No. 15-1408

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In The
# Supreme Court of the United States

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MASIMO CORPORATION,

*Petitioner,*

v.

MICHAEL RUHE and VICENTE CATALA,

*Respondents.*

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**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

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## RESPONDENTS' BRIEF IN OPPOSITION

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## COUNTERSTATEMENT OF QUESTIONS PRESENTED

(1) Whether the court of appeals properly concluded that, on a record that discloses the arbitrator met all of the legal disclosure requirements and the information upon which the eleventh-hour withdrawal request – made directly to the arbitrator – was based, had long been readily publicly available to Masimo, the district court erred in vacating the arbitration award for "evident partiality."

(2) Whether the court of appeals properly concluded that Masimo had failed to brief, and waived, one of its arguments in the context of a case in which the court also properly found the arbitrator did not exceed his powers or otherwise manifestly disregard the law.

## CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

None of the Respondents have a parent corporation, and there is no publicly held company that owns 10% of more of their stock.

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## INTRODUCTION

This Petition is unfortunate. After compelling arbitration of Respondents' claims in proceedings that have spanned nearly six years, Masimo now asks this Court to review an unpublished, three-paragraph disposition that properly reviewed the Arbitrator's Award under the narrow grounds permitted by the Federal Arbitration Act ("FAA"), and found no basis for vacatur.

The Petition advances two grounds for review, based on mischaracterizing the record and misstating the law. As to the first, Masimo incorrectly contends the Ninth Circuit misapplied the FAA's "evident partiality" standard to the Arbitrator's "refusal to refer a disqualification motion to a neutral decisionmaker [and] reliance on a party's disqualification motion as a basis for imposing punitive damages." Pet. ii. Neither assertion is accurate. The Arbitrator did not "refuse" to refer what was a withdrawal request; Masimo directed the request to the Arbitrator without, at any time, asking JAMS to review his decision denying that request. The Arbitrator also did not base – and could not have based – his decision to award punitive damages on Masimo's withdrawal request because that decision had been made in the Interim Award, issued months *before* Masimo's eleventh-hour recusal request. EOR 619-663.

The appellate court also did not review those issues, which Masimo argued in the district court demonstrate the Arbitrator acted in excess of his powers,

under the "evident partiality" standard. Instead, the appellate court properly considered whether Masimo's initial reasons for its withdrawal request demonstrated "evident partiality." Those reasons were publicly available facts a simple Google search would have disclosed: the Arbitrator a decade earlier served on a SIDS (Sudden Infant Death Syndrome) foundation board, and the Arbitrator's brother had been one of the attorneys representing a company which lost an antitrust trial against Masimo many years earlier. The appellate court correctly determined this information did not create a "reasonable impression of bias" because it would not "cause a person reasonably to doubt [the Arbitrator's] impartiality in this case." Pet. App. 2a. That ruling presents no compelling reason for review and indeed Masimo does not directly challenge it.

Instead, Masimo claims the "evident partiality" standard should have also been applied to the Arbitrator's decision to rule on Masimo's withdrawal request and his consideration of Masimo's pattern of abusive litigation tactics as an "additional" although not "central" basis for the amount of punitive damages. But as these decisions were not evidence of "evident partiality" flowing from either actual bias or a failure to disclose, the appellate court correctly considered, under the narrow grounds for vacatur, whether the Arbitrator exceeded his powers or manifestly disregarded the law in reaching them. Masimo offers no basis for this Court's review of that holding.

As to the second ground, Masimo incorrectly contends the appellate court erred in finding that Masimo

had waived an alternative argument regarding punitive damages which ostensibly conflicts with other courts' waiver decisions. The appellate court was free to apply waiver flexibly while addressing vacatur of an arbitration award, particularly where Masimo had filed, but abandoned, a cross-appeal. It is antithetical to arbitration's key attributes of efficiency and finality to permit seriatim appeals of the kind Masimo urges. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985) (noting "the simplicity, informality, and expedition of arbitration"). Further, any error by the Arbitrator would not have been a manifest disregard of the law, so a different finding on waiver would not alter the outcome.

No compelling reason exists to review the unpublished disposition below. The lower court's straightforward application of the FAA's narrow grounds for vacatur does not decide an important federal question in a way that conflicts with the jurisprudence of this Court or other circuit courts. It is time for the Award, issued from an arbitration process imposed by Masimo, with an arbitrator chosen by Masimo, and ultimately with many rulings in favor of Masimo, to become final.

## COUNTERSTATEMENT OF THE CASE

### 1. Factual Background.

This case was brought by two former Masimo sales representatives, who felt compelled to leave their employment and take action after Masimo repeatedly

pressured them and others to misrepresent the performance of Masimo's hemoglobin measuring devices. Plaintiffs ultimately came to believe the devices were dangerous to particularly vulnerable pediatric and nephrology patients, and company management knew of the dangers. EOR 16. Masimo successfully moved to compel the resulting employment action, which had been filed in district court, to arbitration. *Id*.

## 2. The Arbitration Proceedings.[1]

### A. Masimo Selected Justice Neal as Arbitrator.

After winning its motion to compel arbitration, Masimo chose as arbitrator, Justice Richard C. Neal (ret.), a well-known and highly-regarded JAMS neutral who had served on the California Superior Court and Court of Appeal. Masimo's counsel emailed Plaintiffs' counsel stating "Masimo will agree to Richard Neal from your list of [thirteen] proposed acceptable arbitrators." EOR 109; 158-162.[2]

Masimo and its counsel knew Justice Neal; he had served as a neutral in cases for them previously, and ruled for Masimo in another employment arbitration. EOR 18; 109 ¶12; 158-162; 849. Justice Neal had also

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[1] A detailed statement of the arbitration and court proceedings is necessary due to several misstatements of fact in the Petition. SCT rules 14.4, 15.2.

[2] Justice Neal passed away on January 1, 2015. *Daily Journal*, January 6, 2015.

ruled for Masimo's counsel's clients in previous arbitrations, including at least one high-profile case in which he denied class certification. EOR 18.

Justice Neal's 20-page disclosures fulfilled all requirements, including the California Code of Civil Procedure which governs arbitrators in California, JAMS Ethical Guidelines for Arbitrators, and the California Rules of Court Ethics Standards for Neutral Arbitrators. EOR 835-853. Justice Neal disclosed he had been an arbitrator in one case involving Plaintiffs' counsel and ten matters with Masimo's counsel, and that he had another pending arbitration with Masimo. EOR 836; 838; 846-849.

