INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
International Arbitration Tribunal

CASE NUMBER 01-21-0000-4309

ARBITRATION PURSUANT TO
THE COMMERCIAL ARBITRATION RULES OF
THE AMERICAN ARBITRATION ASSOCIATION

BETWEEN:

TELECOM BUSINESS SOLUTION, LLC, on its own behalf and derivatively, on behalf of CONTINENTAL TOWERS LATAM HOLDINGS LIMITED, and LATAM TOWERS, LLC, on its own behalf and derivatively on behalf of CONTINENTAL TOWERS LATAM HOLDINGS LIMITED,

Claimants,

vs.

TERRA TOWERS CORP., TBS MANAGEMENT,S.A., DT HOLDINGS INC., JORGE HERNANDEZ and ALBERTO ARZÚ,

Respondents,

and

CONTINENTAL TOWERS LATAM HOLDINGSLIMITED,

Nominal Respondent,

TERRA TOWERS CORP., TBS MANAGEMENT,S.A., DT HOLDINGS INC. derivatively and on behalf of CONTINENTAL TOWERS LATAM HOLDINGS LIMITED,

Counterclaimants,

vs.

TELECOM BUSINESS SOLUTION, LLC, LATAM TOWERS, LLC, F. HOWARD MANDEL, JOHN RANIERI, RYAN LEPENE, and AMLQ HOLDINGS (CAY) LTD.,

Counterclaim Respondents.

-and-

CONTINENTAL TOWERS LATAM HOLDINGS LIMITED,

Nominal Respondent.

AMLQ HOLDINGS (CAY) LTD.,

Counterclaimant,

vs.

TERRA TOWERS CORP. and TBS MANAGEMENT,S.A.

Counterclaim Respondents.

FIFTH PARTIAL FINAL AWARD

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WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the arbitration provision contained in the Shareholders Agreement (the "SHA" or "Agreement"), dated October 22, 2015, between and among Claimants Telecom Business Solution LLC and Latam Towers LLC, each an affiliate of Peppertree Capital Management (together, "Peppertree"), AMLQ Holdings (CAY) Ltd. ("AMLQ") (collectively hereinafter "Claimants"), Respondents Terra Towers Corp. and TBS Management S.A. ("Terra" or the "Shareholder Respondents"), and nominal party Continental Towers Latam Holdings Limited (the "Company"), and having been duly sworn, and having duly heard and considered the proofs and allegations of the parties, do hereby issue this Fifth Partial Final Award.

PREAMBLE

(1) This is the Fifth Partial Final Award in what should be regarded, by anyone who cares about international arbitration as a viable dispute resolution process – as we do – as a deeply troubling case. We have made four Partial Final Awards[1], all of them against the Respondents, and none of them has been complied with in any respect. Instead, Respondents have pursued unsuccessful efforts to have each of those awards vacated at the seat of the arbitration, New York. Despite the fact that each award has been confirmed by the United States District Court for the Southern District of New York ("SDNY Court") (and one of those judgments has been affirmed by the United States Court of Appeals for the Second Circuit, while an appeal of the three other enforcement judgments is *sub judice*) – still there has been no compliance. Instead, Respondents' efforts to undermine enforcement of the awards have become increasingly disturbing.

[1] These are annexed as Appendices 1-4, respectively. The Appendices to this Award are separately compiled in a PDF portfolio but they are an integral part of the Award, and the filing of the Award in a court that requires filing of the Award for purposes of obtaining or opposing judicial relief shall, from the perspective of this Tribunal, be considered ineffective unless the Appendices are included in the filing.

(2) In our Third Partial Final Award ("PFA-3," Appendix 3), we enjoined Respondents from pursuing multiple arbitrations in Central America in which they assert, through proxies, claims that Respondents had first raised as counterclaims in this arbitration but which we stayed as a noncompliance sanction. Our anti-arbitration injunction was confirmed by the SDNY Court but those foreign arbitrations have continued. Rather than become eligible for the lifting of our stay of their counterclaims by complying with our orders and awards, Respondents chose instead to take their claims to what they apparently see as more welcoming tribunals.

(3) One of the interim measures with which Respondents have refused to comply was our order in 2021 requiring Respondents to reinstate the CEO of the Company (the Company is a nominal Respondent, while the dispute is, in essence, between the Company's minority and majority shareholders), whom the Respondents had removed from that position in breach of the Parties' contract controlling the governance of the Company. Those orders have been ignored and – at an enormous cost to the Claimants and the CEO – Respondents have waged a four-year campaign to harass, vilify, humiliate, vexatiously prosecute, and attempt to kidnap the CEO, and – as this Award was in preparation in recent weeks– ultimately to procure his imprisonment in Guatemala.

(4) The CEO and his father – the latter a former executive of the El Salvador affiliate of one of the Respondents – are incarcerated in a Guatemala prison. They are detained ostensibly for extradition to El Salvador to be criminally prosecuted there on charges that we determined to be false in our Second Partial Final Award ("PFA-2," Appendix 2 annexed). Remarkably, at least one of the criminal charges is premised on the fact that the CEO participated in a hearing in this case in October 2021, providing testimony that we found credible. Respondents by continuing to claim

that the CEO committed "crimes," and causing public prosecutors in Central America accept this claim, are defying our authority and that of the SDNY Court.

