**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | |
|---|---|
| UNITED MEXICAN STATES,<br><br>*Petitioner*,<br><br>v.<br><br>LION MEXICO CONSOLIDATED L.P.,<br><br>*Respondent*. | Civil Action No. 1:21-cv-03185 (TFH) |

**MEMORANDUM OF LAW IN OPPOSITION TO HECTOR CARDENAS' MOTION TO INTERVENE**

**TABLE OF CONTENTS**

**Page**

# TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Statutes**

**Other Authorities**

Respondent Lion Mexico Consolidated L.P. ("Lion Mexico") respectfully submits this Memorandum of Law in Opposition to Hector Cardenas' ("Cardenas") Motion to Intervene [Dkt. 23].

**PRELIMINARY STATEMENT**

Cardenas' Motion to Intervene [Dkt. 23] should be denied because (a) he has failed to establish that he is entitled to either intervene as of right or permissive intervention and (b) the claims he seeks to pursue are barred by statute and precedent.

As set forth in his motion, Cardenas seeks to intervene in order to "file a submission in favor of vacatur of the award ('Award') that is the subject of this proceeding," *i.e.*, that he be permitted to move to vacate the Award. However, the Federal Arbitration Act ("FAA"), 9 U.S.C. § 12, sets a strict three-month deadline to move to vacate an award. That deadline has long since passed, making both this motion untimely and his underlying claim ineligible for resolution. Moreover, his request appears to be predicated on a wholesale challenge to the factual findings in the Award supporting the conclusion that the Mexican courts' failed to provide basic due process with respect to Lion Mexico's investments in violation of the North American Free Trade Act ("NAFTA") Article 1105(1). Again, the FAA does not permit vacatur on that basis—courts have repeatedly held that broad challenges to factual findings are impermissible. Rather, the FAA, at 9 U.S.C. § 10(a), provides only limited grounds to vacate an arbitration award, none of which have been asserted by Cardenas here.

The underlying arbitration in this case concerned whether the Mexican courts failed to provide elemental due process with respect to Lion Mexico's investments in violation of Article 1105 of NAFTA. Based on the evidence presented and several days of hearing, the tribunal, consisting of three highly experienced arbitrators (the "Tribunal"), concluded that Lion Mexico's investments were not afforded protection by the Mexican courts in accordance with Mexican

procedural rules and elemental due process under International Law, and accordingly, under NAFTA.

The only parties to the arbitration were the United Mexican States ("Mexico") and Lion Mexico. Neither Cardenas, nor anyone on his behalf, sought to intervene in the NAFTA arbitration. Moreover, Cardenas' argument that he should be permitted to seek vacatur because he was bound by the Award but unaware of this confirmation proceeding until July 2022 is irrelevant. The FAA's deadline, set out at 9 U.S.C. § 12, for filing a motion to vacate runs from the date the arbitration award was issued; lack of notice or knowledge of the issuance of the award does not toll that deadline. In any event, Cardenas knew of the Award no later than four days after its issuance, and was accordingly aware of the deadline to move to vacate the Award.

Cardenas does not have any interest in this case that justifies allowing him to participate as an intervenor. He is not obligated by the Award to make any payments to Lion Mexico nor is he refrained from any actions. His citation to cases in which arbitrators ordered performance by non-parties are inapplicable, and the Court should deny his motion. In addition, if Cardenas were to become a party, it would delay and disrupt resolution of this litigation because it would require the wholesale reopening and review of the evidentiary record considered by the Tribunal.

**BACKGROUND**

A recitation of the relevant facts are set out in Lion Mexico's Memorandum in Opposition to the United Mexican States' Petition to Vacate the Arbitration Award and in Support of Lion Mexico Consolidated L.P.'s Cross-Petition to Confirm, Recognize, and Enforce an Arbitral Award ("Lion Mexico's Opp. Brief") [Dkts. 14 and 15-1], and in detail in the Award [Dkts. 2-1, 14-2, and 15-3] (hereinafter cited as "Award") and will not be repeated here.