When Masimo chose Justice Neal, there was ample available public information about him. Just weeks before Masimo's selection, the *Daily Journal* ran a detailed profile on him, entitled "Blunt, but Trusted." EOR 109 ¶13; 164-172. The article expressly notes Justice "Neal comes from a family of legal heavyweights" describing his father's career (Dean of the University of Chicago Law School, Professor at Stanford Law School, and Clerk to U.S. Supreme Court Justice Robert Jackson). It explicitly identifies "his brother is Stephen C. Neal, chairman of Cooley LLP." EOR 165. A Google search for "Richard C. Neal" would also have turned up his JAMS website profile and a lengthy interview with him by the Court of Appeal Legacy Project in 2007. EOR 109 ¶14; 174-198. (Uploaded on YouTube over 18 months before Masimo made its recusal challenge. http://www.youtube.com/watch?v=

yl8X5HfZgkY). The interview identifies Steve Neal as Justice Neal's brother.

### B. The Lengthy Arbitration Proceedings and Interim Award.

Masimo was represented by numerous attorneys from two major law firms. EOR 16; 18; 482-484. Throughout the two and a half years of proceedings, which he termed "challenging" and "complex," Justice Neal held several hearings, sought extensive briefing, and issued various orders covering issues ranging from discovery to the bifurcation procedure for punitive damages. EOR 18-19; 35-39; 47. Many rulings favored Masimo.

After discovery concluded, the two-week plenary arbitration occurred in February 2013. The hearing included 26 witnesses and experts, over 4,000 pages of transcript, and nearly 1,000 exhibits, followed by extensive briefing and lengthy closing argument. EOR 16-17; 19. Masimo executives, including its CEO, Joe Kiani, testified, enabling Justice Neal to directly assess their credibility. EOR 24-28; 32; 41; 45; 54.

On October 3, 2013, as the Arbitrator prepared to release the Interim Award, the district court granted summary judgment on the *qui tam* claims. EOR 35-37. In the district court, Masimo argued the *qui tam* claims differed so significantly from the employment arbitration, that any decision by the Arbitrator and evidence from the arbitration must be excluded from the *qui tam* action. *Id.* Once Masimo secured a favorable

decision, however, it reversed course and argued the summary judgment ruling should collaterally estop all claims in the employment arbitration. *Id*. Justice Neal permitted briefing and issued a detailed ruling, based on multiple grounds, that collateral estoppel did not apply to bar the employment claims. EOR 35-37; 646-650.

On October 28, 2013, Justice Neal issued a 45-page Interim Award. EOR 619-663. In that painstakingly detailed decision, Justice Neal concluded that: Plaintiffs "provided extensive evidence that [Masimo's] device inaccuracies could threaten patient safety"; Masimo responded to Plaintiffs' concerns about selling the flawed devices with "pressure and insistence" that they continue to sell them; substantial evidence showed the devices were flawed; and, Plaintiffs and several others were forced to quit because they could not in good conscience continue selling the devices. EOR 636-638. Plaintiffs prevailed on their claim for constructive wrongful termination in violation of public policy. EOR 619; 654-658.

The decision found for Masimo on numerous other issues, including FDA preemption, the Dodd-Frank claim, the California Labor Code section 1102.5 claim, the Business and Professions Code 17200 claim, and denied Plaintiffs' request for injunctive relief.

Finally, based on the extensive record and his observation of the company's executives' testimony, Justice Neal found Masimo exhibited malice, fraud and

oppression by clear and convincing evidence, sufficiently egregious to warrant punitive damages. EOR 662-663.

Masimo executives' testimony was remarkable, demonstrating they were completely unrepentant. As Justice Neal observed:

> All the senior executives continued to assert that the devices always conformed to specification, in the face of a wealth of contrary evidence. In closing arguments, [Masimo] urged that it "always did the right thing," a claim strongly belied by the evidence.

EOR 662. The Arbitrator found this conduct "emanated from the highest levels of the company." EOR 662-663.

### C. Masimo's Repeated Road Blocks, Culminating in Its Eleventh-Hour Request for Recusal.

After the Interim Award issued, Masimo tried to derail the arbitration's completion. First, two weeks after Justice Neal found Masimo liable for compensatory and punitive damages, Masimo asked him to halt the proceedings and *preside over a several months-long scientific "validation study"* – to allow Masimo another chance to convince the Arbitrator the devices performed as advertised. EOR 17; 617-618. Plaintiffs opposed the request. EOR 450-451. Noting the arbitration had gone on for over two years already and yielded an extraordinarily thorough record, Justice Neal rejected Masimo's request. EOR 17; 616.

Second, Masimo hired a private investigator after the Interim Award was issued to search for some potential basis to disqualify Justice Neal. EOR 73:21-74:4; 77:18-24. Mid-evening January 8, 2014 – just 36 hours before the final argument on the amount of punitive damages and attorneys' fees – Masimo's counsel wrote to Justice Neal and to JAMS' General Counsel, citing facts that were purportedly not disclosed by Justice Neal that Masimo claimed raised "doubts" about his impartiality. EOR 610-611. The stated facts were innocuous ones, widely publicly available for years: 1) Justice Neal had, years earlier, sat on the SIDS Foundation Board; and 2) many years earlier, Justice Neal's brother Stephen Neal had been one of the attorneys representing companies which lost an anti-trust and a patent infringement trial against Masimo. *Id*. Masimo's theory was these facts made the Arbitrator biased against it.

Contrary to Masimo's claim, the letter does not invoke or cite to any JAMS rule, nor does it request that JAMS resolve the matter. Instead, the company directed the request to Justice Neal: "Masimo believes that you should, at a minimum, withdraw from further proceedings in this matter" and cancel closing arguments scheduled for the next day. *Id.*

Justice Neal denied Masimo's request, detailing his reasons:

> The letter first asserts I should have disclosed that my brother Stephen Neal and his firm, Cooley LLP, represented companies adverse

> to Masimo in litigation. I was unaware of this until I received and reviewed Mr. Palin's letter. Nor do I believe I was under any duty to inquire about matters my brother is involved in. California Ethics Standards 9(b) limits the duty to inquire to Immediate Family, Extended Family living in my household, and former spouse. My brother and his law firm fall within none of these categories. Nor is the information, had I known it, sufficient to cause a person to reasonably doubt my ability to be impartial in this case. No advantage could flow to me from disfavoring a company simply because my brother was lawyer for a Masimo opponent.
>
> Mr. Palin also asserts I should have disclosed my former membership for several years many years ago on the Board of Directors of the SIDS Foundation. Mr. Palin's letter furnishes no coherent explanation as to how this information would cause a person reasonably to doubt my impartiality in the present case.
>
> The information upon which this request is based has been available for years, and Masimo could and should have raised these points long ago, and certainly before it received the Interim Award revealing a decision adverse to Masimo.

