IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM OF LAW IN SUPPORT OF HECTOR CARDENAS' MOTION TO INTERVENE

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Mr. Hector Cardenas seeks to intervene as a Petitioner in this proceeding either as of right or permissively under Federal Rule of Civil Procedure 24 for the reasons discussed herein and in his accompanying declaration ("Cardenas Decl."). If allowed to intervene, Mr. Cardenas would propose to file a submission in favor of vacatur of the arbitration award ("Award") that is the subject of this proceeding. Petitioner United Mexican States ("Mexico") does not oppose this motion. Respondent Lion Mexico Consolidated, L.P. ("Lion") opposes this motion.

INTRODUCTION

The parties in the underlying arbitration have asked this Court to decide whether to vacate or confirm one of the most significant international arbitration awards in the history of the North American Free Trade Agreement ("NAFTA"). Unlike prior NAFTA awards, this is the first time in more than 25 years of NAFTA arbitration that an arbitral Tribunal has decided that *the judicial system* of one of its sovereign members has denied justice to a foreign investor of another country party to NAFTA. This watershed decision is especially remarkable given the serious jurisdictional and procedural defects of the underling arbitration.

To make a finding of Denial of Justice, the Tribunal first had to establish that it had jurisdiction—a finding which seems unlikely considering a jurisdictional defect that was presented to the Tribunal's attention in an *amicus curiae* application by the representative of the companies administered by Mr. Cardenas. The Tribunal rejected this application and ignored the jurisdictional problem.

Second, the Tribunal had to conclude that the courts' decisions amounted to "gross or notorious injustice" of such nature that "it must impel the adjudicator to conclude that it could not have been reached by any impartial judicial body worthy of that name."[1]

[1] Award, ¶ 219, quoting J. Paulson.

Finally, to make a finding of Denial of Justice, the Tribunal had to conclude that the Mexican appellate courts—all the way to the highest court in the country—were given the opportunity to correct any "gross or notorious injustice" that may have been made by the lower courts, unless recourse to further domestic remedies is obviously futile or manifestly ineffective. This finding is implausible because Lion (1) discontinued two cases prematurely, before an *intermediate court* of constitutional relief and a civil court in a mortgage foreclosure proceeding could issue a decision in each; and (2) filed a *new case* against Mr. Cardenas after having started the NAFTA arbitration. This case remains pending in the Mexican courts.

Paradoxically, the same arbitral Tribunal that decided that the courts of Mexico denied justice to Lion, did exactly that to Mr. Cardenas. The arbitral Tribunal denied justice to Mr. Cardenas by making significant findings of fact that have been devastating to the reputation, financial and legal interests of Mr. Cardenas and the companies he administers, without giving Mr. Cardenas any opportunity to defend himself. In other words, the arbitral Tribunal significantly affected Mr. Cardenas' interests without giving him any due process—the very same due process that the Tribunal faulted the judicial system of Mexico for supposedly not providing to Lion.

This is the reason for Mr. Cardenas' intervention. Although Mr. Cardenas is the central figure in the transactions that underlie the subject matter of the Award and is specifically referenced 111 times in the Award, he was not permitted to participate in those proceedings. The Award makes specific findings about and against Mr. Cardenas that contradict findings in Mexican courts and include whether the settlement agreement that was at the heart of the local court disputes and at the heart of the arbitration is a valid agreement. Lion is now attempting to use those findings in the Award as evidence against Mr. Cardenas in Mexican court proceedings.

Neither of the two parties before the Court represent Mr. Cardenas's legally protected interests nor speak to the denial of due process that is unique to him. Mr. Cardenas's application is also timely, and he has standing. Mr. Cardenas' intervention, if allowed by the Court, would not be disruptive of these proceedings. To the contrary, Mr. Cardenas is confident that the submissions he would make in these proceedings would be of significant value to the Court in deciding whether it should vacate or confirm the Award. Therefore, he should be permitted to intervene in this action under Rule 24 of the Federal Rules of Civil Procedure.