As relevant here, and in summary, following the failure of certain companies owned and controlled by Cardenas to repay loans owed to Lion Mexico, secured by mortgages, Cardenas

orchestrated a "complex judicial fraud scheme[] . . . to avoid the imminent foreclosure of the [m]ortgages." Award at ¶¶ 93-94. After three years of litigation in the Mexican court system in which the courts consistently failed to provide elemental due process to Lion Mexico, *id.* at ¶¶ 111-21, in 2015 Lion Mexico commenced an arbitration pursuant to NAFTA and the International Centre for Settlement of Investment Disputes ("ICSID"). *Id.* at ¶ 12. Following resolution of certain jurisdictional issues, the Tribunal considered three claims by Lion Mexico: (i) that its investment had been the victim of judicial and administrative expropriation under NAFTA Article 1110; (ii) that it had been denied justice which amounted to Mexico's failure to provide fair and equitable treatment under NAFTA Article 1105; and (iii) that Mexico failed to grant Lion Mexico's investment full protection and security under NAFTA Article 1105. Lion Mexico's Opp. Brief at 9; Award at ¶ 187.

In 2016, Ivan Mercado ("Mercado"), submitted a series of letters to the Tribunal seeking to participate in the proceedings as a "non-disputing party." *See* Dkt. 23-6. Mercado sought leave to participate as a "resident and active taxpayer of the Mexican State … and as attorney-in-fact of the company INMOBILIARIA BAINS, S.A.," not on behalf of Cardenas personally. *See e.g.*, Dkt. 23-7. Mercado's letters purported to inform the Tribunal of "certain legal arguments with regard to these proceedings, inform of the existence of a number of ongoing judicial procedures in Mexico, and attach a few exhibits in support of his contentions." *Id.* The Tribunal requested briefing from Mexico and Lion Mexico on Mercado's participation, both of which argued that Mercado had failed to demonstrate a sufficient interest to participate. Dkt. 26-6. On May 23, 2017, the Tribunal denied Mercado's application and concluded, among other things, that "Mercado's communications do not clarify many particulars regarding his identify and background." *Id.*

Mercado never sought to renew his application to supply the required information. Only the U.S. and Canada further sought to intervene as a "non-disputing party."

After approximately five years of arbitration, the Tribunal issued the Award on September 20, 2021. The Award found that Mexico had denied Lion Mexico fair and equitable treatment of law. The Tribunal concluded that Mexico caused Lion Mexico to suffer "improper and egregious procedural conduct by the local courts (whether intentional or not), which does not meet the basic internationally accepted standards of administration of justice and due process, and which shocks or surprises the sense of judicial propriety." Award at ¶ 299. More specifically, the Tribunal found that Lion Mexico was denied justice on three separate grounds: (1) improper service and improper declaration of default, *id.* at ¶¶ 399-422; (2) improper denial of the right to appeal, *id.* at ¶¶ 436-48; and (3) denial of the right to submit evidence of forgery. *Id.* at ¶¶ 496-505. Accordingly, the Tribunal awarded Lion Mexico $47,000,000 in compensatory damages, plus certain legal fees to potentially be incurred in litigation, costs, and both pre-and post-judgment interest. *Id.* at ¶ 924. The Award imposed no penalties or obligations on Cardenas. *See id.* Cardenas concedes that he learned of the Award no later than four days after it was issued when a copy was introduced before a Mexican court. Declaration of Hector Cardenas, dated August 22, 2022, Dkt. 23-2 at ¶ 39 ( "Cardenas Decl.")

On December 6, 2021, Mexico initiated this action by filing a Petition to Vacate the Arbitration Award (the "Petition"). Dkt. 1. Thereafter, on February 4, 2022, Lion Mexico filed a Cross-Petition to Confirm, Recognize, and Enforce the Award (the "Cross-Petition") and an opposition to the Petition. Dkts. 14 and 15. Both the Petition and Cross-Petition are fully briefed, and have been ripe for the Court's review since March 4, 2022. *See* Dkt. 18.

On August 22, 2022, approximately 11 months after the Tribunal issued the Award, Cardenas filed a motion to intervene in this matter. Dkt. 23. According to his motion, Cardenas moves to intervene in this case in order to seek vacatur of the Award. Dkt. 23-1.

## ARGUMENT

### I. THE COURT SHOULD NOT ALLOW CARDENAS TO INTERVENE BECAUSE HE IS TIME-BARRED FROM FILING A PETITION TO VACATE THE AWARD.

Cardenas' motion to intervene in this dispute should be denied because he is time-barred from moving to vacate the Award. The FAA requires that "[n]otice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered." 9 U.S.C § 12; *Ballantine v. Dominican Republic*, 2020 WL 4597159, at *1 (D.D.C. Aug. 11, 2020) ("the FAA requires that notice of a vacatur motion be served within three months of the award's delivery."). A party's "failure to move to vacate the award within the three-month time period provided by the statute precludes a party from later seeking that relief." *Loewen v. United States*, 2005 WL 3200885, at *2 (D.D.C. Oct. 31, 2005). Courts have held that failing to meet this deadline by even a single day warrants dismissal. *Webster v. A.T. Kearney, Inc.*, 507 F.3d 568, 574 (7th Cir. 2007) ("Because the statute of limitations began to run when the award was placed in the mail on January 4, 2006, and expired three months later on April 4, Webster's motion to vacate the arbitration award was untimely. Service of notice on EDS, on April 5, occurred one day too late, and denial of the motion to vacate was proper.").