EOR 609.

Masimo took no further action regarding its withdrawal request. It did not ask that JAMS review Justice Neal's decision. It did not invoke JAMS Rule 15(i) which provides that "JAMS shall make the ***final*** determination" (emphasis supplied) to a challenge to the arbitrator, suggesting, at a minimum, that even if JAMS Rule 15(i) had been invoked by Masimo (which it was not), there was nothing improper about Justice Neal's ruling on the request for withdrawal, so long as Masimo could seek a "final" determination from JAMS (which it chose not to seek). Instead, during the final closing argument the next day, *Masimo's counsel urged Justice Neal once again to suspend the proceedings and personally preside over a months-long validity study of Masimo's devices*, a curious request for a party allegedly convinced of Justice Neal's inability to be impartial. EOR 593:12-594:12. Justice Neal declined, noting it was time for this lengthy proceeding to conclude.

### D. Justice Neal's Final Award.

Justice Neal issued a detailed 41-page Final Award. EOR 16-56. Masimo defeated Plaintiffs' request for attorneys' fees, which amounted by that time to over two million dollars. Justice Neal also addressed at length the factors for quantifying the amount of punitive damages to be assessed. The Final Award ordered approximately $5.3 million in compensatory and punitive damages. EOR 45-54.

As an "additional basis" that was not "central" to the Award, the Arbitrator described a "series of questionable and abusive tactics" Masimo had employed throughout the arbitration, including (1) "repeated" efforts to introduce a "whole new body of evidence" related to a time period it had successfully argued should be excluded from consideration; (2) efforts to delay proceedings further to conduct a new "validation" study of its medical devices which would have forced Plaintiffs "to litigate and win the case anew;" (3) efforts to collaterally estop the arbitration after Masimo had strenuously argued it was entirely distinct from the *qui tam* case, had compelled Plaintiffs' dispute to arbitration, and had not moved to stay either proceeding; (4) seeking to disqualify the Arbitrator after the Interim Award, including punitive damages, was issued and just 36 hours before closing arguments on a basis that was "unjustified factually or legally;" and (5) "outright misstat[ing] the law" on consideration of potential harm to others in gauging the reprehensibility of Masimo's conduct. Pet. App. 84a-86a.

### 3. The District Court's Order.

After losing the arbitration, Masimo asked the district court to vacate the Award. C.D. ECF No. 52 (Mot. to Vacate). Among other things, Masimo argued the Arbitrator exceeded his powers by not giving collateral estoppel effect to the district court's ruling, and engaged in manifest disregard of the law by awarding punitive damages. *Id*. at 16. Masimo also claimed the Arbitrator it chose to resolve the dispute – and who

had made multiple rulings in its favor – was so tainted with bias the entire award must be vacated.

In moving to vacate, Masimo abandoned its argument on Justice Neal's involvement in the SIDS Foundation and focused on Stephen Neal's alleged "well-publicized losses to Masimo," arguing that "a reasonable person aware of the facts might reasonably entertain a doubt that the arbitrator would be able to be impartial." Mot. to Vacate at 22. Masimo also argued, citing to JAMS rule 15(i) for the first time, that the Arbitrator "exceeded his powers" by deciding the withdrawal request even though Masimo explicitly asked Justice Neal to decide it, never requested that JAMS review or make the "final decision" under rule 15(i), and subsequently asked the Arbitrator to preside over a validation study of its devices. *Id*. at 24.

The district court vacated the Final Award. EOR 1-15. Although Masimo's claim of "evident partiality" rested on the Arbitrator's failure to disclose that his brother had represented a Masimo competitor in litigation, the district court found evident partiality on different grounds. It ruled that Justice Neal "demonstrated evident partiality by awarding excessive and improper punitive damages in retaliation for Masimo's counsel challenging his impartiality and taking other reasonable measures to zealously represent their client." EOR 2. Explicit in this ruling is the district court's determination – without a finding that the Arbitrator exceeded his powers or manifestly disregarded the law – that the punitive damages were "excessive and improper." EOR 2; 13-15.

The district court also held that, even though JAMS "Rule 15(i) is not controlling," the Arbitrator "demonstrated evident partiality by deciding Masimo's disqualification challenge himself." EOR 10-11. The court based this ruling, in part, on its belief the Arbitrator failed to make "additional disclosures or provid[e] facts on the record to refute the alleged conflict," even though the Arbitrator had indeed provided a record that he knew nothing of his brother's representation of Masimo's competitor. EOR 11; EOR 609. Although the district court's order discusses Steve Neal's representation of a Masimo competitor, it makes no finding that failing to disclose this fact created a reasonable impression of bias. EOR 1-15.

Plaintiffs appealed the district court's vacatur. Masimo cross-appealed. EOR 57-58.

**4. The Appellate Court's Decision.**

The appellate court reversed, finding the district court "erred in holding the arbitrator exhibited 'evident partiality.'" Pet. App. 2a. The court's reasoning was straightforward:

> Masimo did not establish that the arbitrator "failed to disclose to the parties information that creates 'a reasonable impression of bias.'" [Citation] As the arbitrator noted, Masimo "furnish[ed] no coherent explanation" how his brother's litigation practice or his role in a SIDS foundation "would cause a person reasonably to doubt [his] impartiality in this

> case." Nor did Masimo "establish specific facts indicating actual bias."

Pet. App. 2a.

Masimo now claims the Arbitrator made over a million dollars in presiding over the arbitration. Pet. 2. Nowhere in the massive record does such a fact exist. Moreover, Masimo never raised any concerns or offered any facts in the arbitration, the district court, or the appellate court that Justice Neal made any rulings based upon any purported pecuniary interest flowing from facts that were not disclosed.

