCF and Oxbow. Instead, the district court focused on whether or not there was an "appearance of partiality" on the part of the arbitrator, a standard that we have made clear is too low.

492 F.3d at 137.

[13] For this proposition, the First Department cited *Matter of Weinrott*, 32 N.Y.2d 190, 201 (1973), a case decided eleven years before *Morelite* and involving a domestic New York arbitration not subject to the FAA. The statement in *Weinrott* that it was "incumbent upon arbitrators to disclose any relationship which raises even a suggestion of possible bias" was not based on Section 10(a)(2) of the FAA and was not held there to be a requirement of that statute. Nor did the court in *Weinrott* hold that the alleged failure to disclose "any relationship which raises even a suggestion of possible bias" was a basis for vacating an award under state law. The court in *Weinrott* refused to vacate an arbitration award based upon the alleged failure of Vogel, one of the arbitrators, to disclose that during the course of the arbitration, the chairman of Vogel's company was appointed to serve on the board of directors of Georgia Pacific Corporation, which was chaired by one of the claimants in the arbitration. The court held that although "it would have been preferable if Vogel had disclosed the relationship … we think the asserted relationship too remote and speculative to provide a basis for reversal." *Id.*

B. The First Department Stated That The Chairman Had A Duty To Disclose His Son's Support Of The Merger Despite The Commercial Division's Finding That There Was "No Evidence" That The Chairman Was Aware Of That Support

In *Applied Industrial Materials*, the Second Circuit held that under Section 10(a)(2) of the FAA, the appropriate inquiry when a court is faced with a petition to vacate an award based upon the alleged failure of an arbitrator to disclose a relationship is (a) whether there is "a material relationship with a party" and (b) "whether the arbitrator had knowledge of the relationship that would compel a reasonable person to conclude that he was partial."

Justice Gammerman found that there was no such knowledge "because there [was] no evidence that Chairman Sessions was aware of his son's isolated statements in favor of the merger, there is no showing that the Chairman had any reason to believe that he might have a conflict because of his son's politica1 activities." Slip op. at 3. The First Department made no express contrary finding with regard to the Chairman's knowledge. Nevertheless, the First Department stated that "the chairman should still have made full disclosure" of "the congressman's support of the intended merger between Sirius and XM." 73 A.D.3d at 498. If the First Department meant that such disclosure was required by Section 10(a)(2) of the FAA, then, in the absence of a finding that the Chairman knew of his son's support of the merger, its conclusion conflicts with the holding

of *Applied Industrial Materials*, which held that such knowledge is necessary to show "evident partiality" under Section 10(a)(2).

C. The First Department Held That The Chairman Had An Obligation To Disclose "[i]rrespective of when petitioner learned of the congressman's support of the intended merger," Although The Second Circuit Has Repeatedly Refused To Vacate Arbitration Awards When The Complaining Party Knew Or Could Have Learned During The Arbitration Of The Relationship In Question

According to USE's petition to vacate the arbitration award, Congressman Pete Sessions' support of the proposed Sirius/XM merger was well publicized. "On September 27, 2007, Congressman Pete Sessions became one of the first members of Congress to write a letter to the FCC urging its approval of the Sirius/XM merger. … In October, Sirius issued a press release trumpeting Congressman Sessions' support, along with that of three other Congressmen. … On March 26, 2008, Congressman Sessions appeared on Bloomberg Television promoting the merger as part of an extended Bloomberg segment discussing the merits of the merger."[14] Hence, Congressman Sessions' support of the merger was a matter of public knowledge from at least September 2007 forward.

Courts in the Second Circuit have repeatedly refused to vacate arbitration awards for nondisclosure when the "complaining party should have known of the

[14] *U.S. Elecs., Inc. v. Sirius Satellite Radio, Inc.*, No. 115867/08, Verified Petition to Vacate Arbitration Award, at ¶¶ 33–35.

relationship … or could have learned of the relationship 'just as easily before or during the arbitration rather than after it lost its case'"[15] The Second Circuit has thus "given 'practical meaning' to the *Commonwealth Coatings* principle of disclosure by treating 'the obligation to which arbitrators are subject as being to disclose dealings of which the parties cannot reasonably be expected to be aware…'"[16]

It was suggested below that the petitioners either knew or, from publicly available information, could have learned of Congressman Sessions' support of the merger during the course of the arbitration. However, the First Department made no inquiry into the timing or extent of the petitioner's knowledge, holding, instead, that Chairman Sessions had an obligation to disclose his son's support of the Sirius/XM merger "[i]rrespective of when petitioner learned of the Congressman's support of the intended merger." 73 A.D.3d at 498. This was contrary to established Second Circuit law.

