INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

VERCARA, LLC (FORMERLY SECURITY SERVICES, LLC, FORMERLY NEUSTAR, INC.)

Claimant

v.

REPUBLIC OF COLOMBIA

Respondent

(ICSID Case No. ARB/20/7)

REJOINDER TO RESPONDENT'S REPLY ON ITS APPLICATION FOR SECURITY FOR COSTS AND COMMENTS RELATING TO APPLICABLE LAW ON JURISDICTION

2 JUNE 2023

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I. INTRODUCTION

1. On 19 April 2023, the Respondent submitted its Application for Security for Costs **("Application")**. On 10 May, the Claimant filed its Response to Respondent's Application for Security for Costs and Comments Relating to Applicable Law on Jurisdiction **("SFC Response")**. On 26 May, the Respondent replied **("SFC Reply")**.

2. The present submission comprises the Claimant's rejoinder **("SFC Rejoinder")**. It establishes that the evidence submitted by the Claimant with its SFC Response was responsive to the Respondent's Application, and was thus permissible (**Section II**), that the Respondent's request for security is unfounded and the SFC Reply fails to show otherwise (**Section III**), and that the Respondent's positions as to the law applicable to the Spin Out are likewise unfounded (**Section IV**).

II. THE EVIDENCE SUBMITTED BY THE CLAIMANT IS RESPONSIVE TO THE RESPONDENT'S APPLICATION FOR SECURITY FOR COSTS

3. In its Application, the Respondent made a range of factual arguments to support its request that the Claimant post security. In the Claimant's SFC Response, it rebutted this request, including by filing evidence directly responsive to the accusations made by the Respondent in its Application. The Respondent now asserts that the Claimant "improperly introduced new evidence at a late stage in the proceedings".[1]

4. This position is unfounded as a matter of procedure (**Part II.A**), and also in light of the nature of the Respondent's pleadings in its Application, and the specific and targeted evidence submitted by the Claimant in response (**Part II.B** with respect to exhibits placed on the record, and **Part II.C** with respect to the limited witness statement of Ms. Rodkin).

A. The Respondent's Position is Procedurally Improper

5. As an initial matter, the Claimant's SFC Response was not *sua sponte*, but was in direct response to the Respondent's Application. As such, the Respondent's argument in its SFC Reply that the "Claimant should have requested leave to submit new documents" in line with Articles 16.3 and 17.2 of Procedural Order No. 1,[2] is unfounded.

6. To recall, Article 16.3 states that "[n]either Party shall be permitted to submit additional or responsive documents after the filing of its respective last written submission".[3] Similarly, Article 17.2 states that "[n]either Party shall be permitted to submit any testimony that has not been filed with the written submissions".[4] The Tribunal granted the Claimant a right of reply to the Respondent's Application in the form of a written submission, including to address additional questions of applicable law. The Claimant did not need to request further leave to include evidence and legal authorities in support of that written submission. Indeed, in circumstances where a party seeks provisional measures, it is typical for both parties to file evidence to substantiate their positions in

[1] Respondent's SFC Reply, Section 2.

[2] *Id*., para. 6.

[3] Procedural Order No. 1 (9 July 2021), Article 16.3.

[4] *Id*., Article 17.2.

relation to that request. The fact that, here, the Respondent bases its Application on matters which overlap with one of its jurisdictional objections is a matter of its own making, and cannot possibly deprive the Claimant of the right to file evidence responsive to the Application.

B. All Exhibits Submitted by the Claimant Are Directly Responsive to the Respondent's Application for Security for Costs

7. Contrary to the Respondent's assertions, the evidence filed by the Claimant was responsive to the Respondent's Application. To recall, the Respondent based its Application on the alleged "complete uncertainty regarding the precise identity of the intended claimant in the arbitration, its assets, business operations and its ownership chain."[5] The evidence submitted by the Claimant was responsive to that position. Moreover, several of these exhibits were simply formal submissions of information already provided to the Respondent months ago.

8. Whereas the Respondent presents its complaint at a high level of generality, it will be seen below that a review of the new exhibits one-by-one demonstrates clearly that each new exhibit was in fact responsive to the Application (save for the Delaware law authorities which were responsive to the Tribunal's request in this respect):

    a. **Exh. C-0140**: Agreement among Neustar, Inc., Aerial Security Intermediate, LLC, Aerial Blocker Corp., and Security Services LLC, dated 1 December 2021 (Unredacted) [**CONFIDENTIAL**] (*i.e.* the UPA). The Claimant filed a redacted version of the UPA as **Exh. C-0136** in July 2022. The Claimant offered to provide an unredacted version to the Respondent's counsel, and did so in October 2022, as substantiated by **Exh. C-0148** listed below. Despite being in possession of the unredacted UPA for nearly six months, the Respondent in its Application continued to misrepresent this fact,[6] and still does

[5] Respondent's Application, para. 3.

[6] *See*, *e.g.*, *id*., para. 8 ("To document this transaction and support its request that the name of the Claimant be 'changed', Claimant produced a total of five documents [including a] heavily redacted version of the [UPA].").

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so in its SFC Reply.[7] The Respondent then based its Application on the so-called existence of "exceptional circumstances" because of its misunderstanding and/or misrepresentations of the UPA.[8] To defend the Application, the Claimant thus included the unredacted UPA in the record of these proceedings; it was entitled to do so.

b. **Exh. C-0141**: U.S. Securities and Exchange Commission **("SEC")**, TransUnion, Form 8-K (11 September 2021). On 15 September 2022, in correspondence to the Tribunal, the Claimant provided a link to this document,[9] which is a form required by the U.S. SEC to notify investors of U.S. public companies of specified events. **Exh. C-0141** provides notification that TransUnion entered into a Securities Purchase Agreement with Aerial Investors LLC, which it noted is a "private investment group led by Golden Gate Capital, with minority participation by GIC".[10] The notification described the transaction, and provided further information about its mechanics, and also annexed the Securities Purchase Agreement itself, investor presentations, and a press release. Nonetheless, despite having access to these materials since September 2022, the Respondent in its Application persisted in its accusations that the Claimant demonstrated "continued reluctance to disclose any information on the transactions" which it said "casts serious doubts" on the "likelihood that [the Claimant] would be able and/or willing to satisfy a potential award of costs in Colombia's favour."[11] The submission of **Exh. C-0141** was responsive to these unsupported accusations.

c. **Exh. C-0142**: Golden Gate Capital, Website Extracts. The Respondent further argued in its Application that the Claimant had not provided evidence of

[7] *See*, *e.g.*, Respondent's SFC Reply, para. 44 (where the Respondent asserts that the "undisclosed version of the UPA" shows Section 5.10, and the requirements set out therein. The Claimant notes that Section 5.10 was unredacted in **Exh. C-0136**, provided to the Respondent in July 2022).

[8] *See*, *e.g.*, Respondent's Application, paras. 44-47.

[9] Letter from the Claimant to the Tribunal (15 September 2022), nn. 5, 7.

[10] U.S. Securities and Exchange Commission, TransUnion, Form 8-K (11 September 2021), **Exh. C-0141**, p. 1.

[11] *See*, *e.g.*, Respondent's Application, para. 20.

(continued)

"substantial business operations",[12] and that the "ownership chain" of the Claimant was uncertain.[13] **Exh. C-0142** addresses these claims, demonstrating the overall connection between the Claimant and Golden Gate Capital, including to demonstrate that Neustar was listed as one of Golden Gate's assets, and that David Dominick (who signed Neustar's Written Consent and Waivers, **Exh. RFA-7**) was a Managing Director of Golden Gate. The Respondent has known from the outset of these proceedings that Neustar was ultimately owned by Golden Gate, yet persisted in feigning ignorance as to the Claimant's corporate ownership chain for purposes of its Application. The submission of **Exh. C-0142**, together with **Exhs. C-0141**, **C-0144**, and **C-0145**, are all publicly available materials provided to the Respondent in September 2022 and all respond to that point.

d. **Exh. C-0143**: Assignment and Assumption and Bill of Sale (1 December 2021) [**CONFIDENTIAL**]. As outlined in paragraph 8.a above, the Respondent in its Application sought to obfuscate the facts, including by mischaracterising the terms of the UPA it has had for months now. The redacted UPA (**Exh. C-0140**) proved both the assignment of the MINTIC Claim to Neustar Security Services group, and the subsequent transfer of that group into the ownership of Aerial Security Intermediate, LLC. The Claimant submitted **Exh. C-0143** to further rebut the assertions set out in the Respondent's Application, including its position that there exist "exceptional circumstances" warranting an order for security for costs, based purely on its own misunderstanding and/or misrepresentations of the UPA and other documents provided to it in 2022.[14]

e. **Exh. C-0144**: U.S. Securities and Exchange Commission, TransUnion, Form 8-K (1 December 2021). The same comments apply to **Exh. C-0144** as set out in paragraphs 8.b and 8.c above.

[12] *See*, *e.g.*, *id.*, para. 16.

[13] *See*, *e.g.*, *id.*, para. 3.