BACKGROUND

The parties to the underlying arbitration have already recited the facts from the arbitral Award that is the subject of this action to vacate in which Mr. Cardenas is seeking to intervene. Mr. Cardenas offers a different perspective in his accompanying declaration, much of which the arbitral tribunal was unaware and for which it could not have accounted. *See generally,* Cardenas Decl.

A. The Agreement Between Mr. Cardenas And ING Clarion

Mr. Cardenas is a Mexican businessman and property developer. In early 2007, Mr. Cardenas and ING Clarion—Lion's parent company at the time— reached an agreement to begin a business partnership as a joint investment in two development projects that Mr. Cardenas had in Mexico: one a beach resort, and the other a mixed-use shopping center with two high-rise buildings. ING Clarion proposed to begin the investment through three short-term bridge loans that would be converted into share participations in the two Mexican companies involved in the development. Cardenas Decl., ¶¶ 3-5. These companies were called "Bains" and "C&C Capital," and were both administered, represented, and partially owned by Mr. Cardenas. *Id*., ¶¶ 2, 5.

The intention of the loans was as a bridge to eventually be converted into equity in the

companies represented by Mr. Cardenas. *Id*., ¶¶ 5-7. The parties confirmed their agreement when the second of three loans was signed, and Mr. Cardenas received a letter in June 2007, signed by Mr. Hendricks of ING Clarion, to that effect. *Id*., ¶¶ 6-7.

Following the 2008 financial crisis, ING Clarion began to alter the initial agreement. *Id*., ¶ 8. ING Clarion first asked Mr. Cardenas to place the developments on hold, but later informed Mr. Cardenas that it no longer wanted to make a joint investment and instead wanted the loans repaid, with interest. *Id*., ¶¶ 8-9. The loans had predatory interest rates: 18% regular interest rate, compounded quarterly, and 25% default rate, also compounded quarterly, applicable after the loan was declared in default. *Id.,* ¶ 11. As noted, the loans had never been intended to be repaid in cash, but rather converted into equity in the two companies that Mr. Cardenas represented and that were involved in the developments. *Id*., ¶¶ 2, 5. Following additional discussions, Mr. Robert Baer, who had brokered the original agreement with ING Clarion and who managed the day-to-day relationship, told Mr. Cardenas that he did not need to worry about the letters regarding the loans because they were only a formality. *Id*., ¶¶ 8-10.

After the pressure from Clarion continued, Mr. Cardenas began to negotiate an alternative solution with Ms. Onay Payne, one of its executives. *See Id*., ¶¶ 11-13. Ms. Payne next threatened to foreclose on the two mortgages and take the entire properties. *Id*., ¶ 13. When Mr. Cardenas reminded Ms. Payne of the original agreement and showed her the letter signed by Mr. Hendricks in June 2007, Ms. Payne said that the agreement was legally worthless and would only be good to frame it and hang it on Mr. Cardenas' wall. *Id*., ¶¶ 14.

B. The Mexican Court Proceedings

The breakdown in further negotiations led to litigation in Mexico. Several court cases were initiated between Mr. Cardenas and Lion starting in 2012, including mercantile, civil,

constitutional relief, and criminal court cases.

While still in the middle of the litigation, Lion decided to discontinue two—but not all—of the legal proceedings from the courts of Mexico and, instead, transform its Mexican court disputes with Mr. Cardenas into an investor-State international arbitration against Mexico to recover its investment plus a predatory rate of return. *Id*., ¶¶ 11, 19. Lion also continued to pursue simultaneous actions in Mexican court on the same issues. Lion even initiated an additional criminal proceeding against Mr. Cardenas in which Lion could potentially be awarded money damages. Lion used that case to freeze significant assets from two of the companies represented by Mr. Cardenas, and that case remains pending to this day. *Id*., ¶ 20.

C. Mr. Cardenas Was Excluded From Participating In Any Capacity In The International Arbitration

Mr. Cardenas and the companies he represents were at center stage of the arbitration. Mr. Cardenas himself was referenced 111 times in the Award. *Id*., ¶¶ 21-22. The Tribunal made significant findings of fact and law about Mr. Cardenas. *Id*., ¶¶ 30-31. Despite this, Mr. Cardenas was not allowed to participate in the arbitration in any capacity. *Id*., ¶ 23.

