UNITED STATES DISTRICT COURT

for the

Northern District of Iowa

AALFS FAMILY PARTNERSHIP, et al.,
Petitioners,
v.
GSL HOLDINGS, S.A. DE C.V., et al.,
Respondents,

Civil Action No. 21-CV-4038-CJW-KEM

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one)*:

☐ the plaintiff *(name)* _____ recover from the defendant *(name)* _____ the amount of _____ dollars ($ _____), which includes prejudgment interest at the rate of _____ %, plus post judgment interest at the rate of _____ % per annum, along with costs.

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* _____ recover costs from the plaintiff *(name)* _____ .

☑ other: Judgment is entered in accordance with the attached Order.

This action was *(check one)*:

☐ tried by a jury with Judge _____ presiding, and the jury has rendered a verdict.

☐ tried by Judge _____ without a jury and the above decision was reached.

☑ decided by Judge C.J. Williams on a Motion to Vacate the Final Arbitration Award.

Date: 04/11/2022

PAUL DE YOUNG, CLERK OF COURT

/s/ klh
Signature of Clerk or Deputy Clerk

APPROVED AS TO FORM:

C. J. Williams
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

AALFS FAMILY PARTNERSHIP, et al., Petitioners, vs. GSL HOLDINGS, S.A. DE C.V., et al., Respondents.	No. 21-CV-4038-CJW-KEM **ORDER**

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This matter is before the Court on petitioners' Petition for Confirmation of Arbitration Award (Doc. 1) and respondents' Motion to Vacate the Final Arbitration Award. (Doc. 10). Petitioners timely filed a resistance (Doc. 13), and respondents timely filed a reply. (Doc. 16).

For the following reasons, the Court **denies** respondents' motion (Doc. 10) and **confirms** the final arbitration award (Doc. 1).

I. BACKGROUND

This case arises out of corporate acquisition. GSL Holdings, S.A. de C.V. ("GSL"), a denim manufacturer based in Mexico, acquired all capital stock in Aalfs Manufacturing, Inc. ("Aalfs"), a denim and twill manufacturer formerly headquartered in Sioux City, Iowa, and its subsidiaries. (Doc. 10-8, at 9–14). Together, petitioners owned all stock in Aalfs. (*Id.*, at 11–12). After negotiations, GSL purchased Aalfs for $21.5 million, based on a multiple of Aalfs' FY2017 earnings before interest, taxes, depreciation, and amortization. (*Id.*, at 12–13). The purchase price included an $18 million cash payment and $3.5 million over two interest-bearing promissory notes, one to petitioner Aalfs Family Partnership ("AFP Note") and one to the petitioner Rodawig Family Limited Partnership ("RFLP Note," known as "WRFT Note" after assignment) (together, "the Notes"). (*Id.*, at 14–15, 80). In lieu of collateral, GSL agreed to require that the other respondents (the "Affiliated Entities") sign the Notes as co-makers. (*Id.*, at 15). GSL also agreed to assume Aalfs' revolving line of credit ("RLOC") at closing. (*Id.*, at 12). On February 8, 2018, GSL and petitioners closed on the transaction and entered into the Share Purchase Agreement ("SPA"). (*Id.*, at 14).

After closing, GSL discovered that Aalfs' corporate health was in dire straits, and its shares would soon be worthless. (*Id.*, at 15–16). Serious issues soon arose, including strikes in Aalfs' Mexico facilities, a chargeback claim from Target Corporation, a

national retail chain, based on defective jeans, and a wage claim made by former Aalfs employee Jeff Carlson. (*Id.*). Beginning May 1, 2018, GSL halted any further payment on the Notes. (*Id.*). GSL contacted petitioners with a Notice of Claim and Request for Indemnification based on the work stoppages in Mexico, the Target chargeback, and the Carlson wage dispute, as well as a claim for Aalfs' alleged misuse of the RLOC. (*Id.*, at 16–17). Petitioners disputed all requests. (*Id.*). GSL later emailed petitioners a Notice of Additional Breaches, based on the SPA. (*Id.*, at 17). Petitioners disputed these, too. (*Id.*).

A. Procedural Background

On August 19, 2019, GSL sued petitioners in this Court, alleging fraudulent inducement, breach of contract, and unjust enrichment. (Case 5:19-cv-04047-CJW-KEM, Doc. 1, at 20–23). On September 23, 2019, however, GSL filed an unresisted motion for stay pending arbitration. (Case 5:19-cv-04047-CJW-KEM, Doc. 6). That case remains stayed pending this motion. (Case 5:19-cv-04047-CJW-KEM, *see* Docs. 7, 17).

On September 30, 2019, GSL commenced arbitration Case No. 24795/MK in the International Court of Arbitration at the International Chamber of Commerce ("ICC")[1], as required by the SPA. (Doc. 10-8, at 17–18). In response, petitioners asserted counterclaims. (*Id.*, at 18–19). Petitioners then asserted their own claims against GSL and its Affiliated Entities which GSL and its Affiliated Entities (together, "respondents") resisted, under a second arbitration, Case No. 24897. (*Id.*, at 19–20). In total, among the two arbitrations, respondents asserted claims for (1) fraudulent inducements, (2) breach of contract, (3) equitable recission, and (4) unjust enrichment. (*Id.*, at 17–

[1] For simplicity, the Court uses ICC to refer to the International Chamber of Commerce, and the International Court of Arbitration and its Secretariat.

20). Petitioners asserted claims for (1) breach of contract for respondents' default on the Notes, (2) indemnification and/or contribution on the Target chargeback claim, (3) reimbursement for the payment to defend the Carlson wage claim, (4) an award for respondents' default on the AFP Note; and (5) an award for respondents' default on the RFLP/WRFT Note.[2] (*Id.*). The ICC consolidated the two underlying arbitrations, terming GSL and its Affiliated Entities as "petitioners" and the former Aalfs shareholders as "respondents" for purposes of the arbitration. (*Id.*, at 20). The ICC appointed Lawrence S. Schaner as sole arbitrator, under the parties' Amended Joint Stipulation.[3] (*Id.*, at 20).

Following several months of discovery and pre-hearing motion practice, the ICC held its hearing from February 23–26, 2021. (*Id.*, at 21–28). A total of twelve witnesses were examined: eight called by respondents and four called by petitioners. (*Id.*, at 28). The parties also submitted post-hearing pleadings before the ICC closed proceedings on May 24, 2021. (*Id.*, at 28–29). Arbitrator Schaner issued the Final Award on August 19, 2021. (*Id.*, at 87).

B. Arbitration Decision and Award

Arbitrator Schaner's Final Award denied all of respondents' claims. (*Id.*, at 86–87). It granted petitioners' counterclaims on the AFP Note, requiring respondents to pay a total of more than $2.2 million, and the RFLP/WRFT Note, requiring respondents to pay a total of more than $2.2 million. (*Id.*). The Final Award denied petitioners' other counterclaims. (*Id.*). Finally, the Final Award required respondents to pay petitioners

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[2] Though certain claims are asserted only against certain petitioners or respondents, the Court labels them generally here.

[3] The Court notes that in the record the arbitrator is also referred to as "the Tribunal." (*See, e.g.*, Doc. 1). Because respondents' motion is founded on Arbitrator Schaner's individual misconduct and evident partiality, the Court does not use this impersonal term.

more than $1.2 million for legal fees and expenses, and $120,000 for fees and expenses relating to the administration of the arbitration. (*Id.*). The Court will discuss specific findings of fact and legal conclusions as they are relevant to the Court's analysis.

C. Post-Arbitration Proceedings

Following the Final Award's issuance, petitioners petitioned this Court to affirm the Final Award.[4] (Doc. 1). Respondents responded by filing a motion to vacate the Final Award. (Doc. 10). The Court first addresses respondents' motion to vacate the final arbitration award before turning to petitioners' petition for confirmation.

II. MOTION TO VACATE

Respondents base their motion to vacate the final arbitration award on two arguments. (Doc. 10). First, respondents argue the arbitrator engaged in misconduct. (*Id.*, at 2 (citing 9 U.S.C. § 10(a)(3)). Second, respondents argue the arbitrator engaged in evident partiality. (*Id.* (citing 9 U.S.C. § 10(a)(2)).

Petitioners resist these arguments. (Doc. 13). Further, in a footnote, petitioners question whether respondents can properly pursue vacatur under Section 10, "a section of the FAA which applies to *domestic* arbitration awards," when the Final Award here is "non-domestic." (Doc. 13, at 23 n. 7). Thus, petitioners imply that vacatur here is limited to grounds listed in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention") alone.

For the following reasons, the Court denies respondents' motion.

A. Applicable Law

The SPA provides that it is governed by and construed in accordance with Iowa law, and that "any and all Disputes arising out of or in connection therewith shall be settled by arbitration under the Rules of Arbitration of the [ICC]." (Doc. 2-1, at 40);

[4] The SPA provides that an action for its enforcement be brought in federal court in the U.S. District Court for the Northern District of Iowa. (Doc. 2, at 39).