The Award was issued on September 20, 2021, making December 20, 2021 the deadline for filing a motion to vacate. Cardenas filed this motion to intervene eleven months after the Award was issued, and eight months after the deadline. *See* Dkt. 23. Stated differently, the FAA's "three months after the award is filed or delivered" deadline expired *245 days* before Cardenas even proposed making a motion to vacate of the Award. 9 U.S.C. § 12

In addition, "[t]here is no statutory or common law exception to this time limitation." *Dalal v. Goldman Sachs & Co.*, 541 F. Supp. 2d 72, 76 (D.D.C. 2008), *aff'd sub nom. Dalal v. Goldman Sachs & Co*., 575 F.3d 725 (D.C. Cir. 2009). Accordingly, there are no extensions available for this strict deadline.

Even if the Court had the discretion to extend Cardenas' deadline to file a petition to vacate the Award—which it does not—Cardenas has offered no justification for doing so. He argues that, when Mexico filed this action on December 6, 2021, "[n]either party to this proceeding has ever served Mr. Cardenas of any notice of its initiation or progress" and that he "only learned about the existence of a proceeding initiated by Mexico to try to annul the Award when he read an article online on July 12, 2022." Doc. 23-1 at 7-8. These arguments fail.

As an initial matter, Cardenas offers no explanation as to why, despite learning of the Award at or around the time it was issued, he did not timely move to vacate the Award if he understood that the Award imposed obligations on him. In addition, Cardenas cites no authority for his implicit argument that either Mexico or Lion Mexico were under any obligation to notify him of these proceedings.[1] Indeed there is no such requirement. Moreover, the date which Cardenas asserts he first learned of this proceeding, filed approximately two weeks before the December 20, 2021 deadline, is irrelevant. As noted above, the operative date under the FAA is when "the award is *filed or delivered*" and not when another party challenges the Award. 9 U.S.C. § 12 (emphasis added).

[1] In view of Cardenas' argument that he has standing to intervene and that he has a basis independent of Mexico to seek vacatur, whether or not Mexico moved to vacate the award, and the timing of that application, are irrelevant to the obligation of Cardenas to timely move to protect his rights.

## II. CARDENAS HAS NO RIGHT TO INTERVENE PURSUANT TO FED. R. CIV. P 24(A)

Cardenas cannot establish that he has a right to intervene in this case. Federal Rule of Civil Procedure 24(a) states that "[o]n timely motion, the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute; or (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a). Cardenas does not allege that he satisfied the first element, that any federal statute grants him an unconditional right to intervene, and instead, he claims to have established the second, a "sufficient interest" in this matter. To claim a sufficient interest under Fed. R. Civ. P. 24(a), a putative intervenor must meet four requirements: "(1) the application to intervene must be timely; (2) the applicant must demonstrate a legally protected interest in the action; (3) the action must threaten to impair that interest; and (4) no party to the action can be an adequate representative of the applicant's interests." *WildEarth Guardians v. Jewell*, 320 F.R.D. 1, 3 (D.D.C. 2017) (quoting *Karsner v. Lothian*, 532 F.3d 876, 885 (D.C. Cir. 2008)). Cardenas' motion does not meet this standard.

1. Cardenas' Motion Is Untimely.

As discussed above, Cardenas' motion is untimely because it is barred by 9 U.S.C. § 12's three-month deadline. Any right that Cardenas had to petition for vacatur expired on December 20, 2021, and the Court should not permit Cardenas to intervene when he is time-barred from pressing the claim that is the only basis for seeking intervention.

However, even if the FAA did not present an absolute bar to this motion, it is still untimely. To determine if a motion to intervene is timely, "courts should take into account (a) the time elapsed since the inception of the action, (b) the probability of prejudice to those already party to

the proceedings, (c) the purpose for which intervention is sought, and (d) the need for intervention as a means for preserving the putative intervenor's rights." *WildEarth Guardians*, 320 F.R.D. at 3. When a putative intervenor's motion is untimely, "intervention must be denied." *NAACP v. New York*, 413 U.S. 345, 365 (1973).