On Masimo's arguments regarding the impropriety of punitive damages, the court found the Arbitrator erred in applying Third Circuit instead of California law, but the error "did not rise to the level of 'affirmative misconduct' or 'irrational[ity]' " to warrant vacatur of the award – mirroring manifest disregard of the law. The court also found that Masimo did not argue, and therefore waived, its argument that the ratio of punitive damages to compensatory damages violated due process. Further the appellate court noted this Court has recognized low compensatory damages may properly support a higher ratio of punitive damages "where, as here, the low award of compensatory damages reflects the plaintiffs' successful efforts to mitigate their damages and not the reprehensibility of the defendants' conduct." Pet. App. 2a-3a, n.1.

Justice Hurwitz concurred. He found the Arbitrator should have referred Masimo's "belated request for recusal" to JAMS, but any error in not doing so was

harmless because "the recusal request raised only matters of general public knowledge and occurred very late in an extended arbitration (when the arbitrator had earned virtually all of his fees), and [] Masimo's claims of 'evident partiality' fail on the merits." Pet. App. 4a. Justice Hurwitz concluded that JAMS could not have found evident partiality on the record in any final decision. The concurrence also found that any error regarding punitive damages did not meet the "very demanding standard" of "manifest disregard of the law." *Id*. 5a.

Upon remand, the district court entered judgment for Respondents. Masimo paid the judgment in its entirety, filed a Satisfaction of Judgment, and then filed the instant Petition. C.D. ECF No. 94 (Final Judgment); C.D. ECF No. 95 (Notice of Satisfaction of Judgment).

## REASONS FOR DENYING THE WRIT

### I. Masimo's "Evident Partiality" Challenge Does Not Warrant Review.

#### A. The FAA Severely Limits Vacatur.

The FAA permits a court to vacate an arbitrator's decision "only in very unusual circumstances." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995). This Court has emphasized FAA §10 contains the "exclusive grounds for . . . vacatur," that are limited to "egregious departures from the parties' agreed-upon arbitration" and "extreme arbitral conduct." *Hall*

*Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584, 586 (2008). As relevant here, §10 provides that a court may vacate an arbitration award "where there was evident partiality or corruption in the arbitrators." 9 U.S.C. §10(a)(2).

This statutorily-mandated deference to arbitral decisions "maintain[s] arbitration's essential virtue of resolving disputes straightaway." *Oxford Health Plans LLC v. Sutter*, ___ U.S. ___, 133 S.Ct. 2064, 2068 (2013) (quoting *Hall Street Assocs.*, *supra*, 552 U.S. at 588. Otherwise, arbitration would become "merely a prelude to a more cumbersome and time-consuming judicial process." *Id.*

### B. There Is No Significant Confusion in the Lower Courts.

Masimo's premise, that *Commonwealth Coatings* has caused "widespread confusion" in the lower courts regarding the "evident partiality" standard and led to a circuit split warranting review, does not withstand scrutiny.

In *Commonwealth Coatings Corp. v. Cont'l Cas.*, 393 U.S. 145 (1968), this Court opined on the "evident partiality" standard where a party claims an arbitrator failed to make proper disclosures. There, a subcontractor brought suit against a prime contractor to recover monies owed. One of the arbitrators was regularly, albeit intermittently, hired by the prime contractor to provide consulting services. This fact was never revealed to the subcontractor, who lost the arbitration,

discovered this, and then challenged the award based on bias under Section 10. 393 U.S. at 146-147. The Court held that, in addition to demonstrating actual bias, a party could demonstrate evident partiality if it established an arbitrator failed to disclose "dealings that might create an impression of possible bias." *Id.* at 149. Noting the importance of "the close financial relations that had existed" between the arbitrator and the prime contractor "for a period of years," the Court held the arbitrator's failure to disclose these business dealings created an "impression of possible bias," and therefore required vacatur of the arbitration award. *Id*. at 146-149.

*Commonwealth Coatings* was a 6-3 decision, with Justice Black writing for the majority, and Justice White writing a concurrence joined by Justice Brennan. The majority found vacatur appropriate because the arbitrator's failure to disclose his significant business relationship with a party was a failure to disclose information potentially important to parties in selecting an arbitrator. *Id.* at 146-148. While Justice Black suggested that arbitrators could be held to an impartiality standard the same or even higher than that applied to judges, Justice White's concurrence made plain that "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." *Id*. at 150. According to Justice White, because arbitrators are "men of affairs, not apart from, but of, the marketplace," they should not be "automatically disqualified by a business relationship with the parties before them." *Id*.

Contrary to Masimo's claim that Justice White "never explained what showing short of the majority's 'appearance of bias' he believed the FAA would require," Pet. at 19, Justice White clearly articulated his view that the FAA required arbitrators to disclose only those relationships that would lead a "reasonable person [to] . . . conclude that an arbitrator was partial." *Id.* at 151-152.

With this guidance, courts have fashioned similar tests applied on a fact-driven basis to analyze whether an arbitrator's relationships or other interests are sufficient to support vacatur for evident partiality. In short, all circuits which have addressed the issue find that proof of actual bias is not required, and that something more than a mere appearance of bias is. The cases applying *Commonwealth Coatings* reveal a consistent standard that is largely articulated in the same way. *See, e.g.*, *Consolidated Coal Co. v. Local 1643, United Mine Workers of America*, 48 F.3d 125, 129-130 (4th Cir. 1995) (arbitrator's failure to disclose his brother's membership in the UMWA, a party to the arbitration, was not bias because such a fact would not lead a reasonable person "to conclude that the arbitrator was partial to the other party to the arbitration"); *Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 51 F.3d 157 (8th Cir. 1995) (arbitrator's failure to disclose he was an executive of company that does substantial business for one of the parties creates "impression of bias" showing "evident impartiality"); *New Regency Productions, Inc. v. Nippon Herald Films, Inc.*, 501 F.3d

1101, 1106 (9th Cir. 2007) (arbitrator's failure to disclose that, during arbitration, he accepted job with company that was doing "more than trivial business closely connected to a party to the arbitration" was evident partiality because these were "facts showing a reasonable impression of partiality"); *Schmitz v. Zilvetti*, 20 F.3d 1043, 1046, 1048 (9th Cir. 1994) (arbitrator's failure to disclose his law firm's extensive representation of the defendant's parent company creates "reasonable impression of bias"); *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr.*, 729 F.3d 99, 104 (2d Cir. 2013) (evident partiality may be found "where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration," which "can be inferred from objective facts inconsistent with impartiality" unlike the new information presented that was "irrelevant . . . , unreliable or both"); *Univ. Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331 (11th Cir. 2002) (failure to disclose fact that, during the arbitration, arbitrator had represented a co-defendant and had met with the president of a corporation with an interest in the dispute, necessitated an evidentiary hearing to determine potential bias).