[14] *See*, *e.g.*, *id.*, paras. 44-47.

f. **Exh. C-0145**: TransUnion, "TransUnion and Neustar Announce Transaction Close" (1 December 2021). The same comments apply to **Exh. C-0145** as set out in paragraphs 8.b, 8.c, and 8.e above.

g. **Exh. C-0146**: HoganLovells, "Carve outs, Divestments and Spin-Offs – How to Sell Businesses and Assets" (10 February 2022). In its Application, the Respondent argues that security for costs is warranted based on its (mis)understanding that "the original claimant in these proceedings (Neustar, Inc.) apparently transferred its claim to a new entity on 1 December 2021."[15] The Respondent fundamentally misunderstands the nature of spin out transactions, which are regular corporate transactions and increasing in occurrence. This can be seen in **Exhs. C-0146** and **C-0147**, which were previously included in the Claimant's letter of 15 September 2022.[16] Yet, the Respondent chose to bring its Application based on an inaccurate understanding of the operation of regular corporate transactions such as the one in issue here. The Claimant therefore submitted **Exhs. C-0146** and **C-0147** to demonstrate that there is nothing "suspicious" about the transaction.

h. **Exh. C-0147**: HoganLovells, "Carve-outs, Spin-offs, and Split-offs". The same comments apply to **Exh. C-0146** as set out in paragraph 8.g above.

i. **Exh. C-0148**: Email from Steptoe & Johnson LLP to HoganLovells (28 October 2022). The relevance of this document was explained at paragraph 8.a above.

j. **Exh. C-0149**: Alice Palmer, "Anatomy of a Brand Transformation: Our Journey to Vercara" (3 April 2023). In its Application, the Respondent pointed to the Claimant's change of name from Security Services LLC to Vercara LLC, arguing that "Colombia knows little to nothing about this change and the underlying reasons or potential corporate consequences behind such modification, and much less about Vercara LLC."[17] The Respondent also argued that it was not able to verify Vercara's business operations, which it

[15] *See*, *e.g.*, *id*., para. 45.

[16] Letter from the Claimant to the Tribunal (15 September 2022), nn. 2 and 3.

[17] *See*, *e.g.*, Respondent's Application, para. 5.

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claimed gives rise to "exceptional circumstances" warranting an order for security for costs.[18] Section 5.8(b) of the unredacted UPA, which the Respondent has had since October 2022, clearly explains the necessity of the name change. In light of the Respondent's wilful ignorance on this point, the Claimant also submitted **Exh. C-0149** to provide additional information on the name change, which the Respondent could have obtained by a simple internet search. **Exh. C-0149** explains the change of brand, and ties that change to the Spin Out from Neustar, and thus is directly responsive to the Respondent's arguments in its Application.

k. **Exh. C-0150**: Aerial Blocker Corp. and Subsidiaries, Consolidated Financial Statements December 31, 2022 and 2021, and Year Ended December 31, 2022, Audited by Pricewaterhouse Coopers LLP (29 April 2023) [**CONFIDENTIAL**]. In its Application, the Respondent asserted that an order for security is necessary because of the Claimant's alleged "unwillingness to disclose any financial information" and consequent "material risk that Colombia would be unable to recover" its costs.[19] In fact, the Claimant offered to provide such financial statements to the Respondent at the Hearing,[20] yet the Respondent chose to ignore that offer to enable it to bring its Application. The Claimant submitted **Exh. C-0150** (as well as the bank and investment statements at **Exhs. C-0151** and **C-0152**) in response to the Application. It did so to demonstrate that the Respondent had failed to substantiate the necessity of its request, and to show the Claimant's clear capacity to pay any costs award if so ordered.

l. **Exh. C-0151**: Bank Statement of Security Services, LLC (as of 3 January 2023) [**CONFIDENTIAL**]. The same comments apply to **Exh. C-0151** as set out in paragraph 8.k above.

[18] *See*, *e.g.*, *id.*, paras. 14, 47.

[19] *See*, *e.g.*, *id.*, para. 54.

[20] *See* Tr. Day 2 (28 March 2023), p. 403, line 25 to p. 404, line 10 [Final transcript].

m. **Exh. C-0152**: Investment Statement of Security Services, LLC (as of 31 December 2022) [**CONFIDENTIAL**]. The same comments apply to **Exh. C-0152** as set out in paragraph 8.k above.

n. **Exh. C-0153**: Delaware Division of Corporations, Annual Report Statistics (2021). In its Application, the Respondent argued that there existed "exceptional circumstances" required to order security for costs, based on the fact that the Respondent finds companies "incorporated in Delaware, a jurisdiction characterized by the very limited disclosure obligations" to be "suspicious".[21] **Exh. C-0153** addresses that argument by demonstrating that there are 1.8 million companies incorporated in Delaware, and that the Respondent's "suspicions" were not only unfounded, but non-sensical; there is no correlation between laws on disclosure of financial information and the Claimant being unable to meet its obligations.

o. **Exh. C-0154**: Caroline Simson, "Colombia Can't Get $19M Glencore Award Axed" (24 September 2021), LAW 360. In its Application, the Respondent claimed that an order for security for costs is "all the more necessary in light of Colombia's recent experiences of being unable to recover a favourable award on costs".[22] As the Claimant noted in its SFC Response, while this statement is irrelevant to the Tribunal's consideration, it is also countered by the Respondent's own recent action in seeking to avoid paying liability for its internationally wrongful conduct, as demonstrated by **Exh. C-0154**.

p. **Exh. C-0155**: *Hawkins v. Daniel*, 273 A.3d 792 (Del. Ch. 4 April 2022) (Laster, V.C.). **Exh. C-0155**, along with **Exhs. C-0156**, **C-0157** and **C-0158**, are Delaware law authorities relevant to the assignability of claims. They are responsive to the Tribunal's request for comments on the effect of the Neustar Spin Out transaction on jurisdiction as a matter of Delaware and international law.[23] The Respondent acknowledges this fact, stating that the "Claimant also

[21] Respondent's Application, para. 47.

[22] *Id*., para. 6.

[23] *See* Letter from the Tribunal to the Parties (17 April 2023), para. 1 ("As agreed between the Parties, the Respondent shall submit an application for Security for Costs and comments on the

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produced four Delaware law authorities in response to the Tribunal's request",[24] and thus does not appear to contest the Claimant's submission of this material.

q. **Exh. C-0156**: *In re Emerging Communications, Inc. Shareholders Litigation*, WL 1305746 (Del. Ch. 4 June 2004) (Jacobs, J.). Paragraph 8.p above is repeated.

r. **Exh. C-0157**: 10 Del. C. § 3701. Paragraph 8.p above is repeated.

s. **Exh. C-0158**: *Humanigen, Inc. v. Savant Neglected Diseases*, LLC, 238 A.3d 194 (2020). Paragraph 8.p above is repeated.

9. The Respondent's assertion that the Claimant's factual exhibits "bear no relation to Respondent's Application for Security for Costs"[25] is thus plainly incorrect.

10. Ultimately, however, the Respondent notes that it "does not object to the inclusion on the record of the new exhibits".[26] It appears that the pages of objection it drafted on this subject serve only one end: to distract the Tribunal from the Respondent's demonstrably frivolous Application, and from its own procedural misconduct in persisting to obfuscate the facts known to it in some cases since the outset of the proceedings and in all cases at the very least since July-October 2022. The Respondent's procedural tactics have not only wasted the Tribunal and the Claimant's time, but have also caused both Parties to unnecessarily increase the costs associated with litigating an Application which should have never been brought.

Claimant's request that ICSID update the record of this arbitration on **19 April 2023**. The Claimant shall present its reply on the application on **10 May 2023**. In its reply, the Claimant will present details in relation to the relevant law of Delaware and the specific rules of international law as applicable to the transaction in relation to the claim…") (emphasis in original). The "Spin Out" transaction refers to the 1 December 2021 spin out of Neustar's legacy cloud-oriented security services business before Claimant's ultimate owners sold Neustar, Inc. and its fraud, marketing, and communications business to TransUnion.

[24] Respondent's Application, n. 6.

[25] *Id*., para. 8.

[26] Respondent's SFC Reply, para. 13.

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C. The Witness Statement of Ms. Rodkin is Directly Responsive to the Respondent's Application for Security for Costs

11. The Respondent also submits that the Tribunal "should strike out Ms. Rodkin's witness statement from the record" or "not accord [it] any evidentiary weight".[27] The Respondent's rationale for this request is that Ms. Rodkin's statement "is in no way responsive to Respondent's Application for Security for Costs", and is "solely aimed at establishing the ownership structure of Neustar and Security Services" at the time of the RFA and the Spin Out.[28]

12. The Respondent's assertions are belied by the contents of its Application. In it, the Respondent based its request for security on the following statements (among others):

    a. "This application for security for costs is based on the unusual and, to Colombia's knowledge, unprecedented setting of this proceeding, where there is complete uncertainty regarding the precise identity of the intended claimant in this arbitration, its assets, business operations, and its ownership chain."[29]

    b. The documents submitted by the Claimant "fail[] to provide any specific information about the precise ownership structure of Security Services LLC or its directors and officers".[30]

    c. An assertion that "Security Services LLC existed in April 2017, long in advance of the purported spin out, and Neustar, Inc. similarly continued to exist—albeit under a different ownership—after the completion of the transaction."[31]

13. In response to these statements, and in light of the Respondent's seeming inability to read the corporate documentation placed before it months ago,[32] the Claimant asked

[27] Respondent's Application, paras. 13, 71.

[28] *Id*., para. 9.

[29] *Id*., para. 3.

[30] *Id*., para. 16, third bullet point.

[31] *Id*., para. 24, first bullet point.

[32] *See generally*, Claimant's SFC Response, Section II. In particular, see the materials discussed at nn. 8, 9, 10, 11, 27, 28, 29 and 33 thereof.

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Ms. Rodkin to explain the corporate organization using an organogram.[33] Ms. Rodkin confirmed the corporate structure at the time of the RFA, and immediately before and after the Spin Out. As the Respondent itself notes, Ms. Rodkin's witness statement is "solely aimed" at these limited issues.[34] Given that these issues are directly responsive to the Respondent's allegations in its Application (including as quoted above), it follows that Ms. Rodkin's statement is responsive to the Application.