[15] *Lucent Techs., Inc. v. Tatung Co.*, 379 F.3d 24, 28 (2d Cir. 2006).

[16] *Andros Compania Maritima, S.A. v. Marc Rich & Co., A.G.*, 579 F.2d 691, 700 (2d Cir. 1978) (citing *Cook Indus., Inc. v. C. Itoh & Co. (Am.), Inc.*, 449 F.2d 106, 108 (2d Cir. 1971)).

D. The First Department Incorrectly Held That "clear and convincing evidence that … impropriety or misconduct of the arbitrator prejudicing a party's rights or the integrity of the arbitration" Was Necessary To Vacate An Award Under Section 10(a)(2)

Finally, the First Department concluded that, although disclosure should have been made, the motion to vacate the award was properly denied, holding that, "despite such nondisclosure, petitioner failed to meet its burden of proving by clear and convincing evidence that any impropriety or misconduct of the arbitrator prejudiced its rights or the integrity of the arbitration process or award, since no proof was offered of actual bias or even the appearance of bias on the part of the chairman." 73 A.D.3d at 498–99. Under *Commonwealth Coatings*, vacatur of an award under Section 10(a)(2) for nondisclosure does not require a showing of impropriety or misconduct on the part of the arbitrator prejudicing a party's rights. There, the award was vacated for failure to disclose even when there was no charge "that the third arbitrator was actually guilty of fraud or bias in deciding this case, and … no reason, apart from the undisclosed business relationship, to suspect him of any improper motives." 393 U.S. at 147.

We have not found any case law indicating that "evident partiality" under Section 10(a)(2) must be shown by "clear and convincing" evidence. The Second Circuit has held that "[a] party moving to vacate an arbitration award has the burden of proof, and the showing required to avoid confirmation is very high."

D.H. Blair & Co. v. Gottdiener, 462 F.3d 95, 110 (2d Cir. 2006). No different standard should be applied here.

V. IN DECIDING THIS CASE, THIS COURT SHOULD APPLY THE STANDARDS ESTABLISHED BY THE SECOND CIRCUIT BASED ON *COMMONWEALTH COATINGS* FOR VACATUR OF ARBITRATION AWARDS UNDER SECTION 10(a)(2)

The Association urges the Court, in deciding this case, to apply the federal law standards established by the Second Circuit for vacatur of awards under Section 10(a)(2) of the FAA based on the U.S. Supreme Court decision in *Commonwealth Coatings*. In *Morelite*, the Second Circuit established a rule that thoughtfully and correctly distilled the holding of *Commonwealth Coatings* and the meaning of the words "evident partiality." There is agreement among a majority of circuit courts that an "appearance of bias" is not sufficient to show evident partiality under Section 10(a)(2).[17] The First, Third, Fourth and Sixth Circuits have adopted the test established by the Second Circuit in *Morelite* or a similar formulation.[18] The Seventh, Eighth and Tenth Circuits appear to impose an even

[17] In *Flanagan v. PrudentialBache Securities, Inc.*, 67 N.Y.2d 500, 506 (1986), this Court held that in a cases involving the FAA, "we are bound to apply the statute as interpreted by Supreme Court decision or, absent such, in accordance with the rule established by lower Federal courts if they are in agreement."

[18] *See JCI Commc'ns, Inc. v. IBEW Local 103*, 324 F.3d 42, 51 (1st Cir. 2003); *Kaplan v. First Options of Chicago*, 19 F.3d 1503, 1523 n.30 (3d Cir. 1994), *aff'd on other grounds*, 514 U.S. 938 (1995); *ANR Coal Co. v. Cogentrix of N.C., Inc.*, 173 F.3d 493, 500 (4th Cir. 1999); *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1358 (6th Cir. 1989).

higher threshold for vacating an award.[19] The Fifth Circuit, while vague about the precise standard employed, has held that mere appearance of bias is not sufficient.[20] Two Circuit courts, the Ninth and Eleventh, require a showing of facts creating a "reasonable impression of partiality."[21]

The standard adopted by the Second Circuit in *Morelite* also gives appropriate recognition to the fact that, under the FAA, challenges upon the ground of evident partiality may be heard only after the award has been issued.[22] At that

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[19] *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 681 (7th Cir. 1983) (requiring proof of actual bias or circumstances "powerfully suggestive of bias"); *Winfrey v. Simmons Food, Inc.*, 495 F.3d 549, 552–53 (8th Cir. 2007) (holding that "[t]he mere possibility of prejudice is insufficient to justify setting aside the award" and that, even if evident partiality existed, the complaining party "has the burden…to show that this partiality had a prejudicial impact on the arbitration award."); *Ormsbee Dev. Co. v. Grace*, 668 F.2d 1140, 1147, 1150–51 (10th Cir. 1982) (citing Justice White's *Commonwealth Coatings* opinion and requiring "clear evidence of impropriety" for vacatur).