(5) Moreover, in this Award we find that Respondents have been responsible for the publication – on several obscure, anonymous and untraceable websites that purport to offer "news" of interest to the arbitral community – of multiple "articles" that vilified the Claimants, falsely accusing one of them of Foreign Corrupt Practices Act violations, and defamed the Tribunal, first by asserting in March 2022 that the Chair had taken a bribe from one of the Claimants at the time of his appointment.[2] Our detailed discussion of the websites and articles that had come to our attention prior to the closing of the Phase 2 record appears in paragraphs 218-271 of this Award.

(6) Even as this Award was being prepared in recent weeks, a new anonymous article on one of those websites complained that the American Arbitration Association is not doing enough to weed out corrupt arbitrators such as members of this Tribunal. Such articles have uniformly parroted Respondents' positions and assertions in this proceeding, never alluding to the contrary positions taken by Claimants, or acknowledging the contrary findings determined by this Tribunal in proceedings compliant with due process for Respondents, as any legitimate journalistic endeavor would. In fact, the American Arbitration Association through its Administrative Review Council has rejected Respondents' efforts to disqualify this Tribunal not less than five times, and Respondents' separate federal lawsuit asking for the Tribunal to be disqualified has been dismissed.

[2] The obscurity of the websites does not prevent them from turning up in the results of search engine searches targeting information about persons mentioned in the articles.

(7) Three years of Respondents' injection into the public domain of falsehoods about this proceeding - now culminating in the imprisonment of the Company's CEO in Central America – have gone unrebutted in the public domain because the Tribunal has ethical obligations of confidentiality and Claimants and the Company have understood our Confidentiality Order to prevent them from making public disclosure of our orders and awards. To address this harmful imbalance, one of the measures we adopt today – in addition to an award of punitive damages, itself an exceptional step in an international arbitration – is to grant in a procedural order[3] the Company's application made March 10, 2025, supported by the Claimants, and not opposed by Respondents,[4] to modify the Confidentiality Order we made in 2021 to permit public disclosure of all of our orders and awards, including this one. We have concluded that it is necessary and appropriate for the truth to be made public as an antidote for the public campaign of disinformation perpetrated by Respondents and their proxies.

(8) Respondents' campaign, in addition to their efforts to intimidate this Tribunal and the Claimants, appears to have as its ultimate audience the courts of Central American countries where our awards (or the U.S. court judgments enforcing them) may be brought for recognition and enforcement, and where, it appears, Respondents intend to present false narratives to have those awards and judgments denied recognition (and also to have the CEO unjustly convicted of contrived criminal offenses).

[3] Appendix 5

[4] Although Respondents did not object to the Company's application, they challenged the veracity of the Company's assertion that the CEO had expressed his support for the application, citing to us Guatemala's legal restrictions on the liberties of prisoners including their rights to communicate.

(9) We hope that our decision to permit all Parties to lift the veil of confidentiality will be supported by the SDNY Court by rejecting any application the Respondents might present for the judicial sealing of this Award. We believe it would also be in the interest of justice for the SDNY Court to vacate its prior sealing orders of our earlier Awards.

(10) Some of the conduct by Respondents and/or their proxies may be prosecutable as violations of federal and state criminal laws in the United States. We have raised this issue with the Parties – initially in a procedural order made before the Phase 2 merits hearing (Appendix 5 to this Award) – and more recently as this Award was being prepared. Claimants have opposed our imposing upon them an obligation to make a criminal referral, and we choose to respect their wishes at this time. To be clear, our decision to take no steps with respect to criminal referral at this time does not indicate any diminution in our concern that crimes have been committed.

I. Introduction

1. This is the Fifth Partial Final Award in an arbitration that was commenced by Claimants in February 2021. It may not be the last award we will issue, because Claimants have alleged that they are continuing to make expenditures that they should recover as additional damages, in categories of claims as to which Respondents' liability is established herein.

2. As indicated above, the Claimants are (i) Telecom Business Solution LLC and Latam Towers, LLC, each an affiliate of Peppertree Capital Management (referred to herein together as "Peppertree"), and (ii) AMLQ Holdings (CAY), Ltd., an affiliate of Goldman Sachs ("AMLQ"). Peppertree and AMLQ together have owned approximately 45 percent of shares in

nominal Respondent Continental Towers Latam Holdings Limited (the "Company") since October 2015.[5]

3. Two of the Respondents, Terra Towers Corp. and TBS Management S.A. (referred to herein together as "Terra"), are the majority shareholders of the Company owning approximately 55 percent of the shares. Individual Respondent Jorge Hernandez owns and controls both Terra and Respondent DT Holdings, Inc. ("DTH"), a company that has provided services to the Company pursuant to contractual arrangements among the Parties, the Company and DTH (the "Governing Documents"). The individual Respondents Alberto Arzu, William Mendez and Alejandro Sagastume are, or in the past have been, officers and/or employees of Terra and directors of the Company. Mr. Hernandez also served as a director of the Company, from its establishment in 2015 until early 2023.