The cases demonstrate broad consensus on what constitutes "evident partiality." There is no need for this Court to grant review to resolve any ostensible "conflict" between outcomes in decisions applying slight variations of the *Commonwealth Coatings* rationale. While Masimo may quibble with the linguistic formulations, all courts apply basically the same legal

test. Indeed, this Court has denied multiple petitions for certiorari asserting this alleged "confusion."[3] There is no reason for the Court to change course and grant review in this case.

Moreover, the appellate courts agree the question of evident partiality is a highly fact-intensive one. *See, e.g.*, *Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 283 (5th Cir. 2007) (en banc) ("[t]he 'reasonable impression of bias' standard is thus interpreted practically rather than with the utmost rigor."); *Lucent Techs. Inc. v. Tatung Co.*, 379 F.3d 24, 28 (2d Cir. 2004) ("This court has . . . viewed the teachings of *Commonwealth Coatings* pragmatically, employing a case-by-case approach in preference to dogmatic rigidity."); *University Commons-Urbana*, 304 F.3d at 1345 ("[T]he 'evident partiality' question necessarily entails a fact intensive inquiry [as t]his is one area of the law which is highly dependent on the unique factual settings of each particular case." (alterations in

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[3] *See Stone v. Bear, Stearns & Co.*, 134 S. Ct. 2292 (2014); *PAC Pac. Group Int'l, Inc. v. NGC Network Asia, L.L.C.*, 134 S. Ct. 265 (2013); *Michael Motors Co. v. Dealer Computer Servs., Inc.*, 133 S. Ct. 945 (2013); *Certain Underwriters at Lloyd's, London v. Lagstein*, 131 S. Ct. 832 (2010); *Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 551 U.S. 1114 (2007); *RDC Golf of Florida I, Inc. v. Apostolicas*, 549 U.S. 1253 (2007); *Thomas v. Hassler*, 549 U.S. 1210 (2007); *AFC Coal Props., Inc. v. Delta Mine Holding Co.*, 537 U.S. 817 (2002); *Brown v. Wheat First Sec., Inc.*, 534 U.S. 1067 (2001); *Umana v. Swidler & Berlin, Chartered*, 533 U.S. 952 (2001); *International Bank of Commerce-Brownsville v. International Energy Dev. Corp.*, 528 U.S. 1137 (2000); *ANR Coal Co. v. Cogentrix of N.C., Inc.*, 528 U.S. 877 (1999).

original; internal quotation marks omitted)). Any divergent results turn not on the standard the court articulates, but on the particular facts of each case.

Masimo fails to point to a single case – including this one – in which the court's articulation of the standard would have made a difference in the outcome. This Court need not wade into the narrow grounds of vacatur when the lower courts are consistently and properly applying the FAA and *Commonwealth Coatings.*

### C. This Case Is an Unsuitable Vehicle for Addressing the "Evident Partiality" Standard.

Masimo's claim that this case "effectively guts the 'evident partiality' provision" is hyperbole unbounded by reality. Masimo's issue is not with the lower court's articulation or application of the standard at all, but with its mistaken belief that the standard should be applied to the Arbitrator's conduct after a bias challenge is raised. This case, therefore, does not present an occasion for resolving any purported confusion about the evident partiality standard in the lower courts.

Nothing in the lower court's decision threatens the rationale of *Commonwealth Coatings*. The appellate court correctly articulated the standard with respect to disclosures as a failure "to disclose to the parties information that creates 'a reasonable impression of bias.' " Pet. App. 2a. Applying that standard, the court properly found that Masimo "furnish[ed] no coherent

explanation" as to how Justice Neal's brother's litigation practice or his role in a SIDS foundation "would cause a person reasonably to doubt [his] impartiality in this case." *Id.* at 2a; *see also id.* at 4a (Hurwitz, J., concurring) ("Masimo's claims of 'evident partiality' fail on the merits"). Masimo offered no facts as to any benefit that would flow to either party to the arbitration by virtue of these attenuated connections. *Id.* Thus, the appellate court, in line with several cases addressing evident partiality in the nondisclosure context, properly applied the reasoning of *Commonwealth Coatings* to find no reasonable impression of bias. *Id.*; *see, e.g.*, *Lagstein v. Certain Underwriters at Lloyds, London*, 607 F.3d 634 (9th Cir. 2013), cert. den., 562 U.S. 1110, 131 S.Ct. 832 (2010) (ethics charges against arbitrator with no connection to parties or arbitration was not information that created a "reasonable impression of bias"); *Ormsbee Dev. Co. v. Grace*, 668 F.2d 1140, 1151 (10th Cir. 1982) (alleged nondisclosure that arbitrator had connections to law firm with one party did not "fall within the impartiality commands" of *Commonwealth Coatings* where arbitrator was not financially involved with either party to the arbitration and had made all required disclosures).

In addition, this case is a particularly poor vehicle for review of the "evident partiality" standard because the Ninth Circuit's standard adheres to Justice Black's "impression of bias" articulation, which – as Masimo admits (*see* Pet. 21) – is the articulation bringing the *most scrutiny* to bear on nondisclosure. That is, if this Court granted review and found that Justice White's

"reasonable person" standard is more apt than the "impression of bias" standard, that would not change the outcome in this case, because the appellate court found vacatur was improper under the stricter standard. Thus, if the Court decides that questions concerning the proper application of *Commonwealth Coatings* merit review, it should wait for a case that actually misapplies *Commonwealth Coatings*.