14. The Respondent's further assertion that the Claimant has somehow engaged in "gamesmanship" under the ICSID Rules by preventing the Respondent from cross-examining Ms. Rodkin is unfounded.[35] In this regard, it should be noted that the Respondent does not dispute the Claimant's description of the relevant corporate structures, which were evidenced both by Ms. Rodkin's statement and by further documents as cited in the Claimant's SFC Response.[36] In particular, the Respondent has not indicated that it disbelieves the corporate structure described by Ms. Rodkin, or that it somehow requires verification of that structure which could only be achieved by way of cross-examination. Rather, it merely complains about a general inability to cross-examine. Yet, a party can only cross-examine a witness on matters in dispute. Thus, by choosing not to dispute the matters on which Ms. Rodkin has testified, the Respondent would have no entitlement to cross-examine regardless of when her statement was filed.

15. The Respondent's objections in this respect are nothing more than a charade. This accords with past practice of the Respondent, including its allegation in the Application that the Claimant "carefully refrained from offering" Mr. Hughes "up for questioning" at the Hearing.[37] As the Tribunal will recall, and as explained in the Claimant's SFC Response, the Claimant offered before and at the Hearing for the Tribunal or the

[33] *See id*., para. 28.

[34] Respondent's Application, para. 9.

[35] *Id*., para. 11.

[36] Witness Statement of Megan Rodkin (10 May 2023), **CWS-1**; Claimant's SFC Reply, Sections II.B to II.E.

[37] Respondent's Application, para. 17.

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Respondent to ask Mr. Hughes questions.[38] While the Respondent in its SFC Reply now states that it "signalled on several occasions that it wished to be able to ask questions to Mr Hughes",[39] it is notable that the Respondent was not able to identify any citation in the transcript in support of its position, or any other correspondence to the Claimant or the Tribunal in relation to the same. In these circumstances, the Respondent's theatrics with respect to Ms. Rodkin's witness statement are disingenuous, and its request to strike it from the record should be denied.[40]

D. Conclusion as to the Responsive Evidence Submitted by the Claimant

16. The Respondent's conspiracy theory approach to the evidence in this proceeding is tiresome. It has had numerous factual documents before it for over six months, demonstrating the nature and mechanics of the Spin Out, the fact that there has been continuity of ownership of the MINTIC Claim by the Claimant's Ultimate Owners, and that such Claim had at all times remained in U.S. hands. The Claimant felt compelled to submit additional evidence in its SFC Response because it was necessary to correct the Respondent's continued misstatements, and to specifically rebut the assertions upon which the Respondent founded its Application.

17. It would be a serious departure from a fundamental rule of procedure to allow the Respondent to prevent the Claimant from defending itself against the Respondent's Application, by according little weight to its evidence or by striking that evidence from the record. The Respondent insisted on bringing this Application despite already being in possession of sufficient and material evidence. The fact that the Respondent now realizes that it miscalculated, or made an error in overlooking key evidence in its possession, should not weigh against the Claimant. Further, to repeat, the fact that the

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[38] *See* Claimant's SFC Response, para. 57. *See also* Letter from the Claimant to the Tribunal (15 September 2022), p. 1; Tr. Day 2 (28 March 2023), p. 300, lines 11 to 23 [Final transcript].

[39] Respondent's SFC Reply, n. 28.

[40] The Respondent's attempt to limit the Claimant's right of response is improper, and seeks to upset the equality of arms between the Parties. *See Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment) (5 February 2002), para. 57, **CL-0169** ("It is fundamental, as a matter of procedure, that each party is given the right to be heard before an independent and impartial tribunal. This includes the right to state its claim or its defense and to produce all arguments and evidence in support of it. This fundamental right has to be ensured on an equal level, in a way that allows each party to respond adequately to the arguments and evidence presented by the other." (emphasis added)).

Respondent based its Application on matters which overlap with one of its jurisdictional objections is a matter of its own making, and cannot possibly deprive the Claimant of the right to file evidence responsive to the Application.

III. THE RESPONDENT HAS FAILED TO ADDRESS, LET ALONE ADEQUATELY REBUT, THE CLAIMANT'S RESPONSE TO ITS APPLICATION FOR SECURITY FOR COSTS

18. The Respondent's SFC Reply is largely repetitive of its Application with respect to the merits of its request for security, and fails to address the Claimant's arguments on the appropriateness of ordering security for costs in any meaningful way. In this respect, the Claimant does not consider it useful or necessary to provide a detailed response to points previously made by the Respondent and already rebutted by the Claimant in its SFC Response; the Claimant will simply maintain and re-iterate its prior pleading in this regard. Instead, the Claimant addresses below the Respondent's three overarching positions in its SFC Reply.

A. The Respondent's Misrepresentation of the Legal Standard Applicable to Security for Costs Applications is Contradicted by an Overwhelming Majority of Cases

19. In the Claimant's SFC Response, it reviewed nearly 50 ICSID cases in which applications for security for costs have been considered,[41] to determine the standards the Respondent has the burden of demonstrating support its Application, being that:

a. there is a right to be preserved;

b. provisional measures in the form of security for costs is necessary, giving rise to exceptional circumstances;

c. the request is urgent in the circumstances of the dispute; and

d. granting the requested measures is proportional, and balances the rights of both parties in the arbitration.[42]

20. The Claimant noted that the Respondent in its Application wrongly sought to downplay the specific requirements set out in (b) to (d) above by compressing them into a general

[41] *See* Claimant's SFC Response, n. 74.

[42] *Id*., para. 70.

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assessment as to whether the Tribunal is satisfied that the "circumstances […] require" that provisional measures be ordered.[43]

21. In its SFC Reply, the Respondent does not engage with the jurisprudence on security for costs applications specifically, but instead accuses the Claimant of "misrepresent[ing] the legal standard controlling the Application".[44] The Respondent maintains that a general test of "circumstances" is required. In support of its inaccurate position that this is the "widely established" test,[45] the Respondent refers to the 2022 ICSID Arbitration Rules (which of course do not apply to these proceedings),[46] and points to paragraphs 33-36 and 40 of its Application. In these cited paragraphs, however, the Respondent points to only two cases.[47] One of these cases (*Occidental v. Ecuador*) did not consider the question of security for costs specifically,[48] while the tribunal in the other case (*Eskosol v. Italy*) actually reached a conclusion which unambiguously supports the Claimant's position.[49]

22. In any event, the Respondent's selective reliance on these limited authorities stands in sharp contrast to the Claimant's detailed analysis of the jurisprudence on security for

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[43] *Id*., para. 71.

[44] Respondent's SFC Reply, Section 3.1 (Heading).

[45] *Id*., para. 17.

[46] *Id*., para. 20.

[47] *Id*., n. 37 (citing *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Procedural Order No. 3 Decision on Respondent's Request for Provisional Measures, 12 April 2017, para. 32, **RL-194**; *Occidental Petroleum Corp. and Occidental Expl. & Prod. Co. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, para. 59, **RL-195**).

[48] *Occidental Petroleum Corp. and Occidental Expl. & Prod. Co. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, para. 59, **RL-195**. In that case, the claimant requested provisional measures by way of specific performance of the respondent State to cease occupation of the premises in issue and take all necessary measures to enable the claimant to resume its operations. *See id*., para. 4.

[49] *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Procedural Order No. 3 Decision on Respondent's Request for Provisional Measures, 12 April 2017, para. 36, **RL-194** ("A recommendation of provisional measures should be issued only where doing so is *necessary* to preserve identified rights and *urgently* required for that purpose, in the sense that the requested measure is needed prior to issuance of an award. Tribunals also should ensure that the particular measures requested are *proportionate*, in the sense that they do not impose such undue burdens on the other party as to outweigh, in a balance of equities, the justification for granting them." (emphasis in original)).

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costs specifically, and its description of the legal test developed through this jurisprudence. The Respondent's desperation to compress the detailed standards articulated by numerous tribunals into its preferred legal framework reflects the fact that it has no response in respect of the specific requirements identified in the caselaw as necessary to sustain a security for costs application (see immediately below).

B. The Respondent Has No Response to the Claimant's Position on the Merits of its Application

23. The Respondent broadly asserts that the Claimant has not disproved the need for security for costs, asserting that the evidence submitted by the Claimant is "insufficient".[50] Instead of actually addressing the evidence and legal authorities submitted by the Claimant, however, the Respondent chooses to elide over key aspects of its Application and the Claimant's SFC Response so as to present its preferred narrative, no matter how implausible.

24. *First*, in addressing whether there is a "right to be preserved", the Respondent simply repeats its position that it has a right to "have an enforceable award of costs against a claimant … irrespective of the stage at which the request is made".[51] The Respondent has not, however, made any attempt to address the concerns raised by the Claimant in its SFC Response with respect to the hypothetical scenarios posited by the Respondent: namely, that it will prevail on jurisdiction and/or the merits of the dispute, and that it will be awarded costs notwithstanding the fact that there is no presumption on the award of costs in ICSID proceedings.[52] The Respondent has also largely ignored commentary and case law confirming that an award for security for costs is "a guarantee early in the proceeding to cover the prospective arbitration costs" (as opposed to a late application in regard to costs mostly already incurred).[53]

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[50] Respondent's SFC Reply, Section 3.1 (Heading).

[51] *Id*., para. 23.

[52] Claimant's SFC Response, paras. 74-75.