4. This arbitration involves disputes between the majority and minority owners of the Company, whose business is the development and operation of telecommunications towers in Central and South America. The Company was formed in 2015 when investors — the Claimants here — made a private equity investment in the Company's predecessor, until then wholly owned by or through affiliates of Terra.

5. Greatly simplified, the business model of the Company was to build telecom towers at suitable locations and then rent "space" on the towers to mobile communications operators. The Company pays DTH to carry out the construction and also to provide administrative overhead, including the services of DTH employees in Company management positions. Both the Company

[5] Peppertree's share interest in the Company is 32.2 percent and AMLQ's interest is 13.35 percent, for a total of 45.55 percent. (Claimants' Amended Statement of Claim ("ASOC") at paras. 28-29). Money damages awarded herein to Claimants for losses sustained by them in proportion to the respective interests are calculated and awarded separately to Peppertree and AMLQ. Certain damages are claimed only by Peppertree, and are awarded only to Peppertree as the injured party.

and DTH operate through locally-organized subsidiaries in each of the countries in the Company's territory. The providing of DTH-subsidiary employees for Company-subsidiary management occurs as it does at the parent level. At the parent level, one of the Governing Documents executed at the time of Claimants' investment in 2015 was an engineering, procurement and construction ("EPC") contract between the Company and DTH. This has come to be referred to in the arbitration as the "Offshore EPC Contract" to distinguish it from the "Onshore" EPC Contracts made country-by-country between Company subsidiaries and DTH subsidiaries. The 2015 Governing Documents also included the SHA, Articles of Association and By-Laws and a Development Agreement among the Company, Terra and DTH.

6. The Company, Continental Towers, was identified in 2021 in the Statement of Claim as a "nominal" party to this arbitration. The case at that time presented, most prominently, disputes between the majority and minority shareholders arising from Claimants' attempt to exercise their alleged right to have the Company sold to a third-party purchaser at the end of a five-year "Lock-Up Period" that expired in October 2020. Claimants sought specific performance of Terra's obligation to join with Claimants in a sale of the Company ("Company Sale") to a third-party purchaser. We ordered the specific performance claim to be heard first, with other claims and counterclaims reserved for a further phase of the arbitration. In our First Partial Final Award ("PFA-1," Appendix 1 annexed), issued on February 23, 2022, we granted the Claimants' claim for specific performance of the Company Sale obligation in Section 5.04(b)(ii) of the SHA. Claimants petitioned for confirmation of PFA-1 in the United States District Court for the Southern District of New York (the "SDNY Court"), and Respondents petitioned for PFA-1 to be vacated. For most of 2022 and into early 2023, we did not continue with the next phase of proceedings on the merits, as the Parties made an agreement to stay the next phase until the SDNY Court decided

their respective petitions. PFA-1 was confirmed and the petition to vacate was denied in a Judgment of the SDNY Court on January 18, 2023 (the "PFA-1 Judgment").[6] The U.S. Court of Appeals for the Second Circuit (the "Second Circuit") affirmed the PFA-1 Judgment on February 6, 2024.[7]

7. The three Partial Final Awards we have entered after PFA-1 arise from proceedings collateral to the original merits, but are significant to the Parties, because the Company needed to continue to operate — and to interact with Respondent DTH on day-to-day matters — while the dispute over whether the Company had to be and would be sold to a third-party purchaser ran its course. Disputes over corporate governance and legal representation of the Company in this arbitration have occupied large amounts of time and expense for the Parties and the Tribunal from September 2021 forward. In November 2021, after hearing the Parties, we issued an interim measures order that concluded that Respondents had wrongfully ousted the Company's CEO (Jorge Gaitán) and COO (Carol Echeverria) (together, "Company Management") from those positions, ordered Respondents to restore them to those positions, and confirmed that the Parties had made a mutually binding selection of the Company's counsel in a so-called Framework Agreement dated March 19, 2021. Respondents did not accept the November 2021 interim measures order. They also did not accept our subsequent rulings in late 2021 and early 2022 that reaffirmed the November 2021 order, denied Respondents' applications for reconsideration, and adopted additional interim measures addressed to Respondents' non-recognition of, and interference with, Company Management.

[6] U.S. District Court for the Southern District of New York, Case No. 1:22-cv-01761-LAK (hereinafter "SDNY Docket") at Entry Nos. 124, 125.

[7] SDNY Docket at Entry No. 210. *See* 2024 WL 446016 (2d Cir. Feb. 6, 2024).

8. The details of that phase of the case are described in PFA-2 dated August 12, 2022. PFA-2 was made after an evidentiary hearing in which Respondents chose to participate only as observers, based on their contention that the Tribunal was *functus officio* in regard to the status of Company Management. In PFA-2, we reaffirmed our prior interim measures rulings, found misconduct by Respondents and certain of their attorneys in connection with the creation and presentation to this Tribunal of evidence about alleged misconduct by Company Management, and imposed sanctions pursuant to AAA Commercial Rule R-58 (in the applicable 2013 version of the Rules). The sanction stayed proceedings on Respondents' counterclaims for so long as Respondents continued not to comply with our orders and awards. Another sanction conditioned the further participation in the case as co-counsel for Respondents of certain attorneys -- who had participated in the creation and presentation of misleading evidence -- upon Respondents' appointment of a "Submissions Counsel" who met certain New York Bar admission and experience criteria and who would bear ethical responsibility for all future submissions by Respondents. Claimants petitioned the SDNY Court for confirmation of PFA-2 and Respondents petitioned the SDNY Court to vacate it. On February 19, 2024, the SDNY Court granted the confirmation petition and denied the petition to vacate (the "PFA-2 Judgment").[8] Respondents have taken an appeal from the PFA-2 Judgment to the Second Circuit, which so far as we are aware is *sub judice.*