Mr. Ivan Mercado, an attorney acting as representative of the companies involved in the local disputes with Lion, asked the arbitral tribunal *five times* to be allowed to participate as *amicus curiae* in the arbitration. Because the arbitration was still in its early stages, Mr. Mercado's submissions related to issues of jurisdiction. *Id*., ¶¶ 25-26. Specifically, Mr. Mercado referred in his letters to the jurisdictional implications of still pending litigation in Mexico that Lion had initiated against Mr. Cardenas. *See id*., ¶ 26 and Exs.5 ¶¶ 3-5, 20-26; 6, ¶¶ 2-8; and 9, ¶¶ 2-7. This litigation included significant freezing orders on company real estate assets to pay for potential compensation that the Mexican courts might order. The pendency of these cases meant that Lion had failed to satisfy one of the jurisdictional preconditions of bringing a claim

under NAFTA's Section 1121; namely, the obligation to discontinue any pending litigation seeking money damages related to the measures that gave rise to the dispute submitted to arbitration, and the obligation not to initiate any new such proceeding after filing the request for arbitration. The Tribunal would not allow Mr. Mercado's participation as *amicus curiae*. *Id*., ¶ 26. Furthermore, the Tribunal ignored the jurisdictional implications of the issues raised in Mr. Mercado's letters. *Id*., ¶ 26

D. The Tribunal Made Adverse Findings Against Mr. Cardenas Without Allowing Him To Defend Himself

The arbitral Tribunal made a number of serious and adverse findings against Mr. Cardenas. Specifically, the Tribunal found that Mr. Cardenas had organized and carried out a fraudulent scheme against Lion. Award, ¶ 94. In addition, the arbitral Tribunal found that the settlement document that Mr. Cardenas had accepted with his signature on behalf of the companies, and that the companies represented by Mr. Cardenas in turn had used in legal proceedings to cancel the mortgages, was forged. Award, ¶ 103. In addition, the arbitral Tribunal found that the settlement agreement could not have any legal effect in Mexico. Award, ¶ 784. None of these findings were made with any due process having been accorded to Mr. Cardenas.

E. The Award Has Had Adverse Effects On Mr. Cardenas

The Award has created an irreconcilable legal conflict for Mr. Cardenas in his commercial relationship with Lion. The Tribunal's findings directly contradict the earlier findings of the Mexican courts on the same legal questions. *See* Cardenas Declaration, ¶ 36. In particular, the Mexican courts determined that Lion had failed to prove that the settlement agreement was fraudulent. Therefore, the Mexican courts regard that Lion and Mr. Cardenas have executed a valid settlement agreement that converted that arrangement into shares in Mr. Cardenas' companies. *Id*, ¶ 36. This settlement agreement extinguished any purported future

repayment obligation to Lion. *See id.,* ¶ 37. Contrary to those findings, the Tribunal found that the settlement document was a forgery, and therefore invalid. Award, ¶ 784.

The Award has already been used in Mexican court proceedings by Lion and other parties against Mr. Cardenas and the companies he represents. Cardenas Decl., ¶¶ 38-41. As an immediate result, Mr. Cardenas has seen a setback and an indefinite delay in his effort to obtain a court decision ordering Lion to reimburse Mr. Cardenas for the legal expenses incurred in the constitutional relief procedure that Lion withdrew *prematurely* before initiating the international arbitration against Mexico. *Id*., ¶ 40. This was after Lion's counsel made the court aware that any payment it ordered Lion to make to Mr. Cardenas would have to be reimbursed by Mexico to Lion. *Id.* As a result, Mr. Cardenas may never see a judgment for the $14 million he claims, or any other amount, contrary to the provisions in Mexican law. *Id.*

Mr. Cardenas might be sued by the Mexican government to reimburse Mexico for any amount that Lion is ordered to pay the companies represented by him. Mr. Cardenas might also be sued by the Mexican government to reimburse the money corresponding to the total amount of the Award, which is over $47 million plus interest and costs. *Id*., ¶¶ 42-44. This would be a double loss for the companies represented by Mr. Cardenas, because they have already issued shares in Lion's name to repay the loans, as provided in the settlement agreement that the Mexican courts regard as valid. *Id*., ¶¶ 42-44. Those shares had a book value of over $80 million as of December 2012, the year when they were issued to Lion. Award, ¶ 778, citing Mexico's Counter-Memorial, ¶ 301, and corresponding annexes.