Further, the appellate court did not, as Masimo claims, hold that in order to establish evident partiality, Masimo would have to show "affirmative misconduct" or "irrationality." Pet. 18. That language was directed to Masimo's argument that the Arbitrator improperly applied Third Circuit law (permitting consideration of abusive litigation tactics in determining the amount of punitive damages) rather than California law, which Masimo argued did not permit consideration of such conduct. Pet. App. 2a. Although the district court characterized that legal determination as evidence of "bias" – i.e., the arbitrator demonstrated evident partiality by considering litigation abuse in his determination of the amount of punitive damages – the appellate court correctly viewed this issue as whether the Arbitrator exceeded his powers (such that vacatur would be required under the narrow grounds of §10(a)(4)), and considered whether the Arbitrator engaged in "affirmative misconduct" or issued an award that was "irrational," finding neither test was met. *Id*. It similarly rejected Masimo's argument that the Arbitrator exceeded his powers by deciding

Masimo's withdrawal request in the first instance, concluding "the arbitrator's rulings, even if erroneous, did not 'exceed his powers' or rise to the level of manifest disregard of the law." *Id.* at 3a.

The lower court properly applied *Commonwealth Coatings'* "impression of bias" standard to Masimo's nondisclosure challenge and found Masimo's claim lacking. The court also properly ruled upon Masimo's claims that the Arbitrator should have referred the withdrawal request to JAMS and should not have cited to Masimo's litigation abuse as an "additional basis" for punitive damages by considering whether those actions exceeded the Arbitrator's powers and concluding they did not.

### D. Masimo's Expanded Evident Partiality Test Would Lead to Increased and Unsupported Bias Challenges.

The Petition should also be denied because Masimo would have this Court grant certiorari and engage in an unbridled expansion of the "evident partiality" test in ways that are unprincipled and unworkable.

First, ignoring the FAA's mandate for narrow review of awards, and that "evident partiality" is necessarily fact bound, Masimo insists that *Commonwealth Coatings* ***requires*** a finding of evident partiality any time an arbitrator rules upon a request that he recuse himself. Pet. at 22-23.

Masimo lacks support for this new *per se* bias rule. Justice Black's language that courts should be concerned with arbitrators' "pecuniary interest" was directed at an arbitrator's *failure to disclose a monetary interest that may flow from one of the parties such that it would create an impression of bias*, 393 U.S. at 148, not that an arbitrator necessarily has a pecuniary interest in any dispute he or she arbitrates. Taken to its logical conclusion, Masimo's reasoning would render suspect *any* ruling that may, as a byproduct, increase an arbitrator's fee, for example, permitting 30 rather than five days of testimony, allowing 1,000 rather than 100 exhibits, or denying a dispositive motion. Such a rule would also call into question the awards in myriad cases where a pecuniary interest may have flowed to the arbitrator where, for example, the arbitrator accepts another case with the same employer or with one of the same law firms in the current matter. It would permit losing parties to bootstrap a bias challenge – which can be brought *after* an interim award is issued – onto almost any conduct following an unsuccessful bias challenge, an interpretation that would bloat this Court's constrained "evident partiality" standard beyond recognition.

In addition, Masimo's claims that the Arbitrator earned "more than one million dollars in fees" and that such fees would be "forfeited" if he recused himself are rank speculation with zero support in or citations to the record. Further, the facts in this case, continually misrepresented by Masimo, demonstrate why a *per se*

rule is ill-advised: Masimo directly asked the Arbitrator to withdraw from further proceedings on nondisclosure grounds so weak it abandoned them on appeal, and ***never*** argued that the arbitrator had a pecuniary interest that would flow from the alleged nondisclosure. Masimo made its request after the Interim Award had been issued and on the eve of closing arguments. It did not, but clearly could have, asked JAMS to review the issue and make a final determination. In fact, rather than requesting review by JAMS, Masimo instead asked the Arbitrator – whom it allegedly believed was too biased to be fair – to delay issuing the arbitration decision and personally preside over a lengthy scientific study. Forbidding an arbitrator to rule on a withdrawal request under these circumstances simply invites disqualification challenges to set up appeals of adverse awards by disgruntled parties. *See In re Andros Compania Maritima, S.A.*, 579 F.2d 691, 700 (2d Cir. 1978) (*quoting Commonwealth Coatings*, 393 U.S. at 151 (White, J., concurring)) ("There is an obvious possibility . . . that 'a suspicious or disgruntled party can seize' upon an undisclosed relationship 'as a pretext for invalidating the award.' ").

Moreover, Masimo's claim that arbitration rules are "unanimous" that "motions for disqualification be referred to an independent decisionmaker" (Pet. 23) is simply untrue. For example, the California rules explicitly provide that the arbitrator "*disqualify himself or herself* if he or she concludes at any time during the arbitration that he or she is not able to conduct the arbitration impartially." California Rules of Court,

Ethics Standards for Neutral Arbitrators, Standards 6, 10, emphasis added. Further, as the Court noted in *Commonwealth Coatings* (and as the district court found with respect to the JAMS rules), the arbitration rules are "not controlling" in any event. 393 U.S. at 149; EOR 17a.

Second, Masimo improperly attempts to expand the "evident partiality" standard by asking this Court *to permit bias challenges based on an arbitrator's legal rulings*. Masimo argued below that the Arbitrator erred in citing to a Third Circuit case and considering Masimo's pattern of abusive litigation tactics in assessing the amount of punitive damages. This argument – reviewing a *legal determination by the arbitrator* – was necessarily and properly reviewed, as the appellate court did, under the manifest disregard of the law standard. That the pattern of abusive litigation conduct included an unsuccessful last-ditch bias challenge does not suddenly convert the standard of review into one of "evident partiality."

As part of its overzealous attempt to transform court review of an arbitrator's legal ruling into a test for "evident partiality," Masimo overstates the holding of *De Anza Santa Cruz Mobile Estates Homeowners Assn. v. De Anza Santa Cruz Mobile Estates*, 94 Cal.App.4th 890 (2001), and California law about whether a party's vexatious conduct, which was present here, can form the basis, in part, for an award of punitive damages. In *De Anza*, the California appellate

court was specifically concerned with a *jury's* consideration of litigation conduct in assessing exemplary damages. *Id*. at 919; *see also Sheldon Appel Co. v. Albert & Oliker*, 47 Cal.3d 863, 875 (1989) ("there is a significant danger that jurors may not sufficiently appreciate the distinction between a merely unsuccessful and a legally untenable claim"). Likewise, the Third Circuit decision cited by the Arbitrator adjudged a judge's ability to base punitive damages, in part, on litigation conduct, as opposed to the ability of a jury to do so. *See CGB Occupational Therapy, Inc. v. RHA Health Servs.*, 499 F.3d 184, 194 (3d Cir. 2007) ("Informed by many decades of experience as a trial judge and by the specific experience of presiding over several years of pretrial proceedings and two trials in this matter, the District Court Judge described Sunrise's litigation conduct as 'tell[ing] a tale of repeated stalling and dishonesty' . . . , which included the imposition of 'countless obstacles to rapid resolution of Plaintiff's claims' . . . , among other 'antics'"). Here an arbitrator (sitting in a dual capacity as both trier of fact and law, and with responsibility to reasonably control the arbitration proceedings) issued the determination that Masimo's litigation conduct could be considered, as an "additional" and not "central" factor, in fixing the amount of punitive damages.