Cardenas concedes that he was fully aware of the arbitral proceedings and the efforts of Mercado to participate in the arbitration, yet made no effort to participate himself. Dkt. 23-1 at pgs. 5-6. He also admits he was aware of the Award from approximately the time it was issued and—for approximately *eleven months*—took no action to either challenge this Award or to inquire into whether Mexico was challenging the Award. Cardenas Decl. at ¶ 39. Because timeliness of motion to intervene is "measured from when the prospective intervenor knew or should have known that any of its rights would be directly affected by the litigation," *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003), and because Cardenas knew of the Award that gave rise to these proceedings from the time it was issued, the Court should not excuse Cardenas' failure move to vacate or even to inquire into the existence of this proceeding—particularly since Cardenas himself contends that the Award was "one of the most significant international arbitration awards in the history of the North American Free Trade Agreement." Dkt. 23-1 at pg. 1.

Finally, Cardenas' motion is untimely because it seeks to delay resolution of this matter to Lion Mexico's detriment. "[T]he requirement of timeliness is aimed primarily at preventing potential intervenors from unduly disrupting litigation, to the unfair detriment of the existing parties." *Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014). This consideration weighs against intervention "even where a would-be intervenor could have intervened sooner." *Id.* Here, Lion Mexico commenced arbitration in December 2015 and obtained the Award nearly six years later

in September 2021. Mexico's Petition and Lion Mexico's Cross-Petition have been fully briefed and ripe for the Court's resolution since March 2022, five months before Cardenas moved to intervene. In all, Cardenas waited nearly seven years from the commencement of arbitration before seeking to participate in any capacity with respect to the arbitration or the confirmation of the Award that was the product of that arbitration. It is apparent that Cardenas' motion to vacate would be premised on challenging the extensive findings of fact made by the Tribunal in the Award (again, not a permissible basis to challenge an arbitration award under the FAA). If allowed to proceed, Lion Mexico would be required to respond by marshaling documents and testimony developed over the five year arbitration to demonstrate that the Award was in fact supported by evidence. Permitting such additional briefing, wholly unrelated to the discrete issues currently before the Court, would unduly delay resolution of this matter to the prejudice of Lion Mexico.

2. Cardenas Has Not Demonstrated A Legally Protected Interest In This Matter.

Cardenas had no legally protected interest at issue in the underlying arbitration, and he has no legally protected interest at issue in this case. As an initial matter, because the deadline has passed to contest the Award, Cardenas lacks Article III standing, which requires that a putative intervenor be capable of obtaining redress for his alleged injury, which Cardenas is now time-barred from seeking. *See Deutsche Bank Nat. Tr. Co. v. FDIC*, 717 F.3d 189, 193 (D.C. Cir. 2013). In addition, the arbitration concerned the Mexican court system's treatment of Lion Mexico's investments, and its failure to provide Lion Mexico with "fair and equitable treatment" pursuant to NAFTA Article 1105(1). *See* Dkt. 14-2. Although those court proceedings did arise from the actions of Cardenas and his confederates, the activities of Cardenas were not the primary subject of the arbitration. Rather, Lion Mexico sought arbitration under NAFTA Chapter 11, which governs the obligations of the United States, Mexico, and Canada to investors and investments from one of the other NAFTA-signatories, *because Mexico, not Cardenas*, failed to afford Lion

Mexico "fair and equitable treatment" in the Mexican legal system, failed to protect Lion Mexico, and that such failure violated NAFTA Chapter 11. Again, Cardenas never sought to personally participate in the arbitration as a non-disputing party.

In any event, even if Cardenas had a sufficient interest in this case to warrant intervention, he has waived that interest both by failing to seek to participate in the Arbitration and by failing to seek vacatur in this Court upon learning of the Award—knowledge that Cardenas concedes he had within days of the Award issuing. *See* Cardenas Decl. ¶ 39. Cardenas' awareness of the arbitration and Award, and his subsequent failure to take any actions for eleven month is a "voluntary relinquishment or abandonment—express or implied—of a legal right or advantage," and constitutes waiver. *Mawakana v. Bd. of Trustees of Univ. of D.C.*, 113 F. Supp. 3d 340, 354 (D.D.C. 2015); *see also ARMA, S.R.O. v. BAE Sys. Overseas, Inc.*, 961 F. Supp. 2d 245, 254 (D.D.C. 2013) ("If the misconduct came to light at some point during the course of the arbitral proceedings, but the movant nevertheless failed to raise its concerns in a timely fashion, it may be deemed to have waived its right to seek vacatur under [the FAA]".)