[53] *Id*., paras. 76-78, *citing, e*.g., Martina Polasek and Celeste E. Salinas Quero, "Chapter 21: Security for Costs: Overview of ICSID Case Law" in Serlin Tung, Fabricio Fortese, et al. (eds), FINANCES IN INTERNATIONAL ARBITRATION: LIBER AMICORUM PATRICIA SHAUGHNESSY (Kluwer Law International 2019), p. 387, **CL-134**; *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Procedural Order No. 3 (12 April 2017), paras. 34-35, **RL-194**; cited by *Lao*

(continued)

25. Moreover, the Respondent has not taken any responsibility for the fact that it has itself contributed significantly to the costs of these proceedings by choosing to over-litigate its alleged jurisdictional objections.[54] In such circumstances, the alleged "right" of the Respondent for an order for USD 3.5 million in security for costs must be dismissed.

26. *Second*, and as the Claimant explained in its SFC Response, the Respondent's Application fails at the fundamental hurdle of "necessity", because: **(i)** the Respondent's attempt to infer impecuniosity based on speculation is contrary to precedent;[55] **(ii)** in any event, the Claimant has the ability to pay an adverse costs award, if so required;[56] and **(iii)** even if the Claimant were impecunious (which it is not), that alone is not sufficient.[57]

27. In its SFC Reply, the Respondent effectively ignores the evidence provided by the Claimant of its financial status. To recall, that evidence confirms that, as of 31 December 2022 (*i.e*. the date of the audited financial statements), the Claimant:

a. has USD [redacted] cash / cash equivalent reserves, as well as USD [redacted] in other assets;

b. is [redacted]; and

c. is not subject to any bankruptcy or insolvency proceedings.[58]

Holdings N.V. and Sanum Investments Limited v. Lao People's Democratic Republic, ICSID Case No. ARB(AF)/16/2, ICSID Case No. ADHOC/17/1, Procedural Order No. 6: Decision on Respondent's Application for Security for Costs (26 July 2018), para. 34, **RL-202**.

[54] *See* Claimant's SFC Response, paras. 77, 118.

[55] *Id*., para. 85.

[56] *Id*., paras. 86-87.

[57] *Id*., paras. 88-91.

[58] Aerial Blocker Corp. and Subsidiaries, Consolidated Financial Statements December 31, 2022 and 2021, and Year Ended December 31, 2022, Audited by Pricewaterhouse Coopers LLP (29 April 2023), **Exh. C-150 [CONFIDENTIAL]**. [redacted]

(continued)

28. The Respondent does not dispute these facts.[59] Instead, it insists that "these financial documents are insufficient to disprove the necessity for security for costs".[60] This is non-sensical. The undisputed financial documents submitted by the Claimant establish that it is more than capable of satisfying any costs award that might be made against it. As the Claimant demonstrated by its substantial analysis of the case law in its SFC Response, an order for security for costs has never been made in such circumstances.

29. Seemingly to counter this inescapable conclusion, the Respondent asserts that its Application is nonetheless "necessary" because "the exceptional circumstances in the present case … arise from Neustar and Security Services/Vercara's procedural behavior".[61] However, the Respondent is unable to point to a single case or legal principle supporting its position, and for good reason—there are none.

30. Instead, the Respondent argues that security for costs should be awarded based on its own "doubt" about the Claimant's "approach to these proceedings and [its] willingness to comply with an adverse award on costs."[62] The Respondent further asserts that the "Claimant has not addressed this point in its Response."[63]

31. These arguments are both easily dismissed. As clearly noted by the Claimant in its SFC Response, not only have tribunals routinely rejected the speculative approach to requests for security for costs that the Respondent advances,[64] there are in fact no

[redacted]

[59] In fact, not only does the Respondent not dispute the Claimant's financials, but it appears to have *accepted* them in the course of its proportionality analysis. *See* Respondent's SFC Reply, para. 35. There, the Respondent alleges that an order for security would not unduly burden the Claimant, and expressly asserts: "Far from showing disproportion, Claimant's Response on Security for Costs in fact confirms that the requested security would not create any undue burden on Claimant." Although that sentence is vague as to exactly which part of the SFC Response the Respondent is referring to, the only logical section can be that addressing the Claimant's financials. In other words, the Respondent's argument appears to be that security would not burden the Claimant precisely because it has substantial assets. Yet, this admission flatly undermines its position as to necessity for security.

[60] Respondent's SFC Reply, para. 28.

[61] *Ibid*.

[62] *Ibid*.

[63] *Id*., para. 30.

[64] *See*, *e.g.*, *Bay View Group LLC and The Spalena Company LLC v. Republic of Rwanda*, ICSID Case No. ARB/18/21, Procedural Order No. 6 on the Respondent's Request for Security for

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grounds here to support any inference that the Claimant would be unwilling to comply with an order of the Tribunal on costs.[65]

32. Indeed, it is telling that the Respondent did not challenge the following statement by the Claimant in its SFC Response:

> "In particular, the Respondent does not allege that the Claimant is insolvent, that this case is funded by a third-party, that the Claimant has failed to pay its advances on costs to ICSID, that the Claimant has any history of failing to comply with its financial obligations in connection with ICSID proceedings, that any findings of tax evasion have been made against the Claimant, or that the Claimant has attempted to reduce its assets so as to undermine the Respondent's ability to enforce any costs award against it."[66]

33. Having not challenged this, the Respondent is left with no more than an attempted inference of unwillingness to pay based upon the Claimant's supposed "procedural behavior". Even if this were relevant (which it is not, and the Respondent has no authority to support its position), there is no aspect of the Claimant's conduct of these proceedings upon which the Respondent's attempted inference can be drawn. Such attempted inference is all the more fanciful in circumstances, as here, where the Claimant is plainly a substantial business that is more than capable of paying any costs award that might be made against it. Moreover, it should be noted that the Claimant has already agreed to comply with the award by consenting to ICSID arbitration (given that ICSID Convention Article 53 expressly requires that the parties to an arbitration shall "abide by and comply with" the terms of the award).

34. In sum, the Respondent fails at the very first hurdle of demonstrating that an order for security for costs is necessary. The Respondent has not demonstrated that the Claimant is unable or unwilling to pay a costs award, if ordered, and in fact has chosen to ignore evidence contradicting its position. The Respondent's SFC Reply fails to rebut the

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Costs (28 September 2020), para. 59, **CL-144**; *Burimi S.R.L. and Eagle Games SH.A. v. Republic of Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2 (3 May 2012), paras. 39, 41, **CL-137**.

[65] Claimant's SFC Response, para. 91.

[66] *Ibid*.

Claimant's position and instead continues to advance a novel legal theory that is unsupported by a single tribunal considering applications for security for costs. This position should be rejected.

35. *Third*, in relation to the "urgency" of its request for security for costs, the Respondent effectively repeats its broad position in the Application.[67] Yet, following the Claimant's SFC Response, the Respondent in its SFC Reply now (rightly) backs away from the legal authorities it had previously relied upon in support of its position.[68]

36. For example, in its Application, the centerpiece of the Respondent's analysis was the findings of the tribunal in *Kazmin v. Latvia*.[69] It asserted that "the findings of the tribunal in *Kazmin v. Latvia* are particularly relevant",[70] relying on language used by that tribunal to allege that the "Respondent's '*specific suspicion*' has progressively emerged in light of Claimant's increasingly doubtful behaviour…".[71] In its SFC Response, the Claimant explained the findings of the *Kazmin* tribunal, including the context of the case that the Respondent had omitted from its own description.[72] Notably, the Claimant stated that if the Respondent truly believed it was necessary to file its Application, it could have done so at the same time it filed its Rejoinder, as was the case in *Kazmin*, instead of waiting until after the Hearing to do so.[73] In its SFC Reply, the Respondent backed away from any discussion of the *Kazmin* case, instead burying reference to the decision in a footnote, simply stating that the *Kazmin* tribunal

[67] Respondent's SFC Reply, para. 32, citing *Dirk Herzig v. Turkmenistan*, ICSID Case No. ARB/18/35, Decision on the Respondent's Request for Security for Costs and the Claimant's Request for Security for Claim, 27 January 2020, para. 67, **RL-201**. See also Respondent's Application on Security for Costs (19 April 2023), para. 58, citing *Dirk Herzig v. Turkmenistan*, ICSID Case No. ARB/18/35, Decision on the Respondent's Request for Security for Costs and the Claimant's Request for Security for Claim, 27 January 2020, para. 67, **RL-201**.

[68] *See*, *e.g.*, Respondent's SFC Reply, para. 60, citing *Eugene Kazmin v. Republic of Latvia*, ICSID Case No. ARB/17/5, Procedural Order No. 6: Decision on the Respondent's Application for Security for Costs (13 April 2020), para. 29, **RL-198**.

[69] Respondent's SFC Reply, para. 60.

[70] *Ibid*. (emphasis added).

[71] *Id*., para. 61 (emphasis in original).

[72] *See* Claimant's SFC Response, paras. 102-104.

[73] *Id*., para. 104.

(continued)

ultimately disagreed with the claimant in that case.[74] But this fact was already made clear in the Claimant's SFC Response,[75] and is irrelevant to the question in issue—that is, the circumstances of when a request for security for costs can be considered urgent.

37. The Respondent further asserts that the more recent discussion of the issue in *Bay View v. Rwanda* (a case decided in 2020, and yet ignored by the Respondent in its Application) is "inapposite" because the "requirement considered by the tribunal in that case was one of *timeliness* of the application, not *urgency*."[76] While the Respondent misrepresents the extensive discussion of the *Bay View* tribunal, as is outlined in the Claimant's SFC Response,[77] the Claimant notes that the relevant heading in the Respondent's Application on this issue was titled "Respondent's Application is *Timely*".[78] Likewise, in the *Kazmin v. Latvia* case discussed above (which the Respondent in its Application asserted was "particularly relevant"), the tribunal considered whether the respondent had "waited an unduly long time to bring this Application", or whether "[i]t necessarily took some time before an overall understanding" of the evidence occurred.[79] The Respondent's half-hearted attempt to parse between "urgency" and "timeliness" is therefore contradicted by its own legal authorities and Application on this issue. Ultimately, the point is simple: "urgency" and "timeliness" are one and the same.