F. Mr. Cardenas Only Learned Of This Proceeding Recently

This action was initiated on December 6, 2021. Neither party to this proceeding has ever served Mr. Cardenas of any notice of its initiation or progress. Indeed, Mr. Cardenas 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. Cardenas Decl., ¶ 52 (and Ex. 13). At first, he thought the article was referring to an ICSID annulment proceeding, where he would not be allowed to participate. On July 25, 2022, however, he learned that it was a US federal court proceeding. He promptly retained US counsel to determine his options, which led to the filing of this motion. *Id*., ¶¶ 52.

ARGUMENT

Federal Rule of Civil Procedure 24(a) requires a court to permit "anyone to intervene who […] 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." Intervention as of right is permitted in litigation to vacate an arbitral award even when the intervenor was not a party to the arbitration proceedings. As the United States Court of Appeals for the Second Circuit has explained:

> The threshold question here is whether under [FAA] § 10, a district court may entertain the motion of a non-party to set aside an arbitration award. There is little question that the [the proposed intervenors] have a substantial interest in the arbitrations and, consequently may intervene as of right under Rule 24(a). Once the right to intervene is established, the intervenor's status is equivalent to that of a party […] We conclude that the intervenors have standing in this action equal to that of [the existing parties] and, therefore, may move to vacate the arbitration awards and injunctions under 9 U.S.C. § 10.

Association of Contracting Plumbers of the City of New York, Inc. v. Local Union No. 1 et al., 841 F.2d 461, 467 (2d Cir. 1988) (allowing intervention of non-parties where the outcome of the arbitration "affect[ed] the intervenors in a sufficiently substantial and concrete manner as to confer standing to move to set them aside"). *See also Bruscianelli v. Triemstra*, No. 99 C 6446,

2000 WL 1100439, at *4 (N.D. Ill. August 4, 2000) ("we do not believe that [FAA Section 10] prohibits a third party from intervening [where] the arbitrator goes outside its jurisdiction and issues a ruling purporting to bind that party").

Other courts agree that non-parties to an arbitration may challenge an arbitral award that adversely affects them. *See Westra Construction, Inc. v. United States Fidelity & Guaranty Company*, Civil Action No. 1:03-CV-0833, 2006 WL 1149252, at *2 (M.D. Penn. April 28, 2006)(noting that "there is precedence for permitting non-parties to challenge an arbitration award when the nonparty is adversely affected by the decision" and finding that "[i]t would be manifestly unfair to deny [intervenor] the opportunity to defend itself, and to reject its challenge [to] the arbitration award"). *See also Barrington v. Lockheed Martin et al.*, No. 605CV1601ORL19KRS, 2006 WL 66720, at *7 (M.D. Fla. Jan. 11, 2006) (allowing non-party to underlying arbitration to pursue vacatur of the resulting arbitral award in set-aside litigation).

I. MR. CARDENAS IS ENTITLED TO INTERVENE AS A MATTER OF RIGHT

There are four prerequisites to an intervention as of right under Rule 24(a) "(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." *Atl. Sea Island Grp. LLC v. Connaughton*, 592 F. Supp. 2d 1, 6 (D.D.C. 2008) (quoting *Karsner v. Lothian*, 532 F.3d 876, 885 (D.C. Cir. 2008)). In addition, "the prospective intervenor must establish injury-in-fact to a legally protected interest, causation, and redressability." *Old Dominion Elec. Coop. v. Fed. Energy Regulatory Comm'n*, 892 F.3d 1223, 1233 (D.C. Cir. 2018) (citing *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 316 (D.C. Cir. 2015)).