(*see also* Doc. 1, at 3). The Notes are also governed by and construed in accordance with Iowa law. (Docs. 2-2, at 3; 2-3, at 3). Further, any dispute about the Notes must be settled via an ICC arbitration under ICC rules because the Notes were part of the consideration for the SPA. (Doc. 2-1, at 40).

Article 35(6) of the ICC rules provides that the final award following an arbitration is "binding on the parties."[5] Here, respondents did not voluntarily satisfy the final award (Doc. 1, at 9), and thus petitioners request court enforcement. (*Id.*); *see also* 9. U.S.C. § 207. The SPA provides that such an action for enforcement be brought in this Court. (Doc. 2-1, at 40).

1. Applicable Grounds for Vacatur

For the following, the Court finds both the Convention and FAA grounds for vacatur apply here.

Chapter 2 of the Federal Arbitration Act ("FAA"), Title 9, United States Code, Section 201 *et seq.*, requires federal courts to enforce foreign arbitral awards falling under the Convention. *See* 9 U.S.C. § 202; *see also* Recognition and Enforcement of Foreign Arbitral Awards art. V, June 10, 1958, 21 U.S.T. 2517. A court must confirm a foreign arbitral award unless it finds a ground meriting refusal or deferral of enforcement applies under the Convention. 9 U.S.C. § 207. The Convention contains seven such grounds. Recognition and Enforcement of Foreign Arbitral Awards art. V, June 10, 1958, 21 U.S.T. 2517.

Article I of the Convention provides that the Convention applies only to arbitral awards (1) made in a country different than the country where enforcement is being

[5] *Rules of Arbitration of the International Chamber of Commerce, in force as from 1 March 2017: Article 35: Notification, Deposit and Enforceability of the Award*, ICC RULES, https://library.iccwbo.org/content/dr/RULES/RULE_ARB_2017_EN_35.htm (last accessed Mar. 14, 2022).

sought, and (2) "*not considered as domestic* awards in the [country] where their recognition and enforcement are sought." Recognition and Enforcement of Foreign Arbitral Awards art. I, June 10, 1958, 21 U.S.T. 2517. This second category is what constitutes a "nondomestic award." *See Jacada (Eur.), Ltd. v. Int'l Mktg. Strategies, Inc.*, 401 F.3d 701, 707 (6th Cir. 2005), *abrogated on other grounds by Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008). Additionally, Title 9, United States Code, Section 202 provides that any commercial arbitral agreement (and subsequent award), unless it is between two United States citizens, involves property located in the United States, and has no reasonable relationship with one or more foreign states, falls under the Convention. Read in conjunction with Article I of the Convention, any agreement or award falling under Section 202 is also nondomestic under Article I of the Convention. *See Jacada*, 401 F.3d at 708–709; *Industr. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1440–41 (11th Cir. 1998); *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 18–19 (2d Cir. 1997); *Jain v. de Méré*, 51 F.3d 686, 689 (7th Cir. 1995); *Ministry of Defense of Islamic Republic of Iran v. Gould Inc.*, 887 F.2d 1357, 1362 (9th Cir. 1989); *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 186–87 (1st Cir. 1982). *See also Privacy-Assured Inc. v. AccessData Corp. Ltd.*, No. 2:14–cv–00722–CW, 2015 WL 1868757, at *3 (D. Utah 2015)*; Nanda v. Atul Nanda & Dibon Sols. Inc.*, Civil Action No. 3:12–CV–0011–B, 2012 WL 2122181, at *2–5 (N.D. Tex. June 12, 2012); *Republic of Argentina v. BG Grp. PLC*, 715 F.Supp.2d 108, 117–20 (D.D.C. 2010), *rev'd on other grounds by* 665 F.3d 1363 (D.C. Cir. 2012).

Here, the arbitral agreement—the SPA—was between petitioners,[6] who are citizens of the United States, and respondent GSL, a citizen of Mexico. (Doc. 1, at 1–

[6] The Court notes that petitioner William E. Rodawig Family Trust was not a party to the SPA, but is a party to the final award. (Doc. 1, at 3).

3). Thus, the agreement has a reasonable relationship with one or more foreign states and is therefore nondomestic. The award resolves a dispute between petitioners and respondents, who are almost exclusively citizens of Mexico.[7] Thus, the subsequent award has a reasonable relationship with one or more foreign states and is therefore nondomestic. Thus, the Court finds that both the arbitral agreement and award here are nondomestic. Accordingly, the Convention's grounds for vacatur under Article V apply here.[8]

The Court finds, however, that the Convention's grounds for vacatur are not exclusive here; instead, the FAA's grounds for vacatur under Section 10 also apply.

The FAA provides that, under application from any party, a court may vacate a final arbitration award under four circumstances, including "where there was evident partiality or corruption in the arbitrators," 9 U.S.C. § 10(a)(2), and "where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced." 9 U.S.C. § 10(a)(3).

Courts of Appeal have recognized "more flexibility" in grounds for vacatur when the arbitration and confirmation proceeding occurred within the same country. *See*

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[7] The Court notes that respondents Tavex USA, Inc. and Ropa Siete Leguas, Inc. are citizens of the United States. (Doc. 1, at 2–3). This does not render the award domestic, however, because it still has a reasonable relationship with one or more foreign states. *See* 9 U.S.C. § 202.

[8] It is also undisputed that the final award is nondomestic. (*See* Docs. 1, at 1; 13, at 23 n.7). The Court notes, however, that the definition of a nondomestic award is a subject of debate and has yet to be settled by the Supreme Court or the Eighth Circuit Court of Appeals. *See N. Motors, Inc. v. Knudsen*, No. 4:10–CV–1317 (CEJ), 2011 WL 2552573, at *2 (E.D. Mo., June 27, 2011) (not reaching question of applicability of FAA vacatur grounds because party removing action failed to prove citizenship status). Thus, the Court conducts its own analysis and makes its own finding.

Admart AG v. Stephen & Mary Birch Found., 457 F.3d 302, 307 (3d Cir. 2006) (citing *Alghanim & Sons*, 126 F.3d at 22–23) (2d Cir.).

Specifically, the overwhelming majority of the Courts of Appeal that have addressed this issue have found that the FAA's vacatur standards apply to a final award issued under the Convention when that award was issued in the United States.[9] *See Goldgroup Res., Inc. v. DynaResource de Mexico, S.A. de C.V.*, 994 F.3d 1181, 1189 (10th Cir. 2021) (collecting cases from other Circuit Courts of Appeal); *Ario v. Underwriting Members of Syndicate 53 at Lloyds for 1998 Year of Account*, 618 F.3d 277, 291–93 (3d Cir. 2010); *Zurich Am. Ins. Co. v. Team Tankers A.S.*, 811 F.3d 584, 588 (2nd Cir. 2016); *Gulf Petro Trading Co. v. Nigerian Nat. Petroleum Corp.*, 512 F.3d 742, 746 (5th Cir. 2008); *Jacada (Eur)*, 401 F.3d at 709, *abrogated on other grounds by Hall St. Assocs.*, 552 U.S. 576; *see also TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 936 (D.C. Cir. 2007). *But see Industr. Risk Insurers*, 141 F.3d at 1441–42, 1145 (limiting vacatur to grounds stated in Article V of the Convention); *Tetronics (Int'l) Ltd. v. BlueOak Ark. LLC*, CASE NO. 4:20CV530 SWW, 2020 WL 5775108 (E.D. Ark. Sept. 28, 2020) (citing only *Industr. Risk Insurers*). As petitioners note (Doc. 13, at 23 n.7), the Eighth Circuit Court of Appeals has yet to address this issue.

As the *Ario* court noted, "[t]his reasoning is also consistent with 9 U.S.C. § 208 . . . in which Congress explicitly provided for the application of the domestic FAA to the extent that it did not conflict with the Convention." 618 F.3d at 292. Section 208 provides that "Chapter 1 [of the FAA] applies to actions and proceedings brought under [Chapter 2] to the extent [Chapter 1] is not in conflict with [Chapter 2] or the Convention as ratified by the United States." Section 10, which provides grounds for vacatur, is a

[9] The Court notes that the law in some Circuit Courts of Appeal has evolved on this issue.

general provision under Chapter 1. 9 U.S.C. § 10. "When both the arbitration and the enforcement of an award falling under the Convention occur in the United States, there is no conflict between the Convention and the domestic FAA because Article V(1)(e) of the Convention incorporates the domestic FAA and allows awards to be 'set aside or suspended by a competent authority of the country in which . . . that award was made.'" *Goldgroup Res.*, 994 F.3d, at 1189.

Further, as the Tenth Circuit noted in *Goldgroup*, it appears the Supreme Court has implicitly authorized the majority interpretation that the FAA's vacatur standards apply to a final award issued under the Convention when that award was made in the United States. 994 F.3d, at 1189 (citing *BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25 (2014) (considering whether 9 U.S.C. § 10(a)(4) required vacatur of a nondomestic award rendered in the United States).