Masimo's new judicial review standard is an unprecedented expansion of the FAA's "narrow grounds" for vacatur. It would also greatly restrict an arbitrator's ability to control the arbitration proceedings. This

proposed standard would undo years of careful progress establishing the current deferential standard and would create a potentially overwhelming burden for reviewing courts. *See Commonwealth Coatings*, 393 U.S. at 151 (White, J., concurring) ("The judiciary should minimize its role in arbitration as judge of the arbitrator's impartiality.").

## II. The Decision Below Is Consistent with the FAA and Does Not Announce a New Rule on Waiver.

### A. The Appellate Court Did Not Apply a New and Conflicting Rule on Waiver.

As an initial matter, while the appellate court found that Masimo waived an argument regarding the amount of punitive damages assessed, it also found the Arbitrator's ruling on punitive damages did not manifestly disregard the law, a conclusion that was undoubtedly correct. Pet. App. 2a-3a, n.1; *see infra*, sec. II.B. Thus, its finding of waiver is not dispositive, and this Court's review would not alter the outcome.

Beyond that strong reason to deny the Petition, Masimo's argument is flawed. There is simply no hard and fast rule – nor should there be – concerning waiver. Instead, as makes sense, the rules regarding waiver are necessarily flexible and contextual. As one insightful and scholarly article recently explained, the role of the appellee is not "purely defensive." Tuck, *Strategic Considerations for Appellees in the Federal Courts of*

*Appeals*, Federal Lawyer, 60-MAR Fed. Law. 42 (Federal Bar Association, March, 2013). Appellee waiver "flows from two well-accepted rules": (1) that an appellant waives any argument in favor of reversal by not raising that argument in its opening brief; and (2) that the appellee need not simply respond to the arguments raised in an appellant's brief; instead "an appellee may rely upon any matter appearing in the record in support of the judgment below." *Id.*, *quoting Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982). "Therefore, in its response brief the appellee can affirmatively raise arguments from the court below that the trial court either rejected or ignored[.]" *Id.*

Thus, appellate courts have found appellee waiver in a variety of contexts. In *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1319 (11th Cir. 2012), the court found that the appellee had waived consideration of an alternate ground for affirmance of a summary judgment order by not briefing it. The court explained:

> the requirement that issues be raised in a party's brief on appeal promotes careful and correct decision making. It ensures that the opposing party has an opportunity to reflect upon and respond in writing to the arguments that his adversary is raising. And it gives the appellate court the benefit of written arguments and provides the court and the parties with an opportunity to prepare for oral argument with the opposing positions and arguments in mind. It is not too much to ask of an appellant or an appellee.

*Hamilton*, 680 F.3d at 1319. *See also Johnson v. Wainwright*, 806 F.2d 1479, 1481 n.2 (11th Cir. 1986) (holding that an appellee's failure to raise an affirmative defense on appeal "waives any right to claim such a defense"); *Parker v. Franklin County Cmty. Sch. Corp.*, 667 F.3d 910, 924 (7th Cir. 2012) (holding that appellee waived alternative argument for affirmance by failing to develop it on appeal).

Further, the cases Masimo cites – none involving review of an arbitration award – do not establish a bright line that the appellate court in this case crossed. Indeed, in *Kessler v. Nat'l Enters.*, 203 F.3d 1058 (8th Cir. 2000), the appellate court found an appellee waived an issue it could have, but failed to, raise in an earlier appeal. In so holding, while noting that waiver should not be found "punitively" against appellees, the court also stated the only general principle at issue here: that the rule of waiver "is prudential, not jurisdictional," and "calls for the exercise of an appellate court's sound discretion." *Id.* at 1059. In *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735 (D.C. Cir. 1995), the court noted that courts exercise "a degree of leniency" in applying waiver to appellees, not that waiver is never applied. *Id.* at 741. And in *Schering Corp. v. Ill. Antibiotics Co.*, 89 F.3d 357, 358 (7th Cir. 1996), the court noted circumstances where "judicial economy" would permit waiver to run to an appellee. *Id.* at 358; *see also Haynes Trane Serv. Agency v. Am. Std., Inc.*, 573 F.3d 947, 964 (10th Cir. 2009) (noting that waiver "has been properly applied to appellees in some cases [and] [t]his is such a case."); *Roth v. United States DOJ*,

395 U.S. App. D.C. 340, 360, 642 F.3d 1161, 1181 (2011) (citation omitted) ("Even appellees waive arguments by failing to brief them.").

Thus, many other circuit courts have applied the very waiver rule adopted by the appellate court here – a flexible rule logically based on avoiding piecemeal litigation and requiring parties, on appeal, to argue for reversal or affirmance on any available, meritorious grounds. Here, the necessity for a flexible approach regarding waiver is especially apparent. The appeal was a *de novo* review of the narrow grounds for vacatur of an award that followed arbitration and subsequent court proceedings spanning *over five years.* As this Court has recognized, parties who choose arbitration "forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed." *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685, 130 S. Ct. 1758, 1775 (2010). Masimo's proposed rule would permit, if not require, seriatim appeals on each issue the party seeking to resist an arbitration award may raise, an outcome antithetical to arbitration.

**B. The Appellate Court Properly Concluded the Arbitrator Did Not Exceed His Powers or Manifestly Disregard the Law.**

The Petition should be rejected for a final reason: the appellate court correctly and unremarkably found the Arbitrator did not exceed his powers or manifestly

disregard the law in awarding punitive damages and rejecting Masimo's collateral estoppel argument.

As this Court has noted, to obtain vacatur, Masimo "must clear a high hurdle." *Stolt-Nielsen*, *supra*, 559 U.S. at 671-672. It is not that "an error – or even a serious error" is shown. *Id.* It is only when an arbitrator " 'dispense[s] his own brand of industrial justice' that his decision may be unenforceable." *Id., quoting Major League Baseball Players Assn. v. Garvey*, 532 U.S. 504, 509, 121 S. Ct. 1724, 149 L. Ed. 2d 740 (2001) (per curiam).