Courts in this Circuit have taken a liberal approach to intervention. *See Wilderness Soc'y v. Babbitt*, 104 F. Supp. 2d 10, 12, 18 (D.D.C. 2000) (citing *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 910-11 (D.C. Cir. 1977)). As the United States Court of Appeals for the DC Circuit has observed, "[t]he right of intervention conferred by Rule 24 implements the basic jurisprudential assumption that the interest of justice is best served when all parties with a real stake in a controversy are afforded an opportunity to be heard." *Hodgson v. United Mine Workers of Am.*, 473 F.2d 118, 130 (D.C. Cir. 1972). Mr. Cardenas has satisfied these requirements and the Court should allow him to intervene in this litigation.

A. The Application To Intervene Is Timely

The timeliness inquiry under Rule 24(a) is a multi-factor analysis, which focuses on "the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the probability of prejudice to those already parties in the case." *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1295 (D.C. Cir. 1980). "[M]easuring the length of time passed is not in itself the determinative test because [the analysis] do[es] not require timeliness for its own sake." *Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014) (quotation marks omitted). This application is timely.

Mr. Cardenas first became aware of this proceeding on July 12, 2022, when he read an article in the Mexican press. Cardenas Declaration, ¶ 52. He consulted with counsel in the United States and learned on July 25 that the vacatur proceeding was in Washington, D.C. federal court—a proceeding in which he could seek to intervene. *Id.* Mr. Cardenas' counsel entered an appearance in this action on August 8 and informed the Parties of Mr. Cardenas' intention to file a motion to intervene as soon as practicable. Mr. Cardenas filed this motion on August 22, 2022.

The Parties would not be prejudiced by Mr. Cardenas' intervention in this litigation. *First*, this Court has not made any dispositive rulings. *Second*, Mexico does not oppose Mr. Cardenas' intervention. *Third*, Mr. Cardenas proposes to merely file an additional brief and evidence in support of vacatur. Both Lion and Mexico will have an opportunity to respond to any arguments made by Mr. Cardenas. There will be no need to re-brief issues already submitted by the Parties in their pending cross-petitions for vacatur and confirmation of the award, as the grounds for vacatur that Mr. Cardenas will advance are different to those already submitted by Mexico.

By contrast, excluding Mr. Cardenas from the proceedings would be highly prejudicial to his interests and would only compound the prior denial of his due process rights. This is Mr. Cardenas' only opportunity to challenge an arbitral award that made serious findings of unlawful conduct against him without affording him an opportunity to be informed of what was being said about him during the arbitration and to present evidence in his defense and the defense of the companies he represents. Consequently, there is a critical "need for intervention as a means of preserving the applicant's rights." *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1295 (D.C. Cir. 1980).

In addition, excluding Mr. Cardenas from these proceedings would deprive the Court of the opportunity to be briefed on an important jurisdictional defect in the Award that would call for vacatur, as issuing an award without jurisdiction is the prime example of an arbitral tribunal exceeding its powers.

B. Mr. Cardenas Has A Legally Protected Interest In This Litigation

Intervention is appropriate where the proposed intervenor's interests are "of such a direct and immediate character that [the proposed intervenor] will either gain or lose by the direct legal

operation and effect of the judgment." *Convertino v. U.S. Dep't of Justice*, 674 F. Supp. 2d 97, 108 (D.D.C. 2009) (quoting *United States v. AT&T*, 642 F.2d 1285, 1292 (D.C. Cir. 1980)).

Mr. Cardenas satisfies this prong of the inquiry because this Court's confirmation of the Award would serve to foreclose the Award from future collateral attack, and in turn, would cement the arbitral tribunal's violations of Mr. Cardenas' legally protected rights. As such, Mr. Cardenas would "lose by the direct legal operation and effect of [this Court's] judgment." Of critical importance, the underlying arbitration was seated in Washington, D.C. Award, ¶ 28, and at 212. As such, the governing law of the arbitration was US law—with its attendant procedural and due process protections. US law is clear that in circumstances of fundamental unfairness in the arbitral proceeding, vacatur is appropriate. *See* 9 U.S.C. Section 10(a).[2]