The Court has already found that the Convention, including its standard for vacatur, applies. Here, it is undisputed that the arbitration took place in Des Moines, Iowa (Doc. 1, at 6), and petitioners seek to confirm the final award in the U.S. District Court for the Northern District of Iowa. (*Id.*, at 6–8). Thus, the final award was made in the United States and petitioners seek enforcement in the United States. Accordingly, the Court finds that FAA's vacatur standards—including 9 U.S.C. § 10(a)(2–3)—also apply.

2. Standard of Review

Because the Court has found that the FAA's grounds for vacatur apply and respondents' arguments are based on FAA grounds, it must review respondents' arguments under the FAA standard. Judicial review of a final award under the FAA "is exceedingly limited and deferential." *Precision Press, Inc. v. MLP U.S.A., Inc.*, No. C09–4005–MWB, 2011 WL 1807396, at *8 (N.D. Iowa May 11, 2011) (quoting *St. John's Mercy Med. Ctr. v. Delfino*, 414 F.3d 882, 884 (8th Cir. 2005)). "[A]s long as

the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *Bureau of Engraving, Inc. v. Graphic Commc'n Int'l Union, Loc. 1B,* 284 F.3d 821, 824 (8th Cir. 2002) (quoting *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987)). "It is only when [an] arbitrator strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice' that his decision may be unenforceable." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671 (2010) (quotation omitted). Still, if the arbitrator's actions were harmless, courts have declined to vacate the award for the reasons listed under Section 10. *Balvin v. Rain and Hail, LLC*, 943 F.3d 1134, 1139 (8th Cir. 2019) (citing 9 U.S.C. § 10(a) (providing that courts "may" vacate an arbitration award when the arbitrator exceeded his powers); *Coutee v. Barington Cap. Grp., L.P.*, 336 F.3d 1128, 1134 (9th Cir. 2003); *Brentwood Med. Assocs. v. United Mine Workers of Am.*, 396 F.3d 237, 243 (3d Cir. 2005)).

Having determined what law and standard applies, the Court now turns to its analysis of respondents' arguments.

B. Analysis

For the following reasons, the Court denies respondents' motion as to both their misconduct arguments and evident-partiality arguments.

1. Misconduct

As Section 10(a)(3) states, a court may order vacatur of a final award when the arbitrator is "guilty of misconduct in [1] refusing to postpone the hearing, upon sufficient cause shown, or [2] in refusing to hear evidence pertinent and material to the controversy; or [3] of any other misbehavior by which the rights of any party have been prejudiced." Conversely, courts "have absolutely no authority to reconsider the merits of an arbitration award, even when the parties allege the award rests on factual errors or on a

misinterpretation of the underlying contract." *DFM Invs., LLC v. Brandspring Sols.*, LLC, 743 Fed. Appx. 58, 61 (8th Cir. 2018) (quoting *McGrann v. First Albany Corp.*, 424 F.3d 743, 748 (8th Cir. 2005)). Further, "[a]bsent exceptional circumstances . . . a reviewing court may not overturn an arbitration award based on the arbitrator's determination of the relevancy or persuasiveness of the evidence submitted by the parties." *Swink & Co. v. Norris & Hirshberg, Inc.*, 845 F.2d 789, 790 (8th Cir. 1988) (per curiam) (quoting *Hoteles Condado Beach v. Union De Tronquistas Loc. 901*, 763 F.2d 34, 39–40 (1st Cir. 1985)). Indeed, a court may vacate an award only if the arbitrator's "refusal to hear pertinent and material evidence prejudices the rights of the parties to the arbitration proceedings." *Hoteles Condado Beach*, 763 F.2d at 40. Specifically, "a party seeking to vacate an award under § 10(a)(3) must show that [it] was deprived of a fair hearing." *Ploetz ex rel. Ploetz, 1985 Trust v. Morgan Stanley Smith Barney LLC*, 894 F.3d 894, 900 (8th Cir. 2018) (internal quotations omitted). Further, the party seeking vacatur "must demonstrate that the conduct influenced the outcome of the arbitration." *Delta Mine Holding, Co. v. AFC Coal Pros, Inc.*, 280 F.3d 815, 822 (8th Cir. 2001); *M & A Elec. Power Co-op. v. Loc. Union No. 702, Int'l Brotherhood of Elec. Workers, AFL-CIO*, 977 F.2d 1235, 1238 (8th Cir. 1992).

For the following reasons, the Court finds no reason to infer that Arbitrator Schaner engaged in any misconduct that deprived GSL of a fair hearing. *See Ploetz*, 894 F.3d at 900.

a. Opportunity to Obtain Evidence from Petitioners and Additional Witnesses

Respondents first argue that the arbitrator prevented them from obtaining evidence critical to its fraud claim.[10] (Doc. 10-5, at 10–17). Respondents argue the arbitrator did

[10] The Court notes that respondents discuss this claim as being made by all respondents (Docs. 11; 16, at 4–5), whereas petitioners discuss it as made by GSL only. (Doc. 13, at 24 n.8). The

this by preventing certain discovery and respondents' questioning of additional witnesses at the hearing. (*Id.*, at 10–13). Specifically, respondents argue they should have been able to call Juliana Aalfs Kelly, Jon Andrew Rodawig, and John "Jack" Aalfs (collectively, "Additional Witnesses") as witnesses at the hearing because their testimony was "integral to the entire dispute."[11] (*Id.*, at 7, 10–13). In so doing, respondents argue that Arbitrator Schaner engaged in "misbehavior by which the[ir] rights . . . have been prejudiced." (Doc. 10-1, at 13) (quoting 9 U.S.C. § 10(a)(3)).

In resistance, petitioners assert that the arbitrator properly denied respondents' application for reconsideration regarding cross-examination of the Additional Witnesses. (Doc. 13, at 24–29). Petitioners further assert that even if the denial were improper, it did not deprive respondents of a fair hearing because it would not have impacted the arbitrator's final award. (*Id.*, at 29–32).

"In making evidentiary decisions, an arbitrator need not follow all the niceties observed by the federal courts." *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1997) (internal quotation omitted). Still, "although [an arbitrator is] not required

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Court defers to the arbitrator's award, which describes both a claim of fraud by GSL as to the SPA and a claim of fraud by all respondents as to the Notes. (Doc. 10-8, at 14–15).

[11] The Court notes that respondents' argument focuses on Juliana Kelly and Jon Rodawig, and only briefly mentions Jack Aalfs.

The Court further notes that although petitioners describe respondents' argument as asserting that the arbitrator's ruling as to the Additional Witnesses prejudiced only their fraud claim (Doc. 13, at 29 n.9), respondents appear to argue that the arbitrator's decision prejudiced each of their claims. (*See, e.g.*, Doc. 10-1, at 3 ("Arbitrator Schaner . . . repeatedly denied Respondents the opportunity and ability to adduce critical evidence on key issues in the case, including from Petitioners' own representatives." (emphasis omitted)), 7) ("[I]t was severely prejudicial to Respondents that Arbitrator Schaner prevented them from questioning these critical witnesses about their involvement in the case as they were integral to the entire dispute[.]")). Thus, although respondents focus on their fraud claim, the Court will examine the effect of the arbitrator's ruling as to each claim asserted by respondents as necessary.

to hear all the evidence proffered by a party, an arbitrator 'must give each of the parties to the dispute *an adequate opportunity* to present its evidence and argument.'" *Id.* (quoting *Hoteles Condado Beach*, 763 F.2d at 39) (emphasis added). As such, the party seeking vacatur must show that the arbitrator's alleged misconduct violated the fundamental fairness of the arbitral process. *See Tempo Shain*, 120 F.3d at 20 (citing *Teamsters, Loc. Union 657 v. Stanley Structures, Inc.*, 735 F.2d 903, 906 (5th Cir. 1984)); *see also Sherrock Bros., Inc. v. DaimlerChrysler Motors Co.*, 260 Fed. App'x 497, 501–02 (3d Cir. 2008). Courts have found that no such violation occurred when an arbitrator took evidence in form of deposition instead of live testimony, *Primrose Ret. Cmtys, L.L.C. v. Omni Constr. Co.*, 1:17-CV-01007-RAL, 2017 WL 4279653, at *3–4 (D.S.D. Sept. 25, 2017) (citing arbitrator's refusal to let party "prolong the arbitration" in time-sensitive situation), or when an arbitrator denied the moving party's request to submit additional evidence rendered irrelevant by the arbitrator's decision. *See Marshall v. Green Giant Co.*, 942 F.2d 539, 550–51 (8th Cir. 1991) (concluding evidence about contract interpretation was irrelevant because the arbitrator decided the party was collaterally estopped from relitigating contract's meaning).