Moreover, Cardenas has failed to articulate a legal cognizable basis to vacate the Award that could support intervention here. The motion to intervene raises multiple challenges to the Tribunal's factual findings in the Award. Cardenas asserts that this proceeding is his "only opportunity to challenge an arbitral award that made serious findings of unlawful conduct against him." Dkt. 23-1 at pg. 11. Likewise, he argues that by not participating in the arbitration, he was unable to "proffer evidence that would have directly refuted the factual predicates on which the tribunal based its findings of fraud." *Id.* at pg. 14. This argument fails for two reasons.

First, the FAA does not permit challenges to a tribunal's factual findings. Courts "do not sit to hear claims of factual or legal error by an arbitrator." *Kurke v. Oscar Gruss & Son, Inc.*, 454

F.3d 350, 354 (D.C. Cir. 2006). The FAA lists "only four grounds upon which an arbitration award may be vacated," *id.*, and Cardenas does not attempt to invoke any of them. Instead, Cardenas argues that the Tribunal erred by refusing to allow his participation in the arbitration. Dkt. 23-1 at pg. 5. However, *Cardenas never sought to intervene in the arbitration*. The denial of Mercado's attempt to participate in a personal capacity and as a lawyer for a company owned by Cardenas (but not on behalf of Cardenas), was fully within the discretion of the Tribunal, particularly in view of Mercado's failure to "clarify many particulars regarding his identity and background." Dkt. 23-6 at pg. 2.

Second, the Tribunal issued an Award which does not penalize, impose obligations on, or otherwise restrain Cardenas, so the Tribunal did not err in excluding Mercado even if he was acting as a representative of Cardenas (which was not the case). At no point did the Tribunal ever attempt to make Cardenas or his companies financially responsible for Lion Mexico's damages. In contrast, the Tribunal found *Mexico* liable for failing to ensure that Lion Mexico received fair and equitable treatment in the Mexican court system. Thus, Cardenas is not bound by the Award to pay damages or refrain from any act, and when a putative intervenor "lack[s] an interest in this dispute because they are not bound by the Award," then intervention is properly denied. *1199SEIU United Healthcare Workers E. v. PSC Cmty. Servs.*, 2022 WL 2292736, at *9 (S.D.N.Y. June 24, 2022).

3. The Cases Cited By Cardenas Do Not Support His Arguments.

The cases relied upon by Cardenas do not support his arguments here. He cites *Hendricks v. Feldman L. Firm LLP*, 2015 WL 5671741, (D. Del. Sept. 25, 2015) and *Orion Shipping & Trading Co. v. E. States Petroleum Corp. of Panama, S. A.*, 312 F.2d 299, 300–01 (2d. Cir. 1963) as examples of cases where courts have held that arbitrators erred in determining the rights and obligations of non-parties to arbitration proceedings. Dkt. 23-1 at pgs. 12-13. Cardenas ignores,

however, that the arbitrators in each of these cases explicitly obligated the non-signatories. For example, in *Hendricks*, the arbitrator created "an obligation in PoolRe [the non-signatory] to make the payment" under the arbitration award. 2015 WL 5671741 at *4. The Court found that this created an obligation on the non-signatory because "it is clear that the essence of the ordered payment depends on PoolRe. . . . [the] Arbitrator's posthearing memorandum suggests that the purpose of the Award was to induce PoolRe to make the ordered payment." Similarly, in *Orion*, an arbitrator found that a company, which had not signed an arbitration agreement and did not participate in the arbitration, was responsible for guaranteeing a nearly $1 million arbitration award. *Orion Shipping & Trading Co.*, 312 F.2d at 300. In contrast to *Hendricks* and *Orion*, the Tribunal imposed no such obligations on Cardenas. The Award requires only that Mexico pay Lion Mexico for its damages and interest.[2] *See* Award at ¶ 924 ("the *United Mexican States* has breached NAFTA Art. 1105 . . . ," "ORDERS the *United Mexican States to pay* Lion Mexico . . . ," "ORDERS the *United Mexican States to reimburse* Lion Mexico . . .") (emphasis added).