9. Litigation related to this arbitration has not been confined to proceedings on confirmation and vacatur in the SDNY Court and Second Circuit. Respondents have brought (directly in their own names, or in proceedings commenced by local Company or DTH officials)

[8] SDNY Docket at Entry No. 207.

at least one dozen separate lawsuits and arbitrations. The proceedings they commenced in the United States include:

(1) in March 2021, a lawsuit in a Florida state court against Torrecom, Inc., whose offer to purchase the Company in November 2020 for $407.8 million, presented by Claimants pursuant to Section 5.04 of the SHA, had been the initial step in the Company Sale process attempted by Claimants that immediately preceded commencement of this arbitration. The Torrecom lawsuit by Terra claimed that Torrecom had conspired with Claimants to effectuate a "squeeze-out merger" to eliminate Terra from the Company at an unfair price. (Ex. C-64).

(2) in March 2022, a lawsuit in a Florida state court against Company Counsel and Claimants (Ex. C-138) that sought to dislodge Company Counsel by rescinding for alleged mutual mistake the March 2021 Framework Agreement — the same agreement among all of the shareholders selecting the Company's counsel that the Tribunal had already recognized as valid and enforceable in its November 2021 interim measures order.

(3) in August 2022, a lawsuit in New York Supreme Court seeking to disqualify this Arbitral Tribunal.[9]

(4) in December 2022, a lawsuit in a Florida state court against American Tower International, Inc., alleging that American Tower had caused "substantial financial harm" to Terra and "ruinous pecuniary harm" to DTH by failing to close on a deal to acquire the Company in 2018 for $466 million. (Ex. C-63).

[9] This action was removed to the SDNY Court on August 26, 2022 (SDNY Docket at Entry No. 1). The petition to disqualify the Tribunal was denied by Judge Kaplan on February 21, 2024 (*Id.*, at Entry No. 59); a motion by Terra for reconsideration was also denied (*Id.*, at Entry No. 73). Terra has appealed to the Second Circuit. (*Id.*, at Entry No. 63).

(5) in May 2024, a lawsuit brought in New York Supreme Court by the Individual Respondents seeking a stay of this arbitration (reported to the Tribunal in a letter from Claimants' counsel on May 7, 2024).[10]

10. Respondents have also either caused to be commenced, or failed to cause to be terminated, at least the following foreign legal proceedings related to this arbitration:

(1) Criminal complaints against Company Management filed in courts in Guatemala in December 2021 and January 2022 predicated in part on purported criminal violations caused by providing testimony in this proceeding, as described in PFA-2 (and see also Ex. C-140, the December 2021 Guatemala criminal complaint against Mr. Gaitán).

(2) Four arbitrations, one in each of Peru, Guatemala, El Salvador and Honduras commenced in or about December 2022 to February 2023, in which the claimants are the managers of Company subsidiaries in those countries (the "Foreign Arbitrations"), designated by Respondents to serve in those local management roles. The subsidiary managers have sought damages against Claimants for having allegedly harmed the local Company subsidiaries by rejecting the development of certain cell towers. After an evidentiary process and hearing in January-February 2023, we issued a mandatory injunction in our Third Partial Final Award on February 22, 2023 ("PFA-3," Appendix 3 annexed) that required Respondents to cause the pending Foreign Arbitrations to be discontinued and to prevent any similar additional Foreign Arbitrations from being initiated. Claimants petitioned the SDNY Court to confirm PFA-3 and Respondents petitioned the SDNY Court to vacate it. The SDNY Court confirmed PFA-3 and denied

[10] This action was removed to the SDNY Court on May 6, 2024 at SDNY Docket No. 1:24-cv-03457-LAK, ECF Docket Entry No. 1. Claimants' motion to dismiss the petition for a stay was granted on July 12, 2024 (*id.* at Entry No. 34).

the petition to vacate on September 6, 2023.[11] (the "PFA-3 Judgment"). Respondents have appealed the PFA-3 Judgment to the Second Circuit.[12]

(3) A lawsuit filed on May 15, 2023 in the British Virgin Islands High Court of the Eastern Caribbean Supreme Court by the Company Chief Financial Officer Juan Francisco Quisquinay (a DTH employee whom we determined to be an agent of Respondents, as discussed in more detail below) against defendants that included the Company CEO, other members of Company Management and Claimants. Mr. Quisquinay's suit asked the BVI Court to re-determine determinations we had already made about the identity of the Company CEO and related matters (the "BVI Action," Ex. C-134). Our determinations had already been confirmed by the SDNY Court in the PFA-2 Judgment. Claimants applied to the SDNY Court for a mandatory injunction directing the termination by Respondents and their agents of the BVI Action and obtained that relief on February 20, 2024.[13]

(4) Counsel for the Parties have reported to us, during and after the Phase 2 hearing, the existence (or continuation) of criminal proceedings against Mr. Gaitán, spurred by Respondents or their agents, in the courts of El Salvador and Guatemala, and we have understood these proceedings to be still pending as of the time the record in this Phase 2 was closed in December 2024. We determined not to extend the Phase 2 process

[11] SDNY Docket at Entry No. 182.