Here, respondents offered and the arbitrator took no alternate form of testimony from the Additional Witnesses,[12] and the evidence is relevant to respondents' fraud claim. Thus, the question at issue here is whether Arbitrator Schaner failed to give respondents an adequate opportunity to present relevant evidence material to their fraud claim, and thereby violated the fundamental fairness of the arbitral process, when ruling respondents could not cross-examine the Additional Witnesses.

Respondents argue that the arbitrator's decision robbed them of the chance to adequately present their fraud claim at trial. (Doc. 10-1, at 11–13). Respondents further

[12] Respondents could not depose the Additional Witnesses. (*See* Doc. 10-5, at 6 (Rule 3.23)).

argue that it would be unreasonable for them to assume that the rules on cross-examination were as black and white as they seemed because, as a practical matter, they could not call the Additional Witnesses as direct witnesses. (*Id.*).

Respondents' argument fails for the following reasons.

i. Consistent Rules and Guidance

First, Arbitrator Schaner's rules and guidance consistently indicated that respondents could not cross-examine any witness not called by petitioners as a direct witness, save for a possible exception under Rule 5.7. Procedural Order No. 1, issued on July 20, 2020, clearly indicated that the only parties who could be cross-examined were witnesses that the opposing party called on direct examination, (Doc. 10-5, at 42–42 (discussing Doc. 10-5, at 6–9)), and he found respondents arguments to the contrary unavailing. (*Id.*, at 43–44). On February 3, 2021,[13] respondents submitted a list of witnesses for cross-examination, including several not listed as petitioners' direct witnesses. (Doc. 10-5, at 42–43). Petitioners questioned respondents' ability to do this, and sought confirmation from the arbitrator on February 5, 2021. (*Id.*). On the same day, the arbitrator confirmed that respondents could not cross-examine witnesses not listed among petitioners' direct witnesses. (*Id.*, at 43).

On February 5, 2021, the Arbitrator further observed that respondents had not sought an exception under Rule 5.7. (*Id.*). Rule 5.7 states:

> If a Party wishes to present evidence from a person who will not appear voluntarily at its request, the Party may ask the Tribunal to take whatever steps are legally available to obtain the testimony of that person or seek leave from the Tribunal to take such steps itself. In the case of a request to the Tribunal the Party shall identify the intended witness, shall describe the subjects on which the witness's testimony is sought and shall state why

[13] The Court notes this date reflects an extension approved by Arbitrator Schaner and agreed to by the parties. (Doc. 13-9).

> such subjects are relevant to the case and material to its outcome. The Tribunal shall decide on this request and shall take, authorize the requesting Party to take or order any other Party to take, such steps as the Tribunal considers appropriate if, in its discretion, it determines that the testimony of that witness would be relevant to the case and material to its outcome.

(Doc. 10-5, at 8).

The Court notes that the phrasing "a person who will not appear voluntarily at [a party's] request" is somewhat unclear, in light of the circumstances here. It is perhaps understandable that respondents did not immediately associate this with the Additional Witnesses, given that they may not have naturally considered these witnesses as people who would appear at respondents' request "voluntarily." But, viewing the rules as a whole, respondents should have known that they could not simply list witnesses not called as direct witnesses by petitioners as witnesses for cross-examination.[14] Respondents' assertions about the impracticality and impropriety of contacting the Additional Witnesses (Doc. 10-5, at 12–13) further demonstrates that respondents had notice that they needed to pursue Rule 5.7's exception. Further, as stated in the Procedural Timetable appended to Procedural Order 1, parties were required to make initial disclosure of their fact witnesses by September 1, 2020. (Doc. 10-5, at 13). Parties were required to identify the witnesses they wished to cross-examine at the hearing on February 3, 2021. (Docs.

[14] Respondents' argument that Rule 5.11 is "in seemingly direct conflict" with Arbitrator Schaner's limitation on cross-examination is unavailing. As the arbitrator noted in Procedural Order No. 11 (Doc. 10-5, at 44), this rule sets the scope of cross-examination—not the witnesses available for cross-examination. (*See* Doc. 10-5, at 9). Rule 5.11 states that "[c]ross-examination of a witness may relate to any matter relevant to the proceedings and is not limited to matters addressed in the witness's own witness statement." (*Id.*). But the rules provide that direct testimony be made in the form of witness statements. (*Id.*, at 8 (Rule 5.1)). Thus, Rule 5.11's clarification indicates that though only direct witnesses can be cross-examined, they can be cross-examined on matters outside of their direct testimony.

10-5, at 14; 13-9). Thus, respondents had ample notice that petitioners would not call the Additional Witnesses as direct witnesses and should have sought an exception from the arbitrator, given respondents' claim that the Additional Witnesses' testimony was material to their case.

Regardless, on February 5, 2021, upon petitioners' request for clarification, Arbitrator Schaner provided guidance indicating to respondents that the exception under Rule 5.7 could apply. (Doc. 10-5, at 43; 13-11). Nevertheless, respondents submitted their proposed order of cross-examination, including the Additional Witnesses. (Doc. 13-12, at 1–2). Arbitrator Schaner quickly provided additional guidance on the rules, in effect clarifying again that the Additional Witnesses could not be cross-examined at the hearing. (Doc. 13-12).

Thus, Arbitrator Schaner's rules and guidance consistently informed respondents of the limitations on cross-examination.

ii. Respondents Failed to Support an Exception

Second, despite respondents' delay in applying for an exception, Arbitrator Schaner still considered their argument on the merits and denied it.

On February 7, 2021, respondents submitted an application requesting that the arbitrator reconsider his ruling on cross-examination of the Additional Witnesses.[15] (Docs. 13-14; 10-5, at 42). Respondents also argued that Rule 5.7 applied.[16] (Docs. 13-14 (describing arbitrator's exclusion of the evidence as severely prejudicial because

[15] Respondents do not include their application in the appendix to their motion to vacate. Petitioners, however, include it in the appendix to their response. (Doc. 13-14).

[16] Arbitrator Schaner read respondents' application to argue that Rule 5.7 applies. (*See* Doc. 10-5, at 44). Respondents do not directly make this argument in their application, but their arguments align with the purpose and text of Rule 5.7. (*See* Docs. 13-14; 10-5, at 8). For these reasons, the Court construes respondents' application broadly to include an argument that Rule 5.7 applies.

testimony of the Additional Witnesses would be material to the arbitration's outcome); 10-5, at 8 (Rule 5.7 providing that the arbitrator may authorize admission of evidence not provided for in other rules if it is "relevant to the case and material to the outcome")).

On February 13, 2021, Arbitrator Schaner issued Procedural Order No. 11 in response to petitioners' application and rejected respondents' argument for the Rule 5.7 exception because he found respondents did not show that the evidence in question was material. (Doc. 10-5, at 44–46). The arbitrator found respondents showed, at best, that the Additional Witnesses "*might* possess pertinent information" about the SPA's representations and warranties because they signed the SPA.[17] (*Id.*, at 45) (emphasis in original). Although the arbitrator did not allow respondents to cross-examine the Additional Witnesses, he did consider their application and ruled on the merits of their argument. Thus, not only did respondents have an adequate opportunity to obtain testimony of the Additional Witnesses through the rules outlined in Procedural Order No. 11, but Arbitrator Schaner afforded respondents further opportunity to argue as to the utility of such testimony only a few weeks before the hearing and chose not to deny the application on procedural grounds when he could have.

Upon review of Arbitrator Schaner's response to respondents' confusion and their subsequent application, and Procedural Order No. 11's reasoning and conclusion, the Court cannot conclude that the arbitrator deprived respondents of the fundamental fairness of the arbitral process, *Tempo Shain*, 120 F.3d at 20, such that he prejudiced the respondents' rights. *Hoteles Condado Beach*, 763 F.2d at 40. Instead, the record supports that Arbitrator Schaner denied respondents' application on the merits based on their arguments, when he could have denied on procedural grounds, based on rules

[17] The record indicates that Juliana Kelly and Jon Rodawig signed the SPA. (*See* Docs. 10-3, at 43; 10-7, at 38–39). It does not indicate that Jack Aalfs signed the SPA. (*See* Doc. 10-5, at 46).

provided to respondents at the arbitration's onset. It would have been easier for the arbitrator to deny respondents' application on procedural grounds, but he chose to accommodate further argument. This accommodation undercuts respondents' claim that the arbitrator was partial against them. Also, even if Arbitrator Schaner's rules were unorthodox, respondents were on notice of their contents. Further, respondents had the opportunity to explain the utility of the Additional Witness testimony in their application to qualify for an exception under Rule 5.7 and failed to meet that burden.

Finally, the Court notes that although respondents argue their inability to cross-examine the Additional Witnesses was prejudicial because they possessed information about the SPA's warranties and representations, (Doc. 10-1, at 11), respondents elected not to cross-examine all of petitioners' direct witnesses who could testify to details of the SPA's warranties and representations, based on knowledge of Aalfs' inner workings. (*See* Doc. 10-8, at 23–25, 28, 56–59). The Additional Witnesses whose testimony was allegedly critical to respondents' case appear to have been less involved with the details of the transaction—and thus have more limited testimony on that matter—than many of petitioners' direct witnesses who respondents declined to cross examine. The Court thus has serious misgivings about how critical the potential testimony of the Additional Witnesses actually was.