[20] *Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 285–86 (5th Cir. 2007) (holding that the appearance of impropriety, standing alone, is insufficient to vacate an award).

[21] *Univ. Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331, 1339–40 (11th Cir. 2002) (permitting vacatur only if facts creating "a reasonable impression of partiality" are not disclosed); *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1111 (9th Cir. 2007) (same).

[22] *Aviall, Inc. v. Ryder Sys., Inc.*, 110 F.3d 892, 895 (2d Cir. 1997) ("[I]t is well established that a district court cannot entertain an attack upon the qualifications or partiality of arbitrators until after the conclusion of the arbitration and the rendition of an award." (citation omitted)); *Gulf Guar. Life Ins. Co. v. Conn. Gen. Life Ins. Co.*, 304 F.3d 476, 490–91 (5th Cir. 2002) (citing Second Circuit cases); *Global Reins. Corp. v. Certain Underwriters at Lloyd's*, 465 F. Supp. 2d 308, 311 (S.D.N.Y. 2006). *Accord AIU Ins. Co. v. Am. Int'l Marine Agency*, No. 600337/06, 2006 N.Y. Misc. LEXIS 2352, at *10–11 (N.Y. Sup. Ct. Aug. 8, 2006) (holding that, unlike New York law, the FAA does not permit pre-award challenges based upon the partiality of arbitrators and that the FAA preempts conflicting New York law in this regard).

point, the parties may have devoted substantial time and resources to the arbitration, all of which will have been wasted if the award is vacated. In our view, the court in *Morelite* correctly concluded that, after the expenditure of all of this time and effort, the mere "appearance of bias" was not sufficient ground to send the parties back to square one.

There is extensive case law in the Second Circuit applying the standards established in *Morelite*. In *Applied Industrial Materials*, the Second Circuit reaffirmed and further elaborated those standards and applied them in the context of allegations of nondisclosure. State courts in New York should follow this well-developed body of federal law.

The adoption by the Court of standards for vacatur under the FAA different from those applied by federal courts in New York would be detrimental to the status of New York as a forum for domestic and international arbitration. If different standards are used, the rule to be applied would depend on whether the case was decided in federal or state court, which, in turn, might depend upon such fortuities as whether there was complete diversity of citizenship between the parties.[23] The adoption of different standards would create the risk of forum shopping between federal and state courts. It would also create uncertainty for

[23] 28 U.S.C. § 1332.

parties and arbitrators in their conduct of arbitration proceedings—uncertainty in the handling of issues relating to conflicts of interest and disclosure and uncertainty with respect to the finality of awards. Uncertainty in these areas may lead parties to choose venues other than New York for their arbitration.[24]

The Court has recognized the critical importance of consistency between state and federal courts in matters concerning arbitration under the FAA. In *A/S J. Ludwig Mowinckels Rederi v. Dow Chemical Co.*, 25 N.Y.2d 576, 585 (1970), the Court denied a request for a stay of arbitration under C.P.L.R. § 7502, holding that the provisions of the FAA, which did not permit courts to stay arbitrations, should be applied by state courts in cases subject to the FAA. The Court held that the result of an application for a stay in an FAA case should not be different "merely because it was filed in the State Supreme Court just across the street from the Federal District Court" and suggested that "[a]ny other conclusion…would place the court's stamp of approval on a particularly offensive form of forum shopping"

[24] In October 2010, the New York State Bar Association ("NYSBA") formed a Task Force on New York Law in International Matters to "undertake a systematic review of New York as a neutral forum for resolving international disputes in arbitration and in the courts." The final report of the Task Force, which will be submitted for approval by the NYSBA House of Delegates on June 25, 2011, identifies certainty, predictability and finality as significant factors in the choice of New York as a forum for the resolution of international disputes. Final Report of the New York State Bar Association's Task Force on International Matters, at 6 (Apr. 18, 2011), *available at* http:/www.nysba.org/InternationalReport. Finality and enforceability of arbitration awards is also one of the main reasons that parties choose arbitration. *See* Sch. of Int'l Arbitration, Queen Mary, University of London, 2006 INTERNATIONAL ARBITRATION SURVEY: CORPORATE ATTITUDES AND PERCEPTION, at 23.

and would "undermine the need for nationwide uniformity in the interpretation and application of arbitration clauses in foreign and interstate transactions." *Id*. at 580, 584–85.