Cardenas also argues that the Tribunal denied his right to a fair hearing, and cites several cases in support of that argument. Again, the four cases that Cardenas relies on—*Int'l Union, United Mine Workers of America et al. v. Marrowbone Development Company*, 232 F.3d 383 (4th

[2] In addition, the Award obligates Mexico to indemnify Lion Mexico for any legal fees that may be imposed on it by the Mexican courts as a result of the discontinuance of the foreclosure proceedings in Mexico. *See, e.g.*, Award ¶ 924.3. In particular, in the event Lion Mexico is required by Mexican courts to pay legal fees to Cardenas' owned or controlled companies as a result of the discontinuation or withdrawal of legal proceedings in Mexico, then Mexico must indemnify Lion Mexico for the payment of such fees. While Cardenas complains that after being made aware of Mexico's indemnification obligations in the Award, a court in Mexico directed that a claim for $14 million in legal fees by Cardenas' companies be recalculated, Cardenas does not disclose the basis for the Court's reasoning or attempt to defend the extravagant fees sought. Whatever indirect effect the Award may have on his owned or controlled companies' efforts to recover purported legal fees does not change the fact that the Award did not impose any obligations on Cardenas in a personal capacity (or on his companies), but exclusively on Mexico.

Cir. 2000), *Hoteles Condado Beach v. Union De Tronquistas*, 763 F.2d 34 (1st Cir.1985), *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16 (2d Cir. 1997), and *Prudential Securities, Inc. v. Dalton,* 929 F. Supp. 1411 (N.D. Okla.1996)—are readily distinguishable. Both *Int'l Union* and *Hoteles* vacated arbitration awards in which an arbitrator denied *signatories to the agreement* an opportunity to be heard. *See Int'l Union*, 232 F.3d at 390 (4th Cir. 2000) ("we cannot sanction the decision of an arbitrator who failed to provide *a signatory* to the arbitration agreement a full and fair hearing."); *Hoteles*, 763 F.2d at 39 ("The arbitrator is not bound to hear all of the evidence tendered by the parties; however, *he must give each of the parties to the dispute* an adequate opportunity to present its evidence and arguments."). Likewise, in *Tempo*, the Court held that the arbitrator erred in refusing to allow a party to the arbitration to call a particular witness. 120 F.3d at 19. Despite that party's insistence that the testimony would be critical, the arbitrator stated only that the testimony would be cumulative, and gave no further explanation. *Id.* at 20. The court concluded this was error. *Id.* In *Prudential*, the court explained that the arbitrator "is guided by a basic requirement to grant *the parties* a fundamentally fair hearing" and that "[v]acatur is appropriate only when the exclusion of relevant evidence so affects *the rights of a party* that it may be said that he was deprived of a fair hearing." 929 F. Supp. at 1415 (N.D. Okla. 1996) (cleaned-up).

Although each of these cases speaks to the importance of granting *the parties* a full opportunity to be heard, Cardenas ignores that he was not a party to the arbitration, nor was he asked by a party to testify. Indeed *none* of these cases state that an arbitrator must allow a non-party and non-signatory a full opportunity to be heard—particularly where, as here, that non-party never attempted to participate in the first place.

Cardenas does, however, cite several cases stating that a third-party is not prohibited from intervening in or otherwise challenging an arbitration award. Dkt. 23-1 at 8-9. Yet Cardenas again ignores crucial distinctions between his own arguments and the cases he relies on, and he vastly overstates the holdings of these cases. For example, he cites *Bruscianelli v. Triemstra*, 2000 WL 1100439, (N.D. Ill. Aug. 4, 2000), but ignores the court's instruction that a third-party intervenor can challenge an arbitration award only when "the arbitrator goes outside its jurisdiction and issues a ruling *purporting to bind that party*." 2000 WL 1100439, at *4. He also argues that *Westra Constr., Inc. v. U.S. Fid. & Guar. Co.*, 2006 WL 1149252 (M.D. Pa. Apr. 28, 2006) is analogous to his situation, but similarly ignores that the underlying arbitration award in that case held that a non-party to the arbitration was "liable to Westra for over $1 million." 2006 WL 1149252 at *2. Indeed, Cardenas cites only a single case where a court permitted a intervenor to challenge an arbitration award that did not directly bind that intervenor: *Ass'n of Contracting Plumbers of City of New York, Inc. v. Loc. Union No. 2 et al*., 841 F.2d 461 (2d Cir. 1988). There, the court permitted an international plumbing union to challenge an arbitration award which bound its local chapters. 841 F.2d at 467. Cardenas' argument shares no similarities to this union case.

None of the cases that Cardenas cites stand for the proposition that a non-party has a right to intervene under the FAA; instead, they state only that a non-party to an arbitration may seek to intervene in an enforcement action when the relevant arbitration award purports to bind that non-party. The Award here does not purport to bind Cardenas in any way.