The appellate court properly found this demanding standard was not met by the Arbitrator's award of punitive damages, which was reached after a thorough review of the evidence and which revealed that the low award of compensatory damages was a result of Ruhe and Catala's successful efforts to mitigate their damages. Pet. App. 49a-50a. The appellate court cited this Court's recognition that "low awards of compensatory damages may properly support a higher ratio of punitive to actual damages." Pet. App. 2a-3a, n.1 (*quoting BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582 (1996)).

In addition, the court below properly found the Arbitrator did not exceed his powers in rejecting Masimo's collateral estoppel argument, particularly where it took the position – until it won in the district court *qui tam* action – that the arbitration and *qui tam* actions were factually and legally distinct. Pet. App. 59a-63a. There was no error, let alone an act of rogue

justice, in this legal finding, since the district court's decision on the *qui tam* claims was limited to its finding that there was insufficient evidence to conclude that (1) Masimo made knowingly misleading statements about the device to the FDA, as required to support the *qui tam* claim; and (2) the device was medically worthless under the FCA's worthless services doctrine. *Id*. Neither finding could form the basis for a meritorious collateral estoppel argument because the issue addressed by the Arbitrator – that is, whether Ruhe and Catala were subjected to "an intolerable work environment characterized by pressure to sell devices known to be defective, and eventually conceded by [Masimo] to be so" – is entirely distinct from whether Masimo made knowing misrepresentations to the FDA or if the devices at issue were entirely worthless, as opposed to defective. *See Offshore Sportswear, Inc. v. Vuarnet Intern., B.V.*, 114 F.3d 848, 850 (9th Cir. 1997), *quoting Clark v. Bear Stearns & Co., Inc.*, 966 F.2d 1318, 1320-1321 (9th Cir. 1992) (explaining that collateral estoppel, or issue preclusion, requires, *inter alia*, that "the issue at stake must be identical to the one alleged in the prior litigation" and that "[t]he party asserting preclusion bears the burden of showing with clarity and certainty what was determined by the prior judgment").

Masimo offers no compelling reason for the Court to grant review of the appellate court's application of the narrow grounds for vacatur.

### III. MDMA's Brief Offers No Guidance for This Court.[4]

The brief of amicus Medical Device Manufacturers Association ("MDMA") primarily parrots the arguments in Masimo's Petition. It then offers policy arguments which mischaracterize the record, demonstrate hostility to arbitration, and which would not be advanced by this Court's review in this case.

First, MDMA makes the farfetched claim that the appellate court's disposition "erodes trust" by removing "the right to a neutral arbitrator" and permitting an arbitration award that is "punitive and based on emotion rather than the evidence." Amicus 4, 14. On the contrary, the undisputed record demonstrates the Arbitrator made detailed findings based on a comprehensive record and found, by clear and convincing evidence, that Masimo's conduct warranted punitive damages. That the Arbitrator later declined Masimo's request that he withdraw from the case and noted Masimo's pattern of abusive litigation does not, in hindsight, render his earlier findings the product of "bias." The appellate court correctly analyzed Masimo's challenges to these rulings as whether they demonstrated a manifest disregard of the law or an excess of power, not whether the arbitrator showed "evident partiality" in making them.

[4] Counsel of Record for amicus MDMA, Makan Delrahim, is a registered lobbyist for Masimo. *See* http://lobbying.influenceexplorer.com/lobbying/lobbyists/makan-delrahim/nX5MktV5RCz6zE3fW6uJc.

Second, contrary to MDMA's proclamation, this Court has never held that the mere ratio of punitive damages to actual damages awarded by an arbitrator is "clear evidence of apparent and actual bias," and should decline the invitation to do so here. Amicus at 11. Indeed, such a conclusion cannot stand in unison with the well-developed body of law discussing the due process standards that should apply to punitive damages, *which the arbitrator applied to this case*. *See* Pet. App. 2a-3a, n.1. *BMW of North America*, *supra*, 517 U.S. at 568, 574. The arbitrator's award of punitive damages is plainly not evidence of bias, nor does MDMA have any support for its extreme position.

Third, MDMA's argument that punitive damages must be subject to a greater standard of review than other aspects of arbitration runs afoul of the narrow review the FAA affords arbitrations, which carves out no special treatment for punitive damages awards. *See* FAA § 10; *Hall St. Assocs.*, *supra*, 552 U.S. at 578 (Expanding the narrow and detailed categories of judicial review of arbitration decisions "would rub too much against the grain" as the FAA "carries no hint of flexibility in unequivocally telling courts that they 'must' confirm an arbitral award, 'unless' it is vacated or modified 'as prescribed' by §§ 10 and 11.").

If businesses choose to bind their employees and consumers to arbitration, and to force them to give up their rights to a jury and to appellate review, then they must accept the same terms. They cannot cry foul when an arbitrator, on the basis of voluminous evidence, finds by clear and convincing evidence punitive

damages are warranted. Indeed, although MDMA relies upon *Garrity v. Lyle Stuart, Inc*., 353 N.E.2d 793, 797 (N.Y. 1976), a state court decision barring punitive damages in arbitration, this Court found *Garrity* preempted by the FAA, unless the parties specifically contract to waive punitive damages, because such a rule is hostile to arbitration. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58-60 (1995).

Finally, MDMA argues this Court should grant review to address the Ninth Circuit's "hostility toward arbitration." MDMA Amicus at 8. But the appellate court's decision, which faithfully applies the narrow standard of review for vacatur of arbitration awards and upholds a thoughtful and detailed award following comprehensive arbitration proceedings, is plainly not "hostile" to arbitration. To the contrary, it faithfully applies the FAA's mandate that "unequivocally tells courts to grant confirmation in all cases, except when one of the 'prescribed' exceptions applies." *Hall St. Assocs.*, *supra*, 552 U.S. at 587. "Any other reading opens the door to the full-bore legal and evidentiary appeals that can 'rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process,' and bring arbitration theory to grief in post-arbitration process." *Id.* (citation omitted).

## CONCLUSION

The Petition for a Writ of *Certiorari* should be denied.

Respectfully submitted,

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