First, the arbitral tribunal violated Mr. Cardenas' right not to have findings made as to his rights and obligations while a non-party to the arbitration. A violation of this right can properly be the basis for vacatur of an award. *See, e.g.*, *Hendricks v. Feldman L. Firm LLP*, No. CV 14-

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[2] In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

826-RGA, 2015 WL 5671741, at *3–5 (D. Del. Sept. 25, 2015) (vacating arbitral award where it "imposes, albeit indirectly, an obligation on […], a non-party to the arbitration" and "because it creates a possibility that [the non-party] will be subject to inconsistent obligations."); *see also Orion Shipping & Trading Co. v. E. States Petroleum Corp. of Panama, S. A.*, 312 F.2d 299, 300–01 (2d Cir. 1963) (affirming the district court's vacatur of an arbitral award where "the arbitrator exceeded his powers in determining the obligations of a corporation which was clearly not a party to the arbitration proceeding.").

Second, Mr. Cardenas was denied his right to a fair hearing and the opportunity to defend himself against accusations of serious, unlawful conduct in the underlying arbitral proceedings. The right to due process of law is a fundamental, legally protected interest that can be the basis for the vacatur of an arbitral award if it has been denied by an arbitral tribunal. *International Union, United Mine Workers of America* et al. *v. Marrowbone Development Company,* 232 F.3d 383, 390 (4th Cir. 2000) (finding that the Court "cannot sanction the decision of an arbitrator who failed to provide a signatory to the arbitration agreement a full and fair hearing" and affirming the district court's vacatur of the award); *Hoteles Condado Beach v. Union De Tronquistas*, 763 F.2d 34, 38 (1st Cir.1985) (affirming the district court's vacatur of the arbitral award where the tribunal refused to consider evidence submitted by one of the parties and thereby denied it an "adequate opportunity" to be heard); *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 19–21 (2d Cir. 1997) (affirming the district court's vacatur of the arbitration award where the arbitral panel excluded evidence related to a claim of fraudulent inducement). *See also Prudential Securities, Inc. v. Dalton*, 929 F.Supp. 1411, 1417 (N.D.Okla.1996) (finding that arbitrator engaged in misconduct by making a final decision without hearing "evidence pertinent and material to the controversy"). Had Mr. Cardenas been given an opportunity to be informed

of Lion's allegations about him and present a defense in the arbitration, he would have been able to proffer evidence that would have directly refuted the factual predicates on which the tribunal based its findings of fraud. *See* Cardenas Declaration, ¶¶ 28-32.

Third, the Award has created an untenable legal conflict for Mr. Cardenas and the companies he represents in their relationship with Lion. This too is a basis for vacatur of the Award. *See, e.g.*, *Hendricks v. Feldman L. Firm LLP*, No. CV 14-826-RGA, 2015 WL 5671741, at *3–5 (D. Del. Sept. 25, 2015) (vacating arbitral award where "it creates a possibility that [the non-party] will be subject to inconsistent obligations."). The arbitral tribunal's findings—in Mr. Cardenas' absence—directly contradict the earlier findings of the Mexican courts on the same legal questions arising out of his commercial dispute with Lion. Cardenas Declaration, ¶ 33. In particular, the Mexican courts determined that Lion and Mr. Cardenas had executed a valid settlement agreement that converted that arrangement into shares in Mr. Cardenas' companies. Cardenas Declaration, ¶ 33. As a result of this determination, Lion acquired significant stakes in the two companies Mr. Cardenas represents (Bains and C&C Capital). *Id.* ¶ 41. Together, these two stakes had a book value of $81.4 million as of December 2012, the year they were issued in Lion's name. Award, ¶ 778. This settlement agreement extinguished any purported future repayment obligation to Lion. *Id.* ¶ 41. In direct contradiction of those findings, the tribunal found that the settlement document was a forgery, and therefore invalid. These two findings are irreconcilable and expose Mr. Cardenas to competing legal obligations: if—as the Mexican courts have concluded—the settlement agreement is valid, then Mr. Cardenas has satisfied all outstanding obligations to Lion; if it is not—as the tribunal has concluded—then the repayment obligation is still alive to the extent not satisfied in the Award. Gallingly, Lion continues to own the shares in the two companies Mr. Cardenas represents pursuant to the Mexican court's

decision, on the basis of the settlement agreement. While Lion lambasted the settlement agreement as a forgery in the arbitration—and if allowed will pocket an Award of more than $47 million against Mexico—*Lion also continues to retain the rights to the fruits of that very same (allegedly fraudulent) settlement agreement*.