Later, in *Matter of Weinrott,* 32 N.Y.2d 190, 199 n.2 (1973), this Court went even further and held that consistency between state and federal arbitration law was also desirable. In *Weinrott*, the Court held that under state law as under the FAA, an arbitration clause in a contract was separable, and that the question whether the contract containing the arbitration clause was induced by fraud was subject to arbitration. This Court thus adopted the same rule for cases under state arbitration law that had been adopted by the Supreme Court in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), for cases under the FAA:

> An additional, and desirable, result of this decision is to bring New York State law in accord with Federal law relating to fraud in the inducement. … [I]t is … bothersome to have different rules applied in interstate commerce cases from those applied in intrastate commerce cases. In the *Rederi* case … this court stated that to apply other than Federal law in the State court in matters involving interstate commerce or maritime law would "undermine the need for nationwide uniformity in the interpretation and application of arbitration clauses in foreign and interstate transactions." The need for uniformity between the State and Federal law is probably not as great as the need for a uniform law for all interstate commerce. Still it is a rather technical distinction to apply one law or another depending on whether interstate commerce is involved.

Weinrott, 32 N.Y.2d at 199. Here, the same concerns expressed in *Rederi* and *Weinrott* are present. In order to ensure uniformity in the application of federal arbitration law and avoid what the Court has described as "a particularly offensive form of forum shopping," the Association urges the Court to apply in this case the same standards established by the Second Circuit for vacatur of awards under Section 10(a)(2) of the FAA.[25]

CONCLUSION

For the reasons stated above, the Association urges the Court to adopt and apply in this case the standards established by the Second Circuit in such cases as *Morelite* and *Applied Industrial Materials* for vacatur of awards under Section 10(a)(2) of the FAA. The Association takes no position on the merits of the decision under review or on the outcome if the correct standard is applied. The Association believes that the state and federal courts of this state should apply

[25] The Petitioner also contends that the Respondent had an obligation, under Section 10(a)(1) of the FAA, to disclose to the Petitioner and to the Panel its relationship with the Chairman's son. Neither decision below addresses this argument or Section 10(a)(1) of the FAA. With regard to the standard in the Second Circuit for vacating an award under Section 10(a)(1), *see Karppinen v. Karl Kiefer Mach. Co*., 187 F.2d 32, 34 (2d Cir. 1951) (holding that in order to vacate an award under Section 10(a)(1), it must be "abundantly clear" that the award was procured by "corruption, fraud, or undue means"); *Polin v. Kellwood Co.*, 103 F. Supp. 2d 238, 256 (S.D.N.Y. 2000) (same, quoting *Karpinnen*); *1199 Seiu United Healthcare Workers E. v. Lily Pond Nursing Home*, No. 07-CV-0408 (JCF), 2008 U.S. Dist. LEXIS 74481, at *12 (S.D.N.Y. Sept. 29, 2008) (same). *See also PaineWebber Grp., Inc. v. Zinsmeyer Trusts P'ship*, 187 F.3d 988, 991, 994 (8th Cir. 1999) (holding that the term "undue means" requires proof of intentional misconduct and that the word "procured" in Section 10(a)(1) means that there must be proof of a causal relation between that misconduct and the arbitration award).

uniform standards on these important issues of federal law. We believe that a failure to do so would be detrimental to New York's status as a center for international and domestic arbitration.

Dated: New York, New York
May 18, 2011

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STATE OF NEW YORK)
) ss.: **AFFIDAVIT OF**
COUNTY OF NEW YORK) **PERSONAL SERVICE**

I, , being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On May 19, 2011

deponent served the within: **Proposed Brief for *Amicus Curiae***
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the attorney(s) in this action by delivering **1** true copy(ies) thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein.

Sworn to before me on May 19, 2011

MARIA MAISONET
Notary Public State of New York
No. 01MA6204360
Qualified in Bronx County
Commission Expires Apr. 20, 2013

Job # 236176