In their reply to petitioners' resistance, respondents argue that because knowledge and intent to deceive are the key elements of fraud, they should have been allowed to cross-examine Juliana Kelly and Jon Rodawig, the Additional Witnesses who signed the SPA. (Doc. 16, at 2–3).

Although the arbitrator's ruling prevented respondents from cross-examining Juliana Kelly and Jon Rodawig, they could still—and did—cross-examine other people, including another signatory, who appear from the record to have greater knowledge of the company's inner workings. Indeed, respondents cross-examined James Alex

Rodawig ("Alex Rodawig") and Kevin Kelly at length. (Doc. 13-15). Alex Rodawig was a co-managing partner of Aalfs who was involved in the day-to-day business of Aalfs and directly negotiated the sale and its terms. (Docs. 13, at 8; 13-6). He also signed the SPA for the Rodawig Family Limited Partnership ("RFLP"), W. Eric Rodawig Trust, and James Alex Rodawig Trust. (Docs. 10-3, at 43). Although respondents characterize Kevin Kelly as merely "an in-law," (Doc. 10-1, at 13), presumably a reference to Kevin Kelly's marriage to Juliana Aalfs Kelly, he was also a co-managing partner of Aalfs who was involved in the day-to-day business of Aalfs and directly negotiated the sale and its terms. (Docs. 13, at 8; 13-7).

Thus, again, even if the arbitrator's ruling that respondents could not cross-examine the Additional Witnesses prevented respondents from presenting some evidence, the Court cannot find that the ruling rendered respondents' opportunity to present evidence of knowledge and intent inadequate. Instead, the arbitrator allowed an adequate opportunity for each party to present evidence on each issue as required—a standard respondents' own brief acknowledges. (Doc. 16, at 3–4) (citing *Teamsters, Chauffeurs, Warehousemen and Helpers, Loc. Union No. 506 v. E.D. Clapp Corp.*, 551 F. Supp. 570, 578 (N.D.N.Y. 1982) (finding that "[plaintiff] still should have been given a chance to present its case on *both* the arbitrability and merits issues"); *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust*, 729 F.3d 99, 107 (2nd Cir. 2013) (noting that "[a]rbitration proceedings require merely an expeditious and summary hearing, with only restricted inquiry into factual issues, "[a]rbitrators have substantial discretion to admit or exclude evidence," and finding no misconduct when "the [Arbitration] Panel listed the evidentiary bases for its decision, briefly but sufficiently" despite "deciding to hear only one witness").

iii. Ruling Did Not Influence the Arbitration's Outcome

Finally, even if the Court were to find that the arbitrator did not give respondents an adequate opportunity to show knowledge and intent in their fraud claim, the Court would nevertheless decline to vacate the award. As discussed in Arbitrator Schaner's final award, testimony from the Additional Witnesses could not cure the defects that foreclosed respondents' fraud claim. (Doc. 10-8, at 34–62). Misconduct is not properly found when the arbitrator's conduct would not influence the outcome of the arbitration. *See Delta Mine*, 280 F.3d at 822; *M & A Elec.*, 977 F.2d at 1238. Here, the Court cannot find misconduct based on the arbitrator's denial of respondents' examination of the Additional Witnesses at the hearing because, following the arbitrator's reasoning, the final award would be the same whether the Additional Witnesses testified or not. This is true for each of respondents' claims.

Arbitrator Schaner ultimately found, among other deficiencies in respondents' assertion of fraud,[18] that respondents had notice of the inaccuracy of each of the claims of misrepresentation and thus could not establish justifiable reliance. (Doc. 10-8, at 34–62). Testimony from the Additional Witnesses could not cure this defect.

The only fraud claim in which the arbitrator's ruling did not hinge on justifiable reliance was respondents' claim that the Shareholders misrepresented their inventory in their financial statements. (Doc. 10-8, at 55–61). The inventory had been audited annually for decades, however, and the arbitrator concluded that testimony on the reliability and accuracy of Aalfs' inventory valuation process was credible. (*Id.)*.

[18] Indeed, in examining certain theories within respondents' fraud claim, including fraud based on RLOC, Arbitrator Schaner found that respondents were bootstrapping breach-of-contract claims impermissibly and not actually claiming fraud at all. (Doc. 10-8, at 33–34). Nevertheless, he proceeded to examine each theory on its merits. (*Id.*, at 34–62 ("Even without applying the Delaware rule against bootstrapping, the results in this Arbitration would be the same, for reasons that are set out below [in the merits discussion].")).

Further, the arbitrator found testimony from respondents' witnesses—neither of whom were a CPA or auditor—was "unduly speculative" and unreconcilable with the testimony he found credible. (*Id.*, at 61). The Court cannot conceive that testimony from the Additional Witnesses, who do not appear to have been involved in Aalfs' inventory practices, could be more persuasive than testimony offered by petitioners' witnesses, who included Aalfs' auditors, former CFO, and co-managing partners Kevin Kelly and Alex Rodawig. Thus, the testimony for the Additional Witnesses could not cure this defect in respondents' fraud claim, either.

In concluding that respondents failed to show breach of contract, Arbitrator Schaner found respondents' indemnification claims were barred for failure to comply with the SPA's procedural provisions. (Doc. 10-8, at 66, 70, 75). Additionally, Arbitrator Schaner assessed the merits of respondents' indemnification claims for the Target chargebacks and the Mexican work stoppages in Mexico and found that petitioners could not have breached the SPA because the circumstances underlying the purported breaches had not yet occurred when the SPA was signed. (Doc. 10-8, at 66–67, 71–74). Arbitrator Schaner also found that respondents' indemnification claim for the Carlson wage claim could not have breached the SPA because, as respondents admitted, there was no agreement between Aalfs and Carlson such that respondents were required to pay his claim. (Doc. 10-8, at 75). Finally, Arbitrator Schaner found that two breach-of-contract claims were not barred, but nevertheless failed on the merits. First, the arbitrator found that respondents failed to introduce evidence supporting that Aalfs' financial statements were sufficiently deficient to support a breach. (Doc. 10-8, at 68–69). He then found that respondents failed to show that the use of RLOC funds beyond trade accounts payable and fixed asset purchases breached the contract because respondents knew the RLOC was used for other purposes. Further, respondents failed to show the RLOC balance at closing was not attributable to trade accounts payable and fixed asset

purchases. (Doc. 10-8, at 75–76). Testimony from the Additional Witnesses could not cure any of these defects.

Arbitrator Schaner also found that respondents' claim for equitable recission was barred by the ICC Rules because the arbitration's "Terms of Reference make no mention of a claim for equitable recission" and Article 23(4) of the ICC Rules limits the parties to the claims stated in the Terms of Reference. (Doc. 1-8, at 77). Further, respondents did not request leave to add a claim. (*Id.*). Nevertheless, Arbitrator Schaner found respondents' claim would fail on the merits because it failed to show justifiable reliance, as stated in the arbitrator's ruling on respondents' fraud claim. (*Id.*, at 77–78). Testimony from the Additional Witnesses could not cure these defects.

Finally, in concluding that respondents failed to show unjust enrichment, Arbitrator Schaner found that the claim could not apply because he made no finding that the SPA should be rescinded or was somehow unenforceable. (Doc. 10-8, at 78). Thus, the claim failed as a matter of law. (*Id.*). Testimony from the Additional Witnesses could not cure this defect.

Thus, the Court also cannot find that Arbitrator Schaner engaged in misconduct because misconduct is not properly found when, as here, the arbitrator excludes some relevant and material evidence, and could reasonably base his award on other information in the record or presented at the hearing. *See Chiarella v. Viscount Industries Co., Ltd.*, No. 92 Civ. 9310(RPP), 1993 WL 497967, at*5 (citing *Fine v. Bear Stearns & Co., Inc.*, 765 F. Supp. 824, 829 (S.D.N.Y. 1991)); *Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co.*, 397 F.2d 594, 599 (3d. Cir. 1968) (citing *Great Am. Ins. Co. v. Horab*, 309 F.2d 262 (8th Cir. 1962)). Accordingly, the arbitrator's refusal to allow respondents to cross-examine the Additional Witnesses did not deprive respondents of a fair hearing or an adequate opportunity to present its evidence and argument. *See*

Ploetz, 894 F.3d at 900; *Tempo Shain*, 120 F.3d at 20 (quoting *Hoteles Condado Beach*, 763 F.2d at 39); 9 U.S.C. § 10(a)(3).