[12] SDNY Docket at Entry No. 186. Our Fourth Partial Final Award (PFA-4, Appendix 4 annexed) quantified the award of reasonable legal costs and arbitration costs of Claimants' successful application for interim relief that resulted in PFA-3 (*see* PFA-3 at 43 decretal para. 9). Claimants petitioned the SDNY Court to confirm PFA-4 and Respondents petitioned the SDNY Court to vacate it. The SDNY Court confirmed PFA-4 and denied the petition to vacate on February 8, 2024. (SDNY Docket at Entry No. 202). Respondents have appealed the PFA-4 Judgment to the Second Circuit. *Id.* at Entry No. 217.

[13] SDNY Docket at Entry No. 208.

to develop a more detailed record about these proceedings, as we believe the record developed before the Phase 2 record was closed is sufficient to enable us to determine the issues that are before us.

11. We have provided this introduction to the litigations that have surrounded this arbitration in large part because, by the time we reached the stage in 2023 of (1) ascertaining from the Parties that they considered their stipulated stay of proceedings on the merits to have expired and (2) thereupon launching this Phase 2, Claimants' roster of claims had been materially expanded by reason of the Respondents' activities in 2022-2023. In Claimants' Amended and Consolidated Statement of Claim ("ASOC"), submitted October 11, 2023, the claims fell into approximately three categories: (i) those that related to continued non-occurrence of a Company Sale; (ii) direct claims of Claimants for damages consisting of out-of-pocket expenditures, for alleged Company obligations that Respondents allegedly refused to permit the Company to honor, and (iii) derivative claims for harm to the Company allegedly resulting from Company actions taken at the direction of the Respondents through the exercise of Respondents' *de facto* control of the day-to-day affairs of the Company. The particulars of these claims, the Parties' contentions concerning them, and our dispositions of them, will emerge as we discuss them claim by claim in the Sections of this Award that follow.[14]

[14] This is an appropriate juncture to address Respondents' contention that we are required to address (i) only the relief requested in the ASOC, and (ii) to do so only upon the precise articulations of claims stated in the ASOC, because there was no later version of the ASOC.

Rule 6(b) does not require a "new or different claim" to be stated *in a pleading*. It requires such a matter to be set forth in written form and filed with the AAA. Each alleged change in position by Claimants to which Respondents object satisfied this condition. The period for Respondents to answer such changes exceeded 14 days in each instance, so this requirement in Rule 6(b) was met. Our consent insofar as it was required was reflected in our acknowledgment of Claimants' submissions, a practice that the Parties have understood to connote the receipt into the record of the submitted matter subject to any motion for exclusion a party might wish to make (and seek leave to make). Respondents made no such motion to exclude any portion of Claimants' pre- or post-hearing Memorials or the arguments and evidence they presented at the Phase 2 merits hearing. In all events, Claimants did not submit after the

II. The Parties' Disputes Concerning the Torrecom Offer and Company Sale

A. Claimants' Claim of Ongoing Breach by Respondents' Continued Refusal of a Company Sale After Judicial Enforcement of PFA-1, and Respondents' Contention That Claimants, Not Respondents, Have Blocked a Company Sale

12. There is no dispute between the Parties that a full year elapsed from the issuance of PFA-1 on February 23, 2022, directing specific performance in the form of a Company Sale, to February 2023 when Respondents took what might (or might not) have been a step towards a Company Sale on February 4, 2023. (Ex. C-78). The proposed engagement of Citibank as the Investment Bank to conduct the sale never happened, and the Parties dispute who is to blame, with Claimants contending Respondents raised more, and inappropriate, objections, while Respondents say the blame is on Claimants.

13. The core of the dispute was over Citibank's distribution of Company Sale proceeds. Respondents contend that we decided in PFA-1 that Company Sale proceeds must be distributed *pro rata* immediately upon receipt, without regard to any setoffs such as other money damages, awarded or claimed. (Respondents' Pre-Hearing Reply Memorial at 12-13 paras. 27-28). Claimants contend PFA-1 made no such ruling, and that Respondents are seeking license to put their share of Company Sale proceeds out of Claimants' reach for satisfaction of damages they

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ASOC any "new or different claim" governed by Rule 6(b). A modified analytical approach to the same claim is not a "different claim" under that Rule. Neither is the suggestion of an approach to remedy that is at variance with the remedial approach articulated in a pleading.

The later mention of evidence, in support of a claim, that is not mentioned in a pleading also does not make the later submission a new or different claim. The objective of the Request for Arbitration or Statement of Claim in an AAA Commercial Rules arbitration, unless otherwise agreed, is to provide essential notice of the nature of the dispute, not to bind the submitting party to refrain from any evolution in the articulation of its claims unless an amended Request for Arbitration is permitted by consent of the Tribunal. Such broad application of Rule 6(b) is so antithetical to the objectives of efficient dispute resolution that we cannot conceive that this was the intention of the Rule's drafters, and Respondents submit no commentaries on the Rules showing that we are mistaken.