4. <u>This Proceeding Does Not Threaten To Impair Any Legally Protected Interest Of Cardenas.</u>

Cardenas incorrectly argues that the Award has "created an untenable legal conflict for Mr. Cardenas." Dkt. 23-1 at pg. 14. Specifically, he contends that the Tribunal's findings "directly

contradict the earlier findings of the Mexican courts on the same legal questions arising out of his commercial dispute with Lion." *Id.* This argument fails for four reasons.

First, and as noted above, Cardenas seeks to challenge the Award on improper grounds. It is well established that "courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract." *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 36 (1987); *see also Kanuth v. Prescott, Ball & Turben, Inc.*, 949 F.2d 1175, 1178 (D.C. Cir. 1991) ("Courts have recognized that judicial review of arbitral awards is extremely limited. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.). Cardenas' request that this Court allow his intervention to challenge the Tribunal's factual findings is improper, and alone warrants denial of his motion.

Second, Cardenas' argument that the Tribunal made findings that differ from those made by the Mexican Courts is axiomatic. Lion Mexico initiated the arbitration after facing unfair and inequitable treatment in the Mexican court system. This includes the Mexican courts refusing to provide adequate notice to Lion Mexico of proceedings initiated against it, accepting forged documents to Lion Mexico's detriment, and procedurally estopping Lion Mexico from challenging the authenticity of those forgeries. *See* Award at ¶¶ 153-54, 171. 174. Cardenas' argument that the Tribunal and the Mexican courts reached different conclusions only reinforces why Lion Mexico sought arbitration in the first instance. The Mexican courts repeatedly denied Lion Mexico due process, and findings that result from proceedings that fail to provide a party with due process should not be considered a basis to vacate an Award that was the result of an indisputably impartial arbitration in which all parties were afforded due process.

Third, Cardenas has identified no contradictory obligations imposed on him by the Award. Since the Award imposes no obligations on Cardenas, it cannot subject him to contradictory obligations.

Fourth, Cardenas has also identified no right to participate in the arbitration. Lion Mexico sought arbitration pursuant to NAFTA Chapter 11. This Chapter applies to disputes between a NAFTA-Party (the U.S., Mexico, or Canada) and either investors from another NAFTA-Party, or investments of investors of another NAFTA-Party. *See* NAFTA Art. 1101. For purposes of NAFTA Chapter 11, the only relevant *parties* to the dispute are Lion Mexico, a Canadian investor, and Mexico, a NAFTA-Party. Nevertheless, the ICSID Arbitration Additional Facility Rules[3] permit a non-disputing party to seek to "file a written submission with the Tribunal regarding a matter within the scope of the dispute." ICSID Arbitration (Additional Facility) Rules Art. 41(3), 2006. The Tribunal "*may allow* a person or entity that is not a party to the dispute . . . to file a written submission with the Tribunal" if the Tribunal determines that the submission would assist in resolving contested issues or would address a matter within the scope of the dispute, or if the non-disputing party has a significant interest in the dispute. *Id.* (emphasis added). In exercising this discretion, the Tribunal must also *consider* whether a non-disputing party submission would "disrupt the proceeding or unduly burden or unfairly prejudice either party." *Id.* Dispositively here, *Cardenas never attempted to participate in the arbitration*. To the extent that Cardenas now characterizes Mercado's applications to participate as requests to participate on his behalf—a

[3] At all times during the arbitration, the proceedings were governed by the ICSID Additional Facility Rules established in April 2006. On July 1, 2022, a revised set of Additional Facility Rules came into effect. *See* https://icsid.worldbank.org/news-and-events/communiques/icsid-administrative-council-approves-amendment-icsid-rules The 2022 edition of the Rules have no bearing on either this case or the underlying arbitration. *See* ICSID Additional Facility Rules, 2022 Edition, Rule 1(4) ("The applicable ICSID Additional Facility Arbitration Rules are those in force on the date of filing the request for arbitration.").

interpretation that is not supported by Mercado's filings—the Tribunal fully considered Mercado's applications under Art. 41(3); it requested briefing on Mercado's requests from both Lion Mexico and Mexico (both of which opposed the applications), and it ultimately denied the applications. Dkt. 23-6 ("[T]he parties agree, and the Tribunal concurs, that Mr. Mercado's petitions have not fulfilled the requisites set out in the Statement [of the Free Trade Commission on Non-Disputing Party Participation].[4] For instance, Mr. Mercado's communications do not clarify many particulars regarding his identify and background as the Statement demands."). Such denial was well-within the Tribunal's authority, *see* Art. 41(3), and Cardenas' apparent disagreement with that decision is not a 9 U.S.C. § 10(a) ground for vacatur. Moreover, Mercado never sought to renew his application to address the defects identified by the Tribunal, which he had the right to do, nor did Cardenas seek to intervene himself after the Tribunal rejected Mercado's request.