In sum, the Court finds that respondents fail to show that Arbitrator Schaner engaged in misconduct based on his refusal to permit respondents to cross-examine the Additional Witnesses at the hearing.

b. Attorney-Client Privilege Ruling

Respondents argue that the arbitrator's ruling about what evidence is covered by petitioners' attorney-client privilege prevented respondents' discovery of evidence critical to its fraud case.[19] (Doc. 10-1, at 13–15). Respondents argue that the arbitrator's attorney-client privilege ruling in response to their motion to compel allowed petitioners to plead ignorance to due diligence associated with the SPA and its representations and warranties, using the privilege as both a sword and a shield. (*Id.*, at 15). Again citing 9 U.S.C. § 10(a)(3), respondents argue that Arbitrator Schaner engaged in "misbehavior by which the[ir] rights have been prejudiced." (*Id.*). In resistance, petitioners assert that the arbitrator's denial of respondents' application to compel is not subject to review because the determination of attorney-client privilege is a legal determination, not a refusal to hear relevant and material evidence under Section 10(a)(3). (Doc. 13, at 32–33). Respondents counter that the arbitrator's evidentiary ruling on attorney-client privilege is subject to review, even though it is an error of law, because it denied them

[19] The Court notes that unlike respondents' Additional Witnesses argument, respondents assert that the arbitrator's attorney-client privilege "denied Respondents the opportunity to fully and fairly present their fraud case" only. (Doc. 10-1, at 3). Respondents later say, however, that "[w]ithout [the communications the arbitrator found privileged], Arbitrator Schaner did not have a full picture of Petitioners' scheme before him and therefore was unable to reach a fair decision on Respondents' claims against Petitioners relating to the SPA." (*Id.*, at 15). Nevertheless, respondents appear to be referencing their fraud claims here. If, however, respondents intended to take issue with the effect of Arbitrator Schaner's decision on all claims asserted, for reasons already described, the Court's conclusion would not change.

of a full and fair arbitration hearing. (Doc. 16, at 4 (citing *MPJ v. Aero Sky, L.L.C.*, 673 F. Supp. 2d 475, 498 n.111 (W.D. Tex. 2009)).

Here, Arbitrator Schaner's ruling on attorney-client privilege was a legal determination. Respondents argue that Arbitrator Schaner incorrectly concluded that the attorney-client privilege under Iowa law prevented respondents from accessing critical evidence. (Doc. 10-1, at 15). Although respondents present argument in support of vacatur based on the arbitrator's alleged misconduct, that alleged misconduct is rooted in the arbitrator's application of Iowa law. Arbitrator Schaner reasoned that the materials respondents sought to compel were protected under Iowa law because (1) the law firm whose materials respondents sought to compel represented the Aalfs shareholders in the SPA transaction, in part because it was the shareholder petitioners, not the Aalfs company, that were parties to the SPA; (2) no joint-client exception applied; and (3) the record did not support subject-matter waiver based on email communications. (*See* Doc. 10-5, at 30–37 (Procedural Order No. 8)). Had Arbitrator Schaner not found that the attorney-client privilege barred admission of the evidence and no exception applied, respondents would have had access to the evidence they now argue was prejudicial not to have. In *Misco*, the Supreme Court stated that trial courts cannot "hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts." 484 U.S. at 38. Thus, the Court cannot review Arbitrator Schaner's legal determination as to attorney-client privilege in response to respondents' motion to compel as grounds for misconduct.

Respondents' argument that, despite this precedent, Arbitrator Schaner's error of law is reviewable here because it deprived them of a full and fair arbitration hearing is unavailing. In support, respondents rely on a footnote in *MPJ v. Aero Sky*, a Western District of Texas case in which the court found the moving party failed to "demonstrate[ ] that [the] evidentiary and other rulings were fundamental errors that deprived it of a fair

hearing," such that the court could consider errors of law in its vacatur decision.[20] 673 F. Supp. 2d, at 498, 498 n.111 (citing *Newark Stereotypers' Union No. 18*, 397 F.2d at 599). In response, petitioners assert that even if the arbitrator's attorney-client privilege were subject to review, vacatur for misconduct is inappropriate because the arbitrator's denial did not deprive respondents of a fair hearing. (Doc. 13, at 33–36).

The Court finds respondents do not show that Arbitrator Schaner's attorney-client privilege ruling deprived them of a fair hearing because the arbitrator could reasonably base his award on other information in the record or presented at the hearing. *See Chiarella*, 1993 WL 497967, at *5 (citing *Fine*, 765 F. Supp. at 829); *Newark Stereotypers' Union No. 18*, 397 F.2d at 599 (citing *Great Am. Ins.*, 309 F.2d 262).

But information gleaned from the privileged documents about representations and warranties made in the SPA could not cure the defects that foreclosed respondents' fraud claim, as discussed in Arbitrator Schaner's final award. Again, misconduct is not properly found when the arbitrator's conduct would not influence the outcome of the arbitration. *See Delta Mine*, 280 F.3d at 822; *M & A Elec.*, 977 F.2d at 1238. Here, the Court cannot find misconduct based on the arbitrator's attorney-client privilege ruling because, following the arbitrator's reasoning, the final award would be the same whether he found the documents privileged or not.

Again, in concluding that respondents failed to show fraud, Arbitrator Schaner found, among other deficiencies, respondents did not show justifiable reliance because they were on notice that each of the representations that respondents claimed were

[20] Respondents also cite *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20–21 (2d Cir. 1997), for support that "an evidentiary ruling in error can in fact support vacatur of an arbitration award. (Doc. 16, at 4). There, the court vacated an award when the arbitration panel excluded evidence that it erroneously found cumulative. *Tempo Shain*, 120 F.3d at 20–21. This is distinct from excluding evidence based on a legal finding that bars introduction of such evidence, as here. Thus, the Court finds respondents' reliance on *Tempo Shain* inapposite.

misrepresentations was inaccurate. (Doc. 10-8, at 34–62). Admission of the privileged documents could not cure this defect because the documents, at best, supported only knowledge and intent of the signatories.

Further, again, the only fraud claim where the arbitrator's ruling did not hinge on justifiable reliance was respondents' claim that the Shareholders misrepresented their inventory in their financial statements. (Doc. 10-8, at 55–61). But the inventory had been audited annually for decades and the arbitrator concluded that testimony on the reliability and accuracy of Aalfs' inventory valuation process was credible. (*Id.)*. Further, the arbitrator found testimony from respondents' witnesses, neither of whom was a CPA or auditor—was "unduly speculative" and unreconcilable with the testimony he found credible. (*Id.*, at 61). The Court cannot conceive that the privileged documents involving legal advice about the sale could be more persuasive than testimony offered by petitioners' witnesses, which included testimony of Aalfs' auditors and former CFO and specifically addressed the inventory process. Thus, the privileged evidence could not cure this defect in respondents' fraud claim, either.

Accordingly, the Court finds that respondents fail to show that Arbitrator Schaner engaged in misconduct based on his attorney-client privilege ruling. The Court therefore denies respondents' motion as to misconduct.

2. Evident Partiality

Respondents argue that the award must be vacated for evident partiality based on "the totality of the decisions and rulings made by Arbitrator Schaner before and during the final arbitration hearing." (Doc. 10-1, at 17).

Respondents do not show evident partiality under any standard by the Eighth Circuit because they fail to show evidence supporting an undisclosed relationship between Arbitrator Schaner and petitioners and fail to show objective evidence demonstrating such

a degree of partiality that a reasonable person could assume that Arbitrator Schaner had improper motives. *See Ploetz*, 894 F.3d at 898.

Evident partiality can be found when the arbitrator's relationship with a party, including business dealings, creates an impression of possible bias. *Montez v. Prudential Secs., Inc.*, 260 F.3d 980, 982–83 (8th Cir. 2001); *Commonwealth Coatings v. Continental Cas. Co.*, 393 U.S. 145, 146 (1968). Absent such factual circumstances, however, the meaning of evident partiality is unsettled. This "absence of a consensus on the meaning of 'evident partiality' is evidenced by the approaches adopted by the different circuit[ ] [courts of appeal]." *Ploetz*, 894 F.3d at 898 (quoting *Montez*, 260 F.3d at 983 (collecting and comparing cases)). Overall, the Eighth Circuit's "interpretation of evident partiality has migrated in the salutary direction of its plain and ordinary meaning." *Id.* In various cases, however, the Eighth Circuit has described evident partiality as occurring when (1) "an undisclosed relationship creates an impression of possible bias," (2) "an undisclosed relationship casts significant doubt on the arbitrator's impartiality," and (3) arbitrators "*objectively* demonstrate such a degree of partiality that a reasonable person could assume that the arbitrator had improper motives."[21] *Id.* (citations omitted).