38. Notably, the Respondent has also ignored the findings of the *Bay View* and *Sanum II* tribunals, both of which focused on whether a respondent had demonstrated any "newly discovered information"[80] or whether a Respondent "has permitted the Claimant[] to

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[74] Respondent's SFC Reply, n. 36.

[75] Claimant's SFC Response, para. 102.

[76] Respondent's SFC Reply, para. 33 (emphasis in original).

[77] *See* Claimant's SFC Response, paras. 96-98.

[78] Respondent's SFC Reply, Section 4.2(c) (emphasis added).

[79] *Eugene Kazmin v. Republic of Latvia*, ICSID Case No. ARB/17/5, Procedural Order No. 6: Decision on the Respondent's Application for Security for Costs (13 April 2020), para. 29, **RL-198** (emphasis added).

[80] Claimant's SFC Response, para. 100, citing *Lao Holdings N.V. and Sanum Investments Limited v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/16/2, ICSID Case No. ADHOC/17/1, Procedural Order No. 6: Decision on Respondent's Application for Security for Costs (26 July 2018), para. 42, **RL-202**.

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invest heavily in these proceedings before bringing its Application and the Claimant[] [is] justified in attacking the fairness of this course."[81] Of course, the reason the Respondent has not addressed these issues is because it has no answer. Its Application fails to overcome the test of urgency required to sustain a request for security for costs, and the Respondent has been unable in its SFC Reply to justify its tactical delay in causing both Parties to continue to incur costs as they prepared for Hearing. In these circumstances, the Application should be rejected.[82] Alternatively—at a minimum—any award of security should be limited to future costs only (another issue raised by the Claimant in its SFC Response, and ignored by the Respondent).[83]

39. *Fourth*, the Respondent ignores the scope of application of the requirement of "proportionality" by numerous tribunals as set out in detail in the Claimant's SFC Response.[84] Instead, the Respondent asserts that the Claimant's SFC Response "in fact confirms that the requested security would not create any undue burden on Claimant."[85] In effect, the Respondent seems to believe that because the Claimant has plenty of financial reserves (a fact it conveniently ignores with respect to the question of necessity[86]), it should be required to post USD 3.5 million by way of security for costs simply because the Respondent deems it to be warranted based on its unsubstantiated "doubts".[87] This is wrong. Paragraphs 107-114 of the Claimant's SFC Response are repeated.

[81] Claimant's SFC Response, para. 97, *Bay View Group LLC and The Spalena Company LLC v. Republic of Rwanda*, ICSID Case No. ARB/18/21, Procedural Order No. 6 on the Respondent's Request for Security for Costs (28 September 2020), para. 63, **CL-144**.

[82] *See* Claimant's SFC Response, paras. 94-105.

[83] *Id*., para. 106.

[84] *Id*., paras. 107-114.

[85] Respondent's SFC Reply, para. 35.

[86] *See* paras. 26-33 above.

[87] Claimant's SFC Response, n. 139, referencing the Respondent's Application, paras. 4, 20, 47, 49, 58 and 61. *See also* Respondent's SFC Reply, paras. 3, 28-29, 30, 35.

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C. The Respondent Fails to Support its Request that the Tribunal Order Both Vercara and Neustar to Post Security for Costs

40. In its SFC Reply, the Respondent maintains that the Tribunal has authority to order *both* Vercara and Neustar to provide security.[88] It argues that the assignment was not valid and/or effective under Delaware law, and in any event that Vercara could not be substituted as a claimant without the Respondent's consent. In other words, it repeats its jurisdictional objection arising from the Spin Out. Accordingly, the Claimant refers the Tribunal to its analysis on that matter in Part IV below. Moreover, the Claimant repeats paragraphs 119-121 of its SFC Response. In particular, even if the Tribunal still has jurisdiction over Neustar (which is denied, given the effect of the assignment), the Respondent has failed to even *allege* exceptional circumstances in relation to Neustar specifically so as to justify such an order; the Respondent has not sought to counter this.

D. Conclusion as to the Respondent's Application

41. As explained by the Claimant in its SFC Response, the Respondent's Application is unjustified, and based on various and significant misrepresentations of the facts and of the law. The Respondent's SFC Reply does not remedy these failings, and simply repeats its novel and incorrect approach to the legal standards required to demonstrate necessity for security for costs.

42. In fact, the Respondent now seems to tacitly acknowledge that its Application is unfounded, pivoting to blame the Claimant for the fact that it brought the Application in the first place. For example, the Respondent's SFC Reply states that it was left with "no option but to file its Application for Security for Costs" and that the "Claimant should therefore at the very least bear the full costs associated with this application."[89] This is wrong.

43. As the Claimant explained in its SFC Response, the current circumstances are a situation entirely of the Respondent's own making. The Respondent has had evidence

[88] Respondent's SFC Reply, paras. 37-40.

[89] *See*, *e.g.*, *id.*, para .31.

(continued)

since at least October 2022 (and in many cases, earlier) demonstrating the Claimant's ownership structure, and the details of the Spin Out transaction.[90] Moreover, the Respondent did not accept, nor follow up on,[91] the Claimant's offer during the Hearing to provide the Respondent with its financial statements.[92] Had the Respondent properly read the evidence before it and accepted the Claimant's offer to provide financial information, it would have discovered that the basis of its Application was frivolous, and its insinuation that the Claimant is a mere "empty shell"[93] was completely incorrect. That the Respondent now regrets having brought its Application does not mean that the Claimant should have to cover the costs associated with its wrongful request. The Respondent alone chose to waste the Tribunal and the Claimant's time, and should be penalized with an immediate order that the Respondent shall bear all the costs associated with this incident (in an amount to be assessed at the conclusion of the case).

[90] *See generally*, Claimant's SFC Response, Section II.

[91] Notably, the Respondent's only defense to the Claimant's reference to this offer in its SFC Response is to assert that the "Claimant was careful not to follow-up on its alleged offer to provide financial information to Respondent". *See* Respondent's SFC Reply, para .26, third bullet point. That position is non-sensical. Once the Claimant offered to provide the Respondent with financial information, it was for the Respondent to accept that offer. The Respondent is wrong to seek to blame the Claimant for its own failures.

[92] *See* Claimant's SFC Response, para. 61, citing Tr. Day 2 (28 March 2023), p. 293, line 5 to p. 294, line 17 [Final transcript] (Baldwin: "But more fundamentally this question of the financials or whatever else was asked at 9pm last night, and you know we mentioned – I mentioned to Mr. Laurent that Security Services is a private company so we have to have appropriate confidentiality things, but mentioned to him and I will reiterate here, we are happy to give him financial statements so he can make his determination, but to act like this has been that long coming when it came at 9pm last night, I wouldn't accept that assertion at all.").

[93] *See* Tr. Day 1 (27 March 2023), p. 106, lines 11-12 and p. 202, lines 1-3 [Final transcript] (which include the following assertion: "We would suggest [Neustar Security Services] is an empty shell which is just dealing with this arbitration").

IV. COMMENTS ON LAW APPLICABLE TO THE SPIN OUT

44. This part addresses Section 4 of the Respondent's SFC Reply. As will be seen, the assignment of the MINTIC Claim was effective and valid under Delaware law and international law, and Neustar Security Services (now Vercara) was validly substituted as the claimant.

A. Delaware Law Permits Assignments of Claims

45. As to Delaware law, the Respondent argues **(i)** that the evidence does not prove that there was an effective assignment and **(ii)** that even if there was, it was not valid under Delaware law.[94] Each argument is wrong.

46. *First*, there is ample evidence to prove the assignment. As explained at paragraphs 18-26 of the Claimant's SFC Response, Neustar assigned all of its "rights, obligations and liabilities" with respect to the present arbitration to Neustar Security Services by way of the Bill of Sale **(Exh. C-143)** and as recorded in the UPA **(Exhs. C-136 (redacted) & C-140 (unredacted))**. The Respondent does not affirmatively deny this. Rather, it complains that these agreements are too general as to the terms of the assignment.[95] That complaint is misplaced:

a. *As to the Bill of Sale:*[96] The Respondent is correct that this agreement does not expressly mention the arbitration; the Claimant did not allege otherwise.[97] But this matters not. There is no requirement that an agreement must list out every single asset being transferred; it is sufficient for assets to be listed more broadly. Indeed, the Respondent does not argue otherwise, let alone provide any authority to that effect. Rather, its argument here is on the facts, merely asserting that the Claimant's interpretation of the Bill of Sale is "convoluted".[98] Even if true (which is denied), this misses the point. A "convoluted" interpretation is not necessarily an incorrect one. Yet, the question for the

[94] *See* Respondent's SFC Reply, paras. 42-50.

[95] *See id*., para. 43.

[96] *See id*., para. 43, first bullet point.

[97] Claimant's SFC Response, paras. 22-23.

[98] Respondent's SFC Reply, para. 43, first bullet point and para. 49.