This Award is an Award only on the claims made in the ASOC. Insofar as the remedies we provide do not precisely align with the relief requested in the ASOC, we have exercised our powers under Rule R-47(a). We find Respondents' Rule 6(b) objections to be without merit.

might recover in this arbitration. Respondents also contend they were justified in not following through on the Board Resolution because (i) Citibank would not confirm it was ready to proceed, based on other work it was doing for Torrecom, and (ii) Respondents were, they say, entitled to insist as a condition precedent that Citibank update its valuation of the Company. (Respondents' Opening Pre-Hearing Memorial at 31-33). These secondary contentions are readily dismissed. Claimants were willing to engage a different investment bank to avoid potentially having to wait until completion of Citibank's Torrecom engagement for Citibank to proceed with sale of the Company. (Ex. R-338). But in fact there was no justified concern about such a waiting period, because Citibank signaled it was ready to proceed by asking the Parties to sign its Engagement Letter. (Ex. C-67). Rather, the real dispute is whether Claimants were insisting, and prevailing upon Citibank to implement, a proceeds distribution restriction that would violate a ruling we had made in PFA-1 (which upon judicial enforcement in the SDNY Court became the PFA-1 Judgment). For the reasons discussed below, we find that there was no such ruling in PFA-1 and that Respondents could not reasonably have believed there was. Mr. Rainieri of Peppertree testified in his May 24, 2024 witness statement, on the question of engagement of Citibank, and the veracity of this written testimony was not impeached during cross-examination at the Merits Hearing:

> 49. Following confirmation of the FPFA [PFA-1], the Board entered into a Resolution to engage Citi as the Investment Bank to effectuate the sale. Ex. 78. Yet, now, over a year later, Respondents still have not permitted the Company to actually engage Citi. Specifically, after multiple discussions with the parties, on May 11, 2023, Citi confirmed it was ready to proceed with the engagement by sending the shareholders a proposed engagement letter, which Citi later followed with separate proposed guidelines for the engagement. Ex. 68 at 3-9; Ex. 67 at 1, 5-7. While Peppertree/AMLQ agreed to the proposed engagement letter, Ex. 69 at 1, 2-3, Terra failed to respond until after Peppertree/AMLQ demanded the Company proceed with the agreed engagement. In response, Terra insisted that two new terms be included in the general engagement letter: confirmation that (i) the sale would be to an unaffiliated Third-Party Purchaser; and (ii) the sale proceeds

> would be distributed directly to the shareholders. Exs. 71, 73, 75. Peppertree/AMLQ agreed to the first point — even though the language was unnecessary — but rejected the latter because they are entitled to assurance that any Phase 2 damages be paid, and both the FPFA and the Shareholders Agreement expressly — and logically — permit them to offset such damages before any sale proceeds are distributed to Terra. Exs. 72, 74, 76.
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> 50. Terra's correspondence revealed what is really going on: Respondents intend to abscond offshore with the proceeds from any sale. See Exs. 71, 73, 75. Ultimately, even though Peppertree/AMLQ reasonably offered to proceed with an engagement letter that was silent on this issue, in order to allow the parties to properly arbitrate any dispute regarding sale proceeds, Respondents still refused to execute the engagement letter. Ex. 70 at 1.
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> 51. Thus, Terra has put up roadblock after manufactured roadblock to further obstruct Citi's engagement and delay the sale, first claiming that Citi needs to prepare a valuation before it is even engaged, and then pretending that Terra needed additional information regarding Torrecom (which Peppertree understands had also engaged Citi for a sale) after Citi had already determined it was not conflicted and proposed the engagement letter to the Company. See Ex. 75 at 2; Ex. 70 at 2, 4-5; Ex. 77 at 1.

14. We have made an independent review of the Exhibits referenced in Mr. Rainieri's witness statement as quoted above, and find facts as follows: Citibank, on June 28, 2023, recommended that the Shareholders draft and sign an agreement among the Shareholders that would include, among other provisions, that "proceeds of the sale of CT will be deposited into escrow pending resolution of shareholder disputes." Citibank stated that its proposals for such an agreement of the shareholders were "initial views" and that Citibank "welcome[d]" proposals from the shareholders "on potential edits or additions to these terms…" (Ex. C-67).