In addition, Lion still maintains criminal proceedings against Mr. Cardenas in Mexico, with the only apparent purpose of maintaining substantial assets owned by the companies Mr. Cardenas represents frozen to satisfy a potential award of damages to Lion by the Mexican courts. *Id*., ¶ 20.

Mr. Cardenas has also been harmed by the arbitral tribunal's findings in at least the following ways, in addition to the reputational harm that is so important to any human being and to any businessman:

a. *Lion is attempting to use the Award to short-circuit the remaining Mexican litigation proceedings by labeling Mr. Cardenas a perpetrator of fraud*. As Mr. Cardenas relates,

> Lion was the first one to use the Award against me and the Companies in court. Only four days after the Award was issued, Lion filed a petition introducing a copy of the Award before the Mexican Court that was deciding Lion's challenge to a lower court's finding that Lion had to reimburse the Companies I represent, as provided by Mexican law, as a result of Lion's decision to withdraw from the review process of the foreclosure proceedings immediately before starting the arbitration. (The issue of the assessment of this penalty is mentioned in paragraphs 832-833 of the Award.). Lion petitioned the Court to accept the arbitral Tribunal's findings in the Award as proof that the settlement document was fraudulent, that the Courts of Mexico acted illegally denying justice to Lion, and that Lion's withdrawal from the foreclosure proceedings was justified.

Cardenas Declaration, ¶¶ 39-40.

Lion included the text of paragraph 838 of the Award in its petition to the Mexican court, which orders Mexico to reimburse Lion any amount of money that a Mexican court

should order Lion to pay to the companies represented by Mr. Cardenas. Lion's aggressive use of the Award as a weapon against Mr. Cardenas has already had an impact. The court ruled in favor of Lion and remanded the proceedings to another court to calculate the damages using criteria that would result in a much lower amount. The company represented by Mr. Cardenas has appealed, but the payment of approximately $14 million that the companies represented by Mr. Cardenas have been claiming by operation of Mexican law, has been indefinitely delayed—and may never be paid if the Award is not vacated. *Id.*, ¶ 37.

b. *The findings of fraud in the Award are being used against Mr. Cardenas in other legal proceedings, by other counterparties*. One month after the Award was issued, one of the parties in litigation initiated by two companies represented by Mr. Cardenas submitted a copy of the Award to the Mexican court hearing the case to persuade the court that Mr. Cardenas was a perpetrator of fraud, hoping to obtain a judgment against the interests of the companies represented by Mr. Cardenas. *Id*, ¶ 41 (citing Ex. 12 to Cardenas Declaration).

c. *The Award subjects Mr. Cardenas to potential legal jeopardy*. Mr. Cardenas has received credible information that high government officials in Mexico have called for Mexico to go after Mr. Cardenas to "reimburse the country for the Award and the legal costs of the arbitration." *Id*, ¶¶ 42-44.

C. These Proceedings Threaten to Further Impair Mr. Cardenas' Interests

The impairment inquiry under Rule 24 "is not a rigid one: consistent with the Rule's reference to dispositions that may 'as a practical matter' impair the putative intervenor's interest, courts look to the 'practical consequences' of denying intervention." *Forest Cty. Potawatomi*

Cmty. v. United States, 317 F.R.D. 6, 10-11 (D.D.C. 2016) (quoting *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003)).

If this Court confirms the Award—as Lion has asked it to do—Mr. Cardenas would have no further way of vindicating his injured interests, as the Award at that point will not be subject to collateral attack, set-aside, or any other remedy except for an appeal. Instead, the arbitral Tribunal's findings of serious, unlawful conduct against Mr. Cardenas will have been confirmed in a judgment of this Court. This would likely cause substantial further injury to Mr. Cardenas who—as enumerated above—has already been harmed by the Tribunal's findings made in his absence, and in violation of his right to due process.