## III. THE COURT SHOULD NOT PERMIT CARDENAS TO INTERVENE PURSUANT TO FED. R. CIV. P 24(B)

The Court should not grant permissive intervention to Cardenas for the same reasons it should deny his motion to intervene as of right. Fed. R. Civ. P. 24(b) provides that "[o]n timely motion, the court may permit anyone to intervene who: (A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact." When a party seeks permissive intervention, he must establish "(1) an

[4] The Free Trade Commission ("FTC") is the central institution of the NAFTA. It was created by Article 2001 of the NAFTA to supervise to supervise the implementation of the NAFTA, and among other functions, oversee its further application and decide disputes about its interpretation. This is done through the issuing of Joint Statements. The FTC is comprised of cabinet-level representatives of the three member countries: Canada's Minister of International Trade, United States Trade Representative and Mexico's Secretary of the Economy (Secretaría de Economía). One of these Joint Statements addresses the issue of Non-Disputing Party Participation in arbitration under the NAFTA.
https://ustr.gov/archive/assets/Trade_Agreements/Regional/NAFTA/asset_upload_file660_6893.pdf

independent ground for subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of law or fact in common with the main action." *Env't Def. v. Leavitt*, 329 F. Supp. 2d 55, 66 (D.D.C. 2004)

As an initial matter, Cardenas does not attempt to identify a statute that grants him a conditional right to intervene. Similarly, Cardenas' motion is untimely under 9 U.S.C. § 12, as discussed above. Since Cardenas is time-barred from seeking his requested relief, *see supra* pg. 7, he also is unable to obtain redress, and his "defect of standing is a defect in subject matter jurisdiction." *Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987); *Deutsche Bank Nat. Tr. Co.*, 717 F.3d at 193 ("Article III requires a showing of injury-in-fact, causation, and redressability.").

Cardenas has also not asserted a claim with a common question of law or fact to the Petition[5] or Cross-Petition. Cardenas seeks to intervene to challenge the Tribunal's factual findings, which he contends has caused him to suffer reputational harm. However, challenges to the factual findings of the Tribunal regarding the conduct of Cardenas are not before this Court. Instead, this case solely concerns whether the Tribunal exceeded its authority or acted in manifest disregard of the law in interpreting Article 1105(a) of NAFTA in holding that the phrase "investments of investors" applied to Lion Mexico, so that it could commence arbitration proceedings to protect its mortgage investments in Mexico. In contrast, Cardenas seeks to reopen extensive factual findings regarding his conduct. This would require a full review of the entire arbitral record and would substantially delay the resolution of this matter on arguments *not raised within the three-month FAA deadline*. Furthermore, this review would require the Court to engage

[5] To the extent the Court believes that Cardenas has some legally sufficient interest in vacatur, that interest in already adequately represented by Mexico. *See Earthworks v. U.S. Dep't of Interior*, 2010 WL 3063139, at *2 (D.D.C. Aug. 3, 2010) (denying a permissive intervention motion because the putative intervenor's interests "are adequately represented.").

in precisely the type of impermissible second-guessing that has repeatedly been disallowed by the courts. *See Kurke,* 454 F.3d at 354 (holding that courts "do not sit to hear claims of factual or legal error by an arbitrator.")

Cardenas was not a party to the arbitration, nor is he obligated by the Award. Permissive intervention should be denied because any claims he may have are time barred, and, in any event are not allowable under the FAA.

**CONCLUSION**

For the foregoing reasons, the Court should deny Cardenas' motion to intervene.

**Respectfully submitted,**

Dated: September 6, 2022

*/s/ Reginald R. Goeke*

Reginald R. Goeke (DC Bar No. 435613)
MAYER BROWN LLP
1999 K Street NW
Washington, DC 20006
Tel: +1 (202) 263-3000
rgoeke@mayerbrown.com

John M. Conlon (*pro hac vice*)
MAYER BROWN LLP
1221 Avenue of the Americas
New York, NY 10020
Tel: +1 (212) 506-2500
jconlon@mayerbrown.com

*Attorneys for Respondent Lion Mexico Consolidated L.P.*