15. On July 13, 2023, Mr. Rainieri, in an email to the Board members and Shareholders of the Company, (i) recalled that on February 4, 2023, the Company's Directors had executed a Board resolution that required the Company to engage Citibank to proceed with the sale, (ii) recalled that on June 28, 2023, Claimants had accepted Citibank's recommended "engagement plan," including the terms of Citibank's proposed engagement letter that had been circulated to the Board on May 11, 2023, and (iii) stated that Terra had "failed to respond to Citi or the B/C

shareholders in any way, further delaying the required sale" (Ex. C-69). Nearly seven weeks later, on August 29, 2023, Mr. William Mendez on behalf of Respondents sent an email to the "Citi Team" with Claimants in copy, in which he (1) called upon Citibank to provide an updated valuation of the company, which he claimed was overdue from Citibank, (2) asserted that "all the shareholders, have come to agree that the escrow arrangement is not required… and… that the shareholders will be receiving the sales proceeds representing their share interest at closing," and (3) asserted that "it is our understanding that you informed the counsels that Citi needed to close the Torrecom deal first, before closing the CT sale, please let us know if this is true and how is that sale process going…." Over the course of several more email exchanges between August 29, 2023 and October 3, 2023, and in other communications referenced in those emails (see Ex. C-70), Respondents never retreated from three *quid pro quos* for a Citibank engagement letter that they would sign: (1) that there would be an immediate *pro rata* distribution of all received proceeds at closing, (2) that Citi would first provide its own current valuation of the Company, and (3) that Citi would confirm whether it was correct, or not, that Citi would not begin the Company Sale before completing its engagement for Torrecom. In the long interval from June 28 to October 3, 2023, there were several written communications between Respondents' then co-counsel Juan Rodriguez and Claimants' counsel, on the disputed issue of including a term in Citibank's Engagement Letter that would mandate immediate *pro rata* distribution of Company Sales proceeds at the closing. Respondents, via Mr. Rodriguez, insisted that immediate distribution of proceeds at closing was a necessary term for Citibank's engagement letter. They contended that Section 5.04(b)(ii) of the SHA *as construed by the Tribunal in PFA-1 and adopted by Judge Kaplan through the PFA-1 Judgment* required all proceeds to be distributed immediately upon receipt and that Claimants were violating the SHA, PFA-1 and the PFA-1 Judgment by advocating

for an escrow of proceeds pending full resolution of the Parties' disputes. The initial letter from Mr. Rodriguez in July 2023 asserting this position (Ex. C-71) does not quote language from the SHA, PFA-1 or the PFA-1 Judgment that requires distribution of proceeds received from a Company Sale without regard to the existence of potential damages claims pending between the Shareholders at the time of the closing. While there is language in Section 5.04(b) (ii) that "*the proceeds of such sale shall be distributed among the Shareholders in accordance with their respective Percentage Interests,*" we did not decide in PFA-1 that this language requires that Company Sale proceeds be immediately distributed without regard to the resolution of disputes between the Shareholders that might be unresolved at the time proceeds are received. We certainly did not decide how this language was to be applied to the conduct of an Investment Bank or other third party who might initially receive the proceeds as agent for the Company or the Shareholders. And we certainly did not decide how this language should be construed in a manner consistent with either the Parties' commitment to arbitrate disputes (Section 8.15) or to have the right to injunctive relief in case of any breach (Section 8.12).

16. These unresolved interpretative tensions within the SHA, to the extent they exist, must have been obvious to Respondents' co-counsel when he wrote to Citibank and when he wrote to Claimants' counsel. It would have been perhaps only aggressive legal argument to contend that 5.04(b)(ii) should be construed to impose an unconditional duty of immediate distribution of proceeds, but it was misconduct and bad faith, attributable to Respondents, for their counsel to assert, particularly to a third party like Citibank, that such a conclusion had already been reached by this Tribunal and by Judge Kaplan in the PFA-1 Judgment. Four weeks elapsed (as far as our record indicates) from the time Mr. Rodriguez first made these arguments (Ex. C-71) to the date – August 22, 2023 – on which he first identified to Claimants the language in PFA-1 that

Respondents relied upon in taking this position. Thus, in a letter on that date (Ex. C-75), Mr. Rodriguez wrote:

> Our point here is that in the FPFA the Tribunal clarified that "Terra is entitled to its *pro rata* share of the sale proceeds, subject to any setoffs that *may* be established." FPFA at para. 47 (emphasis added). Distribution of the sales proceeds to Terra has already been decreed, it is part of the FPFA, and confirmed in Judge Kaplan's Final Judgment.

17. Before we address what this legal argument implied about Respondents' intentions as contended by Claimants, we note other elements of Mr. Rodriguez's 2023 correspondence that we believe reflect upon Respondents' intentions. He accused Claimants of having prompted Citibank to propose an escrow of sale proceeds: "*[W]e believe these particular provisions which violate the Award and the Order would not have been proposed by Citi on its own.*" He admitted that Respondents' objection to an escrow of sales proceeds had been the position expressed to Citibank by Mr. Hernandez at the Napa Valley meeting in the first week of June 2023: "*Jesse Davis met with Jorge Hernandez at his offices in California in the presence of two other executives and it was made clear to Jesse then that Terra would not accept an escrow of its sales proceeds.*" (Ex. C-71, July 25, 2023 letter). He repeated the accusation that Claimants had influenced Citibank to propose that the Shareholders agree to an escrow of proceeds, calling this a "***put up job.***" (Ex. C-73, August 2, 2023 letter, emphasis supplied). Attorney Rodriguez, on behalf of Respondents, rejected Claimants' contention that Claimants were acting in good faith by proposing to escrow all proceeds, not just Respondents' share. And he declared that the Respondents could not get fair treatment from this Tribunal but were confident they would get justice from Judge Kaplan: "*We understand you will run to the Tribunal. They will give you whatever you ask. In fact, they have given you remedies you did not ask for. We will, however, file an appropriate motion with Judge Kaplan to enforce the terms of his Final Judgment.*" (*Id.*). Respondents indeed could have sought a declaratory order from Judge Kaplan that they had complied with the PFA-1