Although the Eighth Circuit's third interpretation does not mention undisclosed relationships, the Court notes with great interest that some Eighth Circuit cases using this approach nonetheless appear to require the existence of an undisclosed relationship between the arbitrator and a party. *See, e.g.*, *Dow Corning Corp. v. Safety Nat'l Cas. Corp.*, 335 F.3d 742, 750 (8th Cir. 2003) (concluding "the non-disclosure does not *objectively* demonstrate such a degree of partiality that a reasonable person could assume

[21] The *Ploetz* court concluded that it "need not decide which of our constructions of the term binds [the court] as a matter of circuit precedent since [the moving party] has not shown [the arbitrator] had evident partiality under any of them." *Ploetz*, 894 F.3d at 898.

that the arbitrator had improper motives" (quotation omitted)); *Brown v. Brown-Thill*, 762 F.3d 814, 820 (8th Cir. 2014) ("requiring a specific showing that particular contacts influenced the arbitrator's resolution of *this* dispute"). Additionally, despite the open-ended nature of the word "could" in this third interpretation, "[t]he movant carries a heavy burden in order to meet this onerous standard." *ANR Coal Co., v. Cogentrix of North Carolina, Inc.*, 173 F.3d 493, 501 (4th Cir. 1999) (cleaned up). "The party seeking vacatur has the burden of proof; to meet this burden, he must demonstrate 'that a reasonable person *would have to* conclude that an arbitrator was partial to the other party to the arbitration.'" *Id.* at 500 (quoting *Consol. Coal Co. v. Loc. 1643, United Mine Workers of Am.*, 48 F.3d 125, 129 (4th Cir. 1995) (emphasis added)).

Showing that a reasonable person "would" conclude the arbitrator was partial implies a high likelihood of the conclusion, is a higher burden than "could," which implies a possibility. To qualify for vacatur under Section 10(a)(2), the majority of Circuit Courts of Appeals require that a reasonable person *would* assume that the arbitrator had improper motives. *See, e.g.*, *UBS Fin. Servs., Inc. v. Asociacion De Empleados Del Estado Libre Asociado De Puerto Rico*, 997 F.3d 15, 19 (1st Cir. 2021); *Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 252–52 (3d Cir. 2013); *Consol. Coal*, 48 F.3d at 129 (quoting *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141, 146 (4th Cir. 1993) (quoting *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1358 (6th Cir. 1989) (1989) (citation omitted)); *Morelite Const. Corp. v. New York City Dist. Council*, 748 F.2d 79, 84 (2d Cir. 1984). Nevertheless, the Eighth Circuit Court of Appeals has not used this language. Thus, the Court will analyze respondents' arguments based on whether a reasonable person *could* assume that the arbitrator had improper motives. Further, because all vacatur under Section 10(a)(2) is discretionary, the Court does not dwell on this distinction in its analysis.

Here, respondents do not argue that the arbitrator had an undisclosed relationship with petitioners. So, they cannot meet two of the three standards described in *Ploetz* and necessarily argue the third standard applies. Thus, respondents must show that Arbitrator Schaner objectively demonstrated such a degree of partiality that a reasonable person could assume that he had improper motives in favor of petitioners. *See Ploetz*, 894 F.3d at 898.

To show partiality, respondents must allege "direct, definite, and capable of demonstration rather than remote, uncertain or speculative." *Peoples Sec. Life Ins.*, 991 F.2d at 146 (quoting *Health Servs. Mgmt. Corp. v. Hughes*, 975 F.2d 1253, 1264 (7th Cir. 1992)). "[T]he mere appearance of bias" alone is not enough. *See Williams v. Nat'l Football League*, 582 F.3d 863, 885 (8th Cir. 2009) (quotation omitted). Also, respondents must establish facts supporting the accusation that the arbitrator was "motivated by 'improper motives.'" *Id.* (quoting *Dow Corning*, 335 F.3d at 750).

The Eighth Circuit has not defined what constitutes "improper motives." When applying this standard, the Eighth Circuit has looked for evidence suggesting a relationship between the arbitrator and nonmoving party that required disclosure and created a conflict or bias. *See Dow Corning*, 335 F.3d at 749–50; *Ploetz*, 894 F.3d at 898–900. The Eighth Circuit's opinion in *Dow Corning* is most relevant to the circumstances here because the court also examined evidence offered by the moving party to show the arbitrator's preference for the nonmoving party. In *Dow Corning*, the court found the arbitrator's ex parte contacts with the nonmoving party before contacting the moving party were not evidence of evident partiality because the arbitrator "had an 'administrative' reason for contacting counsel (to discuss scheduling) and a basis for deciding that he needed to contact [the parties] one at a time." 335 F.3d at 751. The court also found the arbitrator's limitation of the moving party's cross-examination of the nonmoving party's expert did not support evident partiality because the arbitrator gave

the moving party "wide latitude to present its affirmative case." *Id.* at 752. Because the *Dow Corning* court did not find evident partiality, however, it is unclear whether the procedural errors and evidentiary decisions discussed could support evident partiality in the absence of an undisclosed relationship.

For the following reasons, the Court finds no reason to infer that Arbitrator Schaner engaged in evident partiality. At most, respondents show only the appearance of bias. *See Williams*, 582 F.3d at 885.

a. Realignment

Respondents argue that the arbitrator improperly realigned the parties before the hearing, causing confusion about the allocation of the burden of proof. (Doc. 10-1, at 18–20). Specifically, respondents argue that by categorizing the William E. Rodawig Family Trust ("WRFT"), the petitioner in a parallel proceeding concerning one of the notes underlying the SPA, as a "respondent" during the proceedings, the arbitrator engaged in an objective degree of partiality such that a reasonable person could infer his improper motives. (*Id.*). In resistance, petitioners assert that the record does not support a finding of evident partiality based on realignment. (Doc. 13, at 37–39).

Respondents do not show direct or definite evidence supporting that the arbitrator's realignment decision was so suspect that a reasonable person could assume that the arbitrator had improper motives. *Williams*, 582 F.3d at 885; *Peoples Sec. Life Ins.*, 991 F.2d at 146; *Health Servs. Mgmt. Corp.*, 975 F.2d at 1264. Respondents assert that they alerted the arbitrator to the possibility of confusion and argued that he should realign the parties post-hearing. (Doc. 10-1, at 18–20). And although respondents assert that the arbitrator "improperly conflated the parties," improperly refused to realign WRFT as a "third-party respondent," and this decision "permeated" throughout the arbitration process (*Id.*, at 18–19), respondents point to no instance when the arbitrator actually misapplied burdens of proof or expressed confusion about which claims belonged to

which parties. Any inference about the propriety of arbitrator's motives or confusion is speculative at best.

Importantly, the record also supports that it was the ICC—not Arbitrator Schaner—who aligned the parties. The ICC consolidated the two underlying arbitrations, terming GSL and its Affiliated Entities as "petitioners" in the arbitration and the Aalfs shareholders as "respondents." (Doc. 10-8, at 20–21). In fact, Arbitrator Schaner stated he understood respondents' concerns. (Doc. 13-4, at 1). Nevertheless, he wrote, "the ICC has fixed the caption in the manner in which it appears in the draft. Once a case is consolidated, the case that is being consolidated ceased to exist. . .. What is important is that we are clear as to the parties that are asserting each claim and as to the parties against which each claim is asserted." (*Id.*). The Court finds no such confusion in the arbitrator's reasoned and detailed final award. (Doc. 10-8).

Further, respondents point to their comments following the hearing in which they told the arbitrator: "It's been one thing to sort of litigate [the parties' claims] to this point. But now we think they need to be, you know, for purposes of any potential award, very separate." (Doc. 10-1, at 20 (citing Ex E, 1225:23-13)). This suggests that respondents recognized that, at least through the hearing, there was an objective utility in aligning the parties as they were, undercutting respondents' argument that the arbitrator's realignment decision—and subsequent decisions not to change that alignment—was objectively partial such that a reasonable person could infer his actions were rooted in improper motives.

For these reasons, the Court finds that respondents fail to show that Arbitrator Schaner engaged in evident partiality based on his alignment of parties in the case.

b. WRFT Assignment

Respondents also argue that the arbitrator ignored the fact that petitioners failed to introduce evidence of an assignment agreement between RFLP, a signatory, and WRFT

for the RFLP Note. (Doc. 10-1, at 20–22). Respondents therefore assert that, as a matter of law, Arbitrator Schaner could not award WRFT recovery under this record. (*Id.*).

In resistance, petitioners assert that the arbitrator's conclusions of fact and law as to the WRFT Note's assignment are not subject to the Court's review. (Doc. 13, at 39 (citing *Misco*, 484 U.S. at 38)).

In the final award, Arbitrator Schaner stated "[respondents] do not dispute—*and the [arbitrator] finds*—that WRFT, as assignee, is entitled to pursue an action and seek entry of an award against [respondents] for amounts due under the RFLP Note." (Doc. 10-8, at 80 (emphasis added)). Thus, the arbitrator made a finding as to RFLP's assignment to WRFT. Again, the Supreme Court has stated that this court cannot "hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts." *Misco*, 484 U.S. at 38.[22] Thus, the Court cannot base a finding of evident partiality on the arbitrator's factual finding of assignment.[23]

For this reason, the Court finds that respondents fail to show evident partiality based on Arbitrator Schaner's finding that RFLP assigned the RFLP Note to WRFT.