Tribunal is whether the Claimant's interpretation is *correct*. The Respondent did not address that question: it did not allege the Claimant's interpretation to be incorrect, or provide any counter-interpretation. Regardless, the Claimant maintains its interpretation of the Bill of Sale (which is far from "convoluted"), and re-iterates that it is confirmed by the UPA which expressly records that the MINTIC Claim had been assigned. See the Claimant's SFC Response, paragraph 22, which is essentially uncontested.

b. *As to the UPA:*[99] The Respondent merely re-hashes its prior arguments, which the Claimant has already responded to. The Bill of Sale and UPA clearly show that the MINTIC Claim has been transferred; and they further make clear that it was transferred to Neustar Security Services (now Vercara). See the Claimant's SFC Response, paragraphs 22 and 24, which are essentially uncontested.

c. Further, the Respondent is wrong to suggest that the UPA "confirms" that the assignment "had potentially not even proceeded".[100] To support this argument, the Respondent selectively quotes from Section 5.10 of the UPA. In fact, the sentence it part-quotes begins: "To the extent the MINTIC Claim cannot be, or is not, assigned to the Business …". The underlined words (omitted from the Respondent's quotation) make clear that this is boilerplate language designed to cover the *possibility* that the assignment of the MINTIC Claim might ultimately prove to have been ineffective. Such language is a standard feature in contracts of this nature, which are designed to cover every eventuality. It certainly does not "confirm" that the assignment had not taken place.

47. *Second*, the assignment was permissible and valid under Delaware law. As an initial matter, the Claimant re-iterates that the Respondent did not challenge this prior to, or even at, the Hearing; consequently, it is now too late for it to do so. In any event, the Respondent's arguments are unavailing.

48. Initially, the Respondent relies on Delaware authority to the effect that "Delaware permits conveyance of a lawsuit so long as the transferor possesses and conveys a

[99] *See id*., para. 43, second bullet point.

[100] *See id*., para. 44.

(continued)

complete interest in the underlying right and makes the litigant the 'bona fide owner of the claim in litigation' and not just the litigation itself".[101] The Claimant relied on the same quotation in its SFC Response,[102] and explained that it was met here (see also paragraph 52 below).

49. Despite emphasising the legal test set out above, the Respondent immediately ignores that test and asserts an entirely different principle: namely, that an assignment is champertous if the assignee had no interest in the claim pre-assignment. However, this is not the legal test that the Superior Court of Delaware articulated with respect to assignments; rather, the test is that quoted above, and which both Parties have emphasised.

50. To the extent that the Court addressed questions of champerty in *Humanigen, Inc. v. Savant Neglected Diseases* (the case cited by the Respondent), it did so based on the specific claims and issues raised in that case, and this was a separate consideration from whether a claim may be assigned. In addressing this separate issue, the Court confirmed that "modern champerty" might arise where a seller is an *unrelated third-party* to the claims in issue (providing an example of a sale of an impounded vehicle, where the third-party seller lacked possession).[103] The Court then noted that where there is a "close relationship" between the assignor and assignee, either by blood or "affinity to either of the parties", champerty will not apply.[104]

51. This is the exact circumstance here. Neustar wholly owned Neustar Security Services (now Vercara) at the time of the transfer, and both entities were wholly owned by Aerial Topco, L.P. (ultimately owned and controlled by Golden Gate). Neustar was not a third party seller lacking possession. There clearly existed a "close relationship" or "affinity" between the assignee (Neustar Security Services, now Vercara) and assignor

[101] *See id*., para. 47, quoting the Superior Court of Delaware's judgment in *Humanigen, Inc. v. Savant Neglected Diseases, LLC*, 238 A.3d 194 (2020), at p. 203, **Exh. C-158**.

[102] *See* Claimant's SFC Response, para. 125, n. 170.

[103] *Humanigen, Inc. v. Savant Neglected Diseases, LLC*, 238 A.3d 194 (2020), at p. 204, n. 60, **Exh. C-158**.

[104] *Id*., p. 204, n. 62.

(Neustar), as part of the same vertical shareholder structure, making the transfer permissible under Delaware law.

52. In any event, the legal test in Delaware does not depend on proximity of the parties to the assignment but rather is whether the transferor has conveyed a "complete interest in the underlying right", and "not just the litigation itself". That test is met here. By way of the Bill of Sale and as recorded in the UPA, Neustar assigned and fully conveyed to Neustar Security Services (now Vercara) Neustar's complete interest in the MINTIC Claim as a claimant thereunder, including the assets and liabilities relating thereto held by Neustar, making Neustar Security Services (now Vercara) the bona fide owner of and claimant under the MINTIC Claim, as permitted by Delaware law.

53. To repeat, Delaware is far from being an outlier in this regard.[105]

54. Further, paragraph 125 of the Claimant's SFC Response is repeated.

B. International Law Permits Assignments of Claims

55. The Claimant maintains that international law permits the assignment of claims, that this can be done mid-proceeding, that the assignee can be substituted in as the new claimant even without the respondent's consent, and that (in any event) the Respondent has in fact provided such consent here.

1. There is no general prohibition on the assignment of claims under international law

56. In its Rejoinder, the Respondent stated: "As a preliminary point, it is highly questionable whether the transfer itself of the claims was permissible. As recognized by the *Mihaly* tribunal, international claims such as claims under the TPA are subjective rights incapable of contractual assignment …".[106] Consequently, the Claimant demonstrated in its SFC Response that it is not "highly questionable" as to whether the

[105] *See* E.M. Borchard, *Diplomatic Protection of Citizens Abroad* (1st edn 1919, reprinted in 2003 by William S. Hein & Co), pp. 636-637, **CL-163** (quoted in Claimant's SFC Response, para. 131).

[106] *See* Respondent's Rejoinder on Jurisdiction and the Merits (4 November 2022), para. 28 and n. 47 thereto.

(continued)

transfer itself of a claim is permissible, but rather that international law does *not* prohibit such transfers.[107] The Respondent's SFC Reply does not engage with the substance of that analysis; rather than engaging on the question (which it had raised) as to whether assignment is permitted generally, the Respondent now limits itself to the narrower question as to whether assignment is permitted after the arbitration agreement had been formed.[108] We address that issue below. For now, the point remains that the Respondent has elected not to rebut the Claimant's analysis demonstrating that there is no general prohibition on the assignment of claims under international law. It merely re-quotes Judge Crawford, without addressing the Claimant's rebuttal to that citation.

2. A claimant *can* be replaced midway through proceedings, even without the Respondent's consent

57. Turning to the narrower question (namely, whether assignment can take place mid-proceedings), the Respondent has simply failed to engage with the extensive legal analysis set out in the Claimant's SFC Response. It re-cites to authorities that the Claimant has already addressed, without responding to our analysis. As such, we maintain that prior analysis. Nevertheless, we comment as follows on this component of the Respondent's SFC Reply.

58. *First*, the Respondent's analysis begins by addressing the Claimant's reliance on *African Holding, Renée Rose Levy*, *Pantechniki* and *LESI & Astaldi*.[109] The Respondent counters that the assignment in those cases had taken place before the arbitration was commenced. This misses the point. The Claimant did not suggest otherwise. To the contrary, we cited and extensively analysed these cases to rebut the Respondent's *broader argument* that "it is highly questionable whether the transfer itself of the claims was permissible". That was the purpose of these citations: to prove that international law does not prohibit assignment.

[107] *See* Claimant's SFC Response, paras 127-144.

[108] *See* Respondent's SFC Reply, paras. 51-52 and para. 52 before the bullet points.

[109] *See id*., para. 53, first bullet (begins on p. 16).

(continued)

59. Moreover, the Respondent has made several errors in its description of these cases:

African Holdings

a. The Respondent first alleges that there was no "ongoing claim" at the time of the assignment, and that mere "receivables" were assigned.[110] This is wrong. The assignment occurred in 2004.[111] The DRC defaulted on its payment obligations during the 1990s.[112] The *claim* (in the sense of an accrued cause of action) thus arose long before the assignment. The Respondent is wrong to conflate the existence of a *claim* with commencement of an *arbitration*; the two are separate. Indeed, the tribunal expressly held that "all the rights held by SAFRICAS were assigned to African Holding, including claims and consent to arbitration".[113]

b. The Respondent further alleges: "At the time SAFRICAS's receivables were transferred to African Holding, no arbitration proceedings were pending and therefore, there was no arbitration agreement in place (with consent of SAFRICAS or African Holding to arbitrate not having been expressed)."[114] This is also wrong. *First*, the Respondent is wrong to conflate the formation of an arbitration agreement with the commencement of an arbitration: in an investment treaty context, the arbitration agreement is usually formed by an investor's acceptance of the state's offer as made in the BIT; such acceptance can (and frequently does) pre-date the request for arbitration. *Second*, there is no indication in the *African Holding* award that consent to arbitration post-dated the assignment. For its part, the Respondent cites paragraph 57, but that

[110] *See id*., para. 53, first bullet, first sub-bullet (on p. 16).

[111] *See African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. The Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Award on Jurisdiction and Admissibility (29 July 2008), para. 57, **CL-164**.

[112] *Id*., paras. 108, 110 and 121.

[113] *Id*., paras. 63 (emphasis added).

[114] *See* Respondent's SFC Reply, para. 53, first bullet, first sub-bullet (on p. 16) (emphasis added).