D. Mr. Cardenas Has Standing

"The standing inquiry for an intervening defendant is the same as for a plaintiff: the intervenor must show injury in fact, causation, and redressability." *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 316 (D.C. Cir. 2015). As a practical matter, "when a putative intervenor has a 'legally protected' interest under Rule 24(a), it will also meet constitutional standing requirements, and vice versa." *Wildearth Guardians v. Salazar*, 272 F.R.D. 4, 13 n. 5. (D.D.C. 2010). Mr. Cardenas satisfies the necessary requirements to establish standing.

Mr. Cardenas has demonstrated that the arbitral tribunal's findings have injured him in several concrete ways. There can be no question that the tribunal's findings against Mr. Cardenas are the proximate cause of the enumerated injuries. Finally, vacatur of the Award—and of the tribunal's findings—would erase these injurious effects.

E. Mexico and Lion Do Not Represent The Interests Of Mr. Cardenas

Neither Mexico, nor Lion represent Mr. Cardenas' interests in this litigation. "[T]he putative intervenor[s'] burden [on the question of adequacy of representation] is *de minimis*, and extends only to showing that there is a ***possibility*** that its interests may not be adequately represented absent intervention." *Forest Cty.*, 317 F.R.D. at 11 (emphasis added). This standard is readily satisfied here.

In the underlying arbitration, Lion pursued an aggressive strategy of labeling Mr. Cardenas as a perpetrator of fraud and has made no arguments in these proceedings to contradict that posture.

Mexico accepted Lion's assertions of purported fraud by Mr. Cardenas in the arbitration. As set forth in the Award:

- Mexico told the tribunal that "[Mr. Cardenas'] alleged multi-level fraud was so complex and sophisticated that its judicial system could not withstand it." Award, ¶ 94.
- The tribunal stated that it "***concurs with Mexico*** that the evidence marshalled in this case supports the conclusion that Sr. Cardenas and the debtors engaged in a sophisticated fraud . . . ." Award, ¶ 366 (emphasis added).

Nor has Mexico made any arguments in this litigation in support of Mr. Cardenas' due process rights. To the contrary, Mexico has labeled Mr. Cardenas' actions as "reprehensible." Mexico's Motion to Vacate Award, ¶ 61.

Finally, the single ground that Mexico advances to vacate the Award is unrelated to Mr. Cardenas' injuries.

II. ALTERNATIVELY, THE COURT SHOULD GRANT PERMISSIVE INTERVENTION

Federal Rule of Civil Procedure 24(b)(1) provides, in pertinent part: "On timely motion, the court may permit anyone to intervene who: […] (B) has a claim or defense that shares with the main action a common question of law or fact." Courts have "wide latitude" in determining whether a third-party should be permitted to intervene. *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998). Courts typically look for an intervenor to meet the following requirements: "(1) an independent ground for subject matter jurisdiction;[3] (2) a timely motion; and (3) a claim or defense that has a question of law or fact in common with the main action."

As demonstrated in Section I, Mr. Cardenas satisfies these factors. Accordingly, should the Court decline to accept Mr. Cardenas' motion to intervene under Rule 24(a), the Court may grant Mr. Cardenas the right to intervene under Rule 24(b).

CONCLUSION

For the foregoing reasons, Mr. Cardenas respectfully requests that this Court grant his motion to intervene as a petitioner as of right or, in the alternative, permissively, and order that he be allowed to file a brief of no longer than 45 pages, along with supporting documentation, addressing his unique arguments regarding why this Court should vacate the arbitration award at issue in this action currently pending before the Court.

[3] As Mr. Cardenas would be advancing arguments in support of Mexico's Petition to Vacate the Award under Section 10 of the Federal Arbitration Act, federal question jurisdiction exists under 28 U.S.C. Section 1331.

Dated: August 22, 2022
Washington, D.C.

Respectfully submitted,

By: */s/ Luis A. Parada* .

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