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[22] The Court notes that even if it were "convinced that [the arbitrator] committed serious error" in his fact-finding, it would "not suffice to overturn [the arbitrator]'s decision." *Misco*, 484 U.S. at 38. Further, the Court is not convinced that Arbitrator Schaner committed error, let alone serious error, here. Respondents do not assert, in either their brief or reply, that they did not concede that the RFLP Note was assigned to WRFT. Additionally, the Court notes that at the hearing Arbitrator Schaner heard at least some evidence supporting the assignment. (Doc. 10-7, at 21) (witness testimony to his belief that the RFLP Note was assigned to WRFT). The parties do not point the Court to any testimony or other evidence negating assignment.

[23] Because the Court finds it cannot review Arbitrator Schaner's finding of fact as to assignment, it does not reach petitioners' secondary argument that respondents waived the right to contest WRFT's assignment. (*See* Doc. 13, at 39–40). Had the Court reached this argument, it would have found that waiver bars respondents' claim. *See Int'l Brotherhood of Elec. Workers, Loc. Union No. 545 v. Hope Elec. Corp.*, 380 F.3d 1084, 1101 (8th Cir. 2004); *Brown*, 762 F.3d at 819–20.

c. Sustained Objections

Respondents argue that during the hearing, the arbitrator sustained only one substantive objection out of nearly fifty objections made by respondents. (Doc. 10-1, at 22–23). Respondents further assert that the arbitrator sustained nearly every identical objection that petitioners made. (*Id.*). Thus, respondents' argument is that a reasonable person could assume that the arbitrator had improper motives based on his rulings on objections. In resistance, petitioners assert that objections cannot support a finding of evident partiality because respondents merely speculate the objections were based on bias and show no facts supporting this claim. (Doc. 13, at 40–41).

Respondents admit that "ordinarily[,] these types of objections and rulings standing alone may not be significant," but viewing them in light of Arbitrator Schaner's other conduct shows his evident partiality. (Doc. 10-1, at 23). At this stage, the Court will only consider the merits of respondents' argument by itself. Later, the Court will consider the merits of respondents' arguments about evident partiality collectively.

Here, respondents' argument is based on conjecture. Respondents do not provide the context of some of respondents' overruled objections, as they do with some of petitioners' sustained objections. Nor do they compare objections made by each party in a similar context, thereby inferring Arbitrator Schaner's leniency towards petitioners. Instead, respondents rely on the numbers of objections made and objections overruled. Arbitrator Schaner overruled forty-nine out of fifty—or 98%—of respondents' objections. Indeed, this percentage is very high. But a reasonable person would need more context about the nature and the quality of objections to assume the arbitrator had improper motives based on objections overruled alone. Further, the Court finds, and respondents suggest, no precedent supporting evident partiality based on particular percentage—or even the amount—of objections sustained or overruled. Thus, the Court declines to find evident partiality based on Arbitrator Schaner's rulings on objections alone.

For these reasons, the Court finds that respondents fail to show that Arbitrator Schaner engaged in evident partiality based on the number of objections he overruled.

d. Totality

The Court has already found that, individually, Arbitrator Schaner's actions and rulings fail to show evident partiality. The Court now examines whether Arbitrator Schaner's actions show evident partiality when viewed in their "totality." (*See* Doc. 10-1, at 17–18). The Court will also consider respondents' assertion that the arbitrator's denial of discovery requests, as discussed in its misconduct arguments, also evidence the arbitrator's partiality. (Doc. 10, at 4).

Respondents cite two cases supporting their argument that an arbitrator's aggregate actions can show evident partiality: *Sun Refining & Mktg. Co. v. Statheros Shipping Corp.*, 761 F. Supp. 293, 302 (S.D.N.Y. 1991), *aff'd*, 948 F.3d 1277 (2d Cir. 1991), and *Thomas Kinkade Co. v. Lighthouse Galleries, LLC*, No. 09-CV-10757, 2010 WL 436604, at *8 (E.D. Mich. Jan 27, 2010). Neither case supports respondents' argument here.

In *Sun Refining*, the court vacated an award based on evident partiality when the neutral arbitrator on a three-arbitrator panel remained on the panel despite an ongoing business relationship with a party, personal and extensive involvement in another arbitration involving that party, and numerous requests that he step down from his role as chairman in the current arbitration. *See generally* 761 F. Supp. 293. There, the majority of arbitrators, including the arbitrator in question, agreed to have the moving party pay 60% of the total arbitration fee, instead of the typical 50%. *See id.* In analyzing the arbitrator's purported bias, the court looked to factors including: "1) the financial interest the arbitrator may have in the proceeding; (2) the directness and nature of the alleged relationship between the arbitrator and a party to the proceeding; and (3) whether the relationship existed at the same time as the challenged proceeding." *Id.*, at 299.

Additionally, the court noted that a business relationship is more likely to create bias than a professional one. *Id.* Ultimately, the court concluded "the fee episode rings like the 13th chime on the mantel clock: Not only is it utterly unreasonable in its own right, but it also generates substantial doubts about the validity of what preceded it." *Id.*, at 304.

In *Thomas Kinkade*, the court vacated an award based on evident partiality when the neutral arbitrator on a three-arbitrator panel did not disclose relevant business relationships for nearly five years, failed to provide an explanation for the award, found the moving party's breach-of-contract claim inadequate even though the nonmoving party conceded facts supporting the moving party's recovery, and *sua sponte* re-opened hearings so the nonmoving party "could attempt to salvage their claims," among other misdeeds. *See generally* 2010 WL 436604. The court found the arbitrator's actions collectively "cast a dark shadow over the parties' arbitration proceeding" and that "time and again, irregularities in the proceeding favored [the nonmoving party]." *Id.*, at *8. "Given [the arbitrator's] mid-arbitration disclosures," the court reasoned, "these circumstances cannot be blamed on coincidences alone and a reasonable person would have to conclude that [he] was partial to [the nonmoving party]." *Id.*

Here, respondents do not allege that Arbitrator Schaner had a financial interest in the proceeding or that he had a direct relationship to petitioners. Further, they do not allege that Arbitrator Schaner had a business or professional relationship with petitioners. At most, respondents imply that some kind of personal preference must have existed for Arbitrator Schaner to act as he did. Essentially, respondents ask the Court to find that because Arbitrator Schaner made rulings and excluded important evidence in petitioners' favor, he must have had a relationship that favored petitioners. This argument is pure speculation. *Peoples Sec. Life Ins.*, 991 F.2d at 146. Respondents' evidence does not make it clear that Arbitrator Schaner's actions were utterly unreasonable in their own right, or generated substantial doubts about the validity of the proceeding as a whole.

See Sun Refining, 761 F. Supp. at 304. Each of the cases cited by respondents includes an undisclosed business relationship. Respondents do not argue that Arbitrator Schaner failed to disclose a business relationship or present facts supporting such a finding here.

Further, as noted, it is unclear under Eighth Circuit precedent whether the procedural errors and evidentiary decisions that respondents allege collectively show evident partiality could support evident partiality in the absence of an undisclosed relationship. The Court declines to extend the Eighth Circuit's reasoning without clearer guidance, especially when judicial review of a final award under the FAA "is exceedingly limited and deferential." *Precision Press*, 2011 WL 1807396, at *7 (quoting *St. John's Mercy Med. Ctr.*, 414 F.3d at 884). Regardless, even if alleged procedural errors and evidentiary rulings alone could, in theory, support a finding of evident partiality, the Court would not find it here when that evidence fails to show evident partiality for the reasons stated.

For these reasons, the Court finds that respondents fail to show that the totality of Arbitrator Schaner's actions, when viewed in the aggregate, show his evident partiality. Thus, the Court denies respondents' motion as to evident partiality.

Respondents' Motion to Vacate the Final Arbitration Award, (Doc. 10), is denied on these grounds.

III. PETITION FOR CONFIRMATION

Having denied respondents' motion to vacate, the Court now addresses petitioners' petition for confirmation.

As stated, the Court must enforce a final arbitration award unless it finds a ground meriting refusal or deferral of enforcement applies under the Convention. 9 U.S.C. § 207. Here, the Court has found respondents' asserted grounds do not support the Court's vacatur of the final award. Further, upon independent review, the Court finds no reason to vacate or delay enforcement of the final award.

For these reasons, the Court grants petitioners' petition.

IV. CONCLUSION

For the reasons stated, respondents' Motion to Vacate the Final Arbitration Award (Doc. 10) is **denied**. Petitioners' Petition for Confirmation of Arbitration Award (Doc. 1) is **granted**. The Court thus **confirms** the final arbitration award. The Clerk of Court is directed to enter judgment in favor of Aalfs Family Partnership, et al., and against GSL Holdings, S.A. de C.V., et al.

IT IS SO ORDERED this 11th day of April, 2022.

C.J. Williams
United States District Judge
Northern District of Iowa