(continued)

paragraph records no such point.[115] In fact, other parts of the award indicate that consent to arbitration *did* pre-date the assignment. In particular, the tribunal held that "all the rights held by SAFRICAS were assigned to African Holding, including claims and consent to arbitration";[116] for consent to arbitration to have been assigned, it must have pre-dated the assignment. Accordingly, not only does *African Holding* establish that a claim can be assigned, it also establishes that consent to arbitration can be assigned.

c. Further, while the Parties agree that the assignment in *African Holding* was notified to the DRC, they disagree as to whether the DRC consented to that assignment. The Claimant noted in its SFC Response that the award indicates no such consent.[117] By contrast, the Respondent alleges that the DRC "expressly accepted" the assignment, citing paragraph 73 of the Award.[118] Once again, this is wrong. That paragraph records no such acceptance.[119]

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[115] *See African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. The Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Award on Jurisdiction and Admissibility (29 July 2008), para. 57, **CL-164** ("On October 1, 2004, SAFRICAS transferred, without reservation, its claim to African Holding, a company incorporated in the United States. The deed of assignment of debt was notified to the Congolese State on October 5, 2004. The DRC asserts that, as a result, SAFRICAS lost all legal interest in bringing an action against the Respondent and to act in this arbitration proceeding.").

[116] *Id.*, para. 63 (emphasis added). *See also* para. 71 ("Once the assignment was executed, only African Holding is the assignee of the rights legally linked to the DRC for the purposes of the investment, and the consent given to arbitrate." (emphasis added)).

[117] *See* Claimant's SFC Response, para. 133.

[118] *See* Respondent's SFC Reply, para. 53, first bullet, first sub-bullet (on p. 16).

[119] *See African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. The Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Award on Jurisdiction and Admissibility (29 July 2008), para. 73, **CL-164** ("However close the relationship between contracts and treaties may be concerning obligations arising from each other, in a situation such as this, the difference is very clear. The assignment is enforceable against the DRC, but not the parallel private contract concluded between the companies. From this, only African Holding has, in this case, standing to bring a claim against the DRC. Jurisdiction is declined with respect to SAFRICAS.") (note that the translation is contained within the same document that includes the French original text, with the translation at the beginning of that document).

(continued)

Renée Rose Levy

d. Again, the Respondent alleges that the initial investor did not assign an "ongoing claim" but merely its investment "along with a potential claim".[120] There is no such thing as a "potential claim". As above, the Respondent is wrong to conflate the existence of a *claim* with commencement of an *arbitration*. The point remains that at the time of the assignment in *Renée Rose Levy* the alleged breach had already occurred.[121]

e. The Respondent further alleges that "it is undisputed that when the transfer occurred, there was no concluded agreement to arbitrate (and consent had not crystallized)", but provided no citation to support this.[122] In fact, it is unclear when the arbitration agreement was formed in this case. Having set out the ISDS provision of the BIT, the tribunal merely stated: "Peru did not deny having consented to ICSID arbitration; this point will therefore not be analyzed in this award."[123] In any event, this case establishes that a claim (in the sense of an accrued cause of action) is assignable.

Pantechniki and *LESI & Astaldi*

f. The Respondent emphasises that the transfer of the claims in these cases pre-dated the initiation of the arbitration.[124] Again, that misses the point. The undisputed fact remains that each case concerned at least some alleged mistreatment that preceded the merger, but the tribunals accepted jurisdiction without temporal limitation in this regard.[125] Thus, both cases further establish that a claim (in the sense of an accrued cause of action) is transferrable.

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[120] *See* Respondent's SFC Reply, para. 53, first bullet, second sub-bullet (on p. 16).

[121] *See* the discussion of the case at Claimant's SFC Response, paras. 140-141.

[122] *See* Respondent's SFC Reply, para. 53, first bullet, second sub-bullet (on p. 16).

[123] *See Renée Rose Levy de Levi v. Peru*, ICSID Case No. ARB/10/17, Award (26 February 2014), paras. 138-139, **RL-164**.

[124] *See* Respondent's SFC Reply, para. 53, first bullet, third-fourth sub-bullets (on pp. 16-17).

[125] *See LESI S.p.A. & Astaldi S.p.A. v. Algeria*, ICSID Case No. ARB/05/3, Decision on Jurisdiction (12 July 2006), paras. 3-18, 92-94, **CL-8**; and *Pantechniki S.A. Contractors & Engineers*

(continued)

60. Accordingly, the Claimant maintains that these cases (and the other authorities cited in its SFC Response) establish that international law claims are capable of being assigned.

61. *Second*, the Respondent next addresses the Claimant's reliance on *Quasar de Valores* and *Vivendi II*. To recall, these cases concerned the assignment of claims mid-way through proceedings. The Respondent counters that the assignments in these cases followed a merger/liquidation, in circumstances where the new claimant was the universal successor of the initial claimant.[126] For the Respondent, the only case that is comparable to the matter at hand is *Wintershall.*[127] The Claimant maintains its prior rebuttal of these matters, as set out in its SFC Response, at paragraphs 148-152 and 156-167. Rather than repeat that analysis in full, we limit ourselves to the following observations:

a. As to *Wintershall*, the Respondent alleges that this is the "only" authority comparable to the present matter,[128] but continues to ignore the fact that the passage it relies on was *obiter dicta*. That tribunal did not have to decide the question of whether or not to permit *substitution* of a claimant, because it chose instead to allow the *addition* of the assignee as a second claimant.[129] Further, not only is the passage that the Respondent relies on *obiter dicta*, it is self-evidently tentative: the tribunal held that "an objection to the substitution of the Claimant by a new entity during the course of ICSID arbitration proceedings may be well-taken – for lack of empowerment of a Tribunal to do so, absent consent".[130] *May* be well-taken. That is not a definitive statement of principle. This is the case on which the Respondent's objection is founded, but it has made no effort whatsoever to rebut the fatal deficiencies noted above.

(Greece) v. The Republic of Albania, ICSID Case No. ARB/07/21, Award (30 July 2009), paras. 6, 12-27, 30, 72, **RL-131**.

[126] *See* Respondent's SFC Reply, para. 53, second bullet (begins on p. 17).

[127] *See id*., paras. 55-56.

[128] *See id*., paras. 55 ("The only previous ICSID case known to Respondent with factual similarities to the present situation is the *Wintershall* case.").

[129] *See* the discussion of *Wintershall* in the Claimant's SFC Response, paras. 148-152.

[130] *See Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (8 December 2008), para. 59, **RL-123**.

(continued)

b. As to *Quasar de Valores*,[131] the Claimant maintains its prior description of that case, as set out in its SFC Response, at paragraphs 157-160. As explained there, *Quasar de Valores* is a case where, during the pendency of the arbitration, the original claimant assigned its title to a BIT claim to an affiliate, it attempted to swap in the new claimant, the respondent withheld its consent, but the tribunal permitted the assignee to substitute into the case and ultimately awarded it damages. The Respondent seeks to distinguish this case by noting that it concerned a universal succession,[132] but this overlooks what the tribunal actually held:

> "In sum, the Tribunal considers that (a) it was a universal succession, (b) <u>if this was not so</u>, ALOS 34 under these circumstances <u>could nonetheless, given its legal title to the credito litigioso [i.e. the arbitration claim[133]], assume Rovime's position irrespective of consent by the Respondent</u>, (c) there are no special circumstances that cut the other way; to the contrary, (d) ALOS 34 qualifies under the BIT just as Rovime did."[134]

c. Thus, the tribunal expressly held that even if ALOS 34 was not the universal successor, it could still replace the original claimant given that it had been assigned legal title to the claim.

d. As to *Vivendi II*, the Claimant maintains its prior description of that case, as set out in its SFC Response, at paragraphs 161-165. As explained there, *Vivendi II* stands for the proposition that in circumstances where the original claimant is merged into a new entity mid-proceeding, the new entity can be substituted as claimant, even against the objection of the respondent.

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[131] We note that our SFC Response discussed the 2009 Award on Preliminary Objections and the 2012 Award in *Quasar de Valores*, but that only the former was exhibited, as **Exh. CL-165**. We are grateful to the Respondent for exhibiting the 2012 Award as **Exh. RL-205**.

[132] *See* Respondent's SFC Reply, para. 53, second bullet, first sub-bullet (on p. 17).

[133] *See Quasar de Valors SICAV S.A. and Others v. The Russian Federation*, SCC No. 24/2007, Award (20 July 2012), para. 35, **RL-205**.

[134] *Id*., para. 40 (emphasis added).

(continued)

e. The Respondent seeks to distinguish *Quasar de Valores* and *Vivendi II* by emphasising that they concern merger/liquidation scenarios.[135] It is wrong to do so. As stated in the Claimant's SFC Response, there is no good reason that the same conclusions as were reached in *Quasar de Valores* and *Vivendi II* should not also apply in situations where the original claimant undergoes a de-merger, whereby certain assets are spun out (as here). Indeed, contrary to the Respondent's assertions,[136] this was Professor Schreuer's view (as expert) in *Wintershall*. In particular, that award records the following testimony: **Q:** "Are you aware of any principle under international law that would impede [W.Holding], which is the company to which the assets of [Wintershall], the original Claimant, were spun off, … from being a sole Claimant, or a co-Claimant together with [Wintershall]? **A:** "No. I am not aware of any such rules. There have been a few cases that do not cover exactly this situation, but that also cover succession incorporations, notably Vivendi II, and LESI Astaldi that indicate that this is possible, and that indicate in particular that the law of the incorporation of the company is the applicable law." [137]

f. Contrary to the Respondent's assertions, the fact that the original claimant entity remains in existence is legally irrelevant and is plainly a red-herring.

62. *Third*, the Respondent next returns to its reliance on *Sumrain* and certain provisions of the TPA to support its argument that once an arbitration agreement has been crystallised it cannot be unilaterally altered or modified.[138] In this regard, the Claimant maintains its prior rebuttal of these matters, as set out in its SFC Response, at paragraphs 146-147

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[135] *See* Respondent's SFC Reply, para. 53, second bullet (beginning on p. 17).

[136] *See id*., para. 55, footnote 77, wrongly accusing the Claimant of being "highly misleading". Prof Schreuer's evidence was quoted in our SFC Response, para. 166, footnote 271 and is quoted once more herein. That testimony speaks for itself.

[137] *See Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (8 December 2008), para. 52, **RL-123**. See also *See* C. Schreuer, L. Malintoppi, A. Reinisch, A. Sinclair, *The ICSID Convention: A Commentary* (Second Edition) (2009), 'Article 25 – Jurisdiction', p. 185, para 362, **RL-44**, which states as follows in discussing the effect of an assignment: "If the successor to rights and obligations is closely affiliated to the party named in the consent agreement, either as a parent company or as a subsidiary, the standards will be less stringent." In this regard, it should be recalled that Neustar Security Services was Neustar's subsidiary at the time of the assignment (*see* Claimant's SFC Response, paras. 15-17 and 28).

[138] *See* Respondent's SFC Reply, paras. 58-61.

and 168-172. Again, rather than repeat that analysis in full, we limit ourselves to the following observations:

a. *Sumrain* concerned the joinder of an entirely new claimant, not the substitution of an original claimant with its assignee. Paragraphs 146-147 of the Claimant's SFC Response are repeated.

b. TPA Article 10.16.2's requirement that the notice of intent must include the name and address of the claimant is a requirement of form, and not jurisdictional. Paragraphs 169-171 of the Claimant's SFC Response are repeated. The Respondent disagrees, relying on *Aven*, *Pac Rim* and *Amec Foster Wheeler USA Corporation*.[139] However, these authorities are unavailing.[140] In any event, the Respondent misses the key point: Article 10.16.2 was complied with at the time the notice of intent was filed, and there is nothing within that provision to prohibit a subsequent substitution of the claimant. Had the drafters of the TPA wished to prevent such a substitution, they could have done so; the fact that they chose not to must be respected.

c. TPA Article 10.18's requirement that the RFA must be accompanied by a claimant's written waiver in relation to domestic proceedings is likewise irrelevant. Per the Bill of Sale and UPA, Vercara has "assume[d] all rights, obligations and liabilities of [Neustar]" with respect to these proceedings.[141] Thus, by reason of the assignment, Vercara *is* a party to the original arbitration

[139] *See id*., paras. 60, footnote 89, second para.

[140] First, in the *Aven* case cited by the Respondent (**RL-11**, para. 344), that tribunal merely opined that the failure of the claimant to expressly assert a claim for full protection and security in its request for arbitration, instead waiting until late in the proceedings, rendered such claim inadmissible (*see* **RL-11**, paras. 343-346). Second, in the passage from *Pac Rim* cited by the Respondent (**RL-12**, para. 93), that tribunal, in discussing the general approach to be taken to be taken in deciding certain preliminary questions, first noted that it was required to assume the claimant's factual allegations as contained in the notice of arbitration to be true; having so held, it then stated in passing that the CAFTA's requirements as to the notice of intent require that liability, causation and damages be pleaded to, but made no finding that even such requirement was jurisdictional in nature. Third, the Respondent merely cites the US' submission in *Amec Foster Wheeler USA Corporation* (**RL-137**); this lacks precedential value. In any event, none of these authorities contradict the Claimant's position that a claimant can be substituted mid-way through proceedings even absent the respondent's consent; they simply do not address that matter.

[141] *See* Claimant's SFC Response, paras. 22-24.

(continued)

agreement, and with it the connected waiver (*i.e*. an assumed "obligation"). Alternatively, to the extent that Neustar's waiver did not pass to Vercara (which is denied),[142] this can be remedied should the Tribunal so direct.[143] Whereas the Claimant observed that such remedial action was possible in its SFC Response, the Respondent did not seek to deny this in its SFC Reply.

d. Instead, the Respondent maintains that the assignment of the arbitration agreement to Vercara without its consent would amount to an impermissible unilateral modification of that agreement.[144] It is wrong. Indeed, the Respondent has failed to point to any authority which stands for the proposition that an assignment of an arbitration agreement amounts to a modification of it. To the contrary, as explained at *e.g*. paragraph 147 of the SFC Response, the tribunal in *African Holding* expressly found that "consent to arbitration" had been transferred to the assignee, and that the "the right to present a claim and the arbitration clause have not changed".[145] The whole point is that Vercara is now a party to the original arbitration agreement; there has been no change and no modification, but merely an assignment of the rights and obligations arising from it.

63. *Lastly*, the Respondent repeats its misplaced reliance on Section 5.10 of the UPA, asserting that this suggests that the Claimant knew that the assignment "would not be permissible".[146] However, as noted at paragraph 46.c above, the sentence which the

[142] For the avoidance of doubt, the Claimant maintains its position that the waiver executed by Neustar, Inc. contains no formal or material defects. *See*, *e.g*., Claimant's Reply on Jurisdiction and the Merits (29 July 2022), paras. 50-80.

[143] *See Pope & Talbot v. Government of Canada*, NAFTA/UNCITRAL, Award on the Merits of Phase 2 (10 April 2001), paras. 186-190, **RL-113**. There, the claimant's alleged damages included those arising from its ownership interest in a Canadian company (Harmac), which was later merged with another of the claimant's indirect Canadian subsidiaries (Pope & Talbot, Ltd). The tribunal raised with the parties the issue of a then-absence of the required waiver under the NAFTA in respect of the claim concerning Harmac, which was then resolved to the tribunal's satisfaction by the filing of a new waiver by the post-merger entity. This case confirms that a defect in the waiver required by the NAFTA (similar to the TPA) can be cured during the course of the arbitration.

[144] *See* Respondent's SFC Reply, para. 61.

[145] *See African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. The Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Award on Jurisdiction and Admissibility (29 July 2008), paras. 63, 78-79 and 84, **CL-164**. For a fuller discussion of this case, see the Claimant's SFC Response, paras. 133-138.

[146] *See* Respondent's SFC Reply, paras. 62-63.

Respondent relies upon begins: "To the extent the MINTIC Claim cannot be, or is not, assigned to the Business …". This is boilerplate language designed to cover the *possibility* that the assignment of the MINTIC Claim might ultimately prove to have been ineffective. Such language is a standard feature in contracts of this nature, which are designed to cover every eventuality. It certainly does not indicate any lack of faith on the part of the Claimant as to the efficacy of the assignment, nor does it indicate any acceptance that there was a "real risk" that the assignment would be ineffective.

3. The specific provisions of the ICSID Convention and TPA upon which the Respondent relies do not support it

64. This matter was addressed above.

4. Alternatively, the Respondent *did* consent to Vercara becoming a party to these proceedings, and even now maintains such consent by way of its demand that Vercara be ordered to provide security and ultimately pay its costs

65. The Claimant maintains that the Respondent has consented to Vercara becoming a party to these proceedings, by virtue of its initial response to the notification of the change of claimant and/or its subsequent conduct in seeking security from Vercara and indicating its intention to seek a costs award against it.

66. As to the Respondent's initial response to the notification, it counters that this was subject to a reservation of its rights.[147] The Claimant already addressed that, and thus repeats paragraphs 173-177 of its SFC Response.

67. As to the Respondent's subsequent conduct:

a. The Respondent first counters that its application for security is expressly made "pending" the Tribunal's decision as to whether it has jurisdiction over Vercara.[148] This matters not. The Tribunal can only make such an order against a claimant. Provisional measures may well be granted pending a decision as to whether there is jurisdiction over a claimant, but they cannot be made against

[147] *See id*., paras. 66-68.

[148] *See id*., para. 69.

an entity which is not even a claimant. Thus, by seeking security against Vercara, the Respondent implicitly accepts that Vercara has at least become a claimant. Such acceptance is sufficient to meet the consent required in *Wintershall*, to the extent that case is relevant (which is denied).

b. The Respondent further appears to counter that it has not indicated an intention to seek award against it. To do so, it quotes vague assertions to the effect that it "primarily" wants Neustar to bear costs, but is "not so interested" in Vercara.[149] Yet, those vague assertions are flatly contradicted elsewhere in the record. For example, the Respondent has stated: "We note that the award of costs should be granted not only against Security Services LLC, but also against Neustar Inc.");[150] and "[I]f and when, which we are confident you should, find costs in favour of Colombia, that that cost should be found against both entities. … [T]his Tribunal has authority in the award to issue the award against both of these entities so we are not left chasing one or the other in terms of that."[151]

68. Accordingly, to the extent that the Respondent's consent was a necessary condition to Vercara being added to these proceedings, such consent was in fact provided.

C. Conclusion as to Jurisdiction re the Spin Out

69. For the reasons set out in the Claimant's SFC Response and above, the Tribunal has jurisdiction over Vercara and no longer has jurisdiction over Neustar.

[149] *See id*., para. 70, n. 99.

[150] *See* Tr. Day 2 (28 March 2023), p. 303, lines 17-19 [Final transcript].

[151] *See id*., p. 306, lines 7-17.

V. REQUEST FOR RELIEF

70. For the reasons set out in the Claimant's SFC Response and in Parts II and III above, the Claimant respectfully requests the Tribunal to:

    a. Dismiss the Respondent's request to strike the witness statement of Ms. Rodkin from the record;

    b. Dismiss the Respondent's Application for Security for Costs; and

    c. Order that the Respondent will bear all costs associated with this incident (including those of the Tribunal and the Claimant's legal fees) to be assessed at the conclusion of this arbitration.

71. For the reasons set out in Part IV, the Respondent's objection to jurisdiction arising from the Spin Out should be dismissed.

Dated: 2 June 2023
London, UK

Respectfully submitted,

[Signed]

Steptoe & Johnson UK LLP
Thomas Innes