Judgment, but to our knowledge they did not do that in 2023 or at any time up to now. Three more weeks passed before Mr. Rodriguez on August 22, 2023, finally identified some language in PFA-1 that purportedly was the basis for Respondents' contention that an escrow of proceeds would be violative of PFA-1 and the PFA-1 Judgment. (Ex. C-75). The language he referenced was lifted from paragraph 47 of PFA-1, which we quote here in full text:[15]

> Ultimately this part of the dispute is only about money in one sense: what it will cost Terra, if it wishes to acquire 100% control, to outbid a potential third-party purchaser to acquire the Peppertree and AMLQ shares. That this calculus would potentially present itself at the end of the Lock-up Period had to have been obvious to Terra when it signed the Agreement. The Agreement provided for a Company sale process, not a majority-minority redemption process. There is no injustice or inequity in requiring Terra to live up to the contract. It is entitled to its pro rata share of the sale proceeds, subject to any setoffs that may be established, and nothing in the SHA stops Terra from asking Claimants, at any time, but more likely once the value achievable by a third-party sale is better understood, to sell their shares to Terra.

18. In all events, the language Mr. Rodriguez quoted from para. 47 of PFA-1, "*subject to any setoffs that may be established…*," has a plain meaning that is the opposite of the meaning Mr. Rodriguez assigned to it, as the position he advocated was that an escrow of proceeds would violate this clause of PFA-1 and in turn the PFA-1 Judgment because Respondents were entitled to their *pro rata* share of proceeds ***notwithstanding*** any setoffs that might be established. Respondents' failure to apply to Judge Kaplan, as they threatened to do in August 2023, suggests that they lacked confidence that Judge Kaplan would agree with their position that PFA-1 and the PFA-1 Judgment would be violated unless the Investment Bank's Engagement Letter contained language requiring immediate distribution of sales proceeds notwithstanding possible setoffs arising from other damages claims in this arbitration. Respondents have left that decision to us, in

[15] There was a misnumbering of paragraphs at this point in PFA-1. This was indeed para. 47, although in the text it appears as the second paragraph bearing number 46.

the context of Claimants' claim that Respondents' course of conduct was an ongoing breach of the obligation to proceed with a Company Sale. We find that it was. There is no merit to Respondents' arguments that anything we said in para. 47 of PFA-1 requires that the Parties, directly or through their Investment Bank, affirmatively commit to immediate distribution of proceeds at closing ***notwithstanding*** potential setoffs arising from damages claims by Claimants against Respondents. The Respondents' refusal to proceed with a Company Sale unless there was such an affirmative commitment by the Investment Bank in the Engagement Letter therefore was a new objection to proceeding with the Company Sale, made in violation of the "no objection" obligation in Section 5.04(b). On this basis, we will sustain Claimants' claim for breach of contract based on their theory of "ongoing breach."[16]

19. Respondents also contend that their position with regard to Citibank's engagement for Torrecom was not a violation of the SHA. We must first be clear about what the evidence shows to have been Respondents' stated position. Respondents did not contend, in the 2023 discussions that ensued after the Board Resolution in February 2023, that Citibank had a disqualifying conflict of interest due to its work for Torrecom. Rather, Respondents' position was that if Citibank believed its work for Torrecom prevented Citibank from launching its engagement for the Company until Citibank's Torrecom engagement was concluded, that would be a reason to select a different investment bank. (*See* August 29, 2023 email from Mr. Mendez to the Citibank

[16] The argument on this point by Respondents' former Submissions Counsel (terminated by Respondents just prior to the Phase 2 Merits Hearing) in the Opening Pre-Hearing Memorial in 2024 also insisted the Claimants were calling for a violation of PFA-1 and the PFA-1 Judgment. But their argument, while also focused on para. 47 of PFA-1, was different. They contended that "*[w]hile [PFA-1] also states that Terra 'is entitled to its pro rata share of the sale proceeds, subject to any setoffs that may be established,' the Tribunal could only have been referring to customary setoffs that may be established during negotiations with the potential buyer (e.g., set-off for its pro-rata share of the costs associated with the sales process, taxes, indemnity escrow requested by buyer, etc.)*" (Respondents' Pre-Hearing Reply Memorial at 13 fn. 63). We have no power to interpret our award, but we can state that what it says -- "*subject to any setoffs that may be established*" -- does not correspond to the cramped implicit limitations suggested by Respondents' former Submissions Counsel.

Team, in Ex. C-70: "*Finally, it is our understanding that you informed the counsels that Citi needed to close the Torrecom deal first, before closing the CT sale, please let us know if this is true and how is that sale process going, as the A Shareholders are hopeful Citi can move forward as quickly as possible.*" However, the ensuing thread of emails in Ex. C-70 shows that a current draft Engagement Letter proposed by Citibank was circulating for signatures of the Shareholders and this implies that Citibank was prepared to proceed with the engagement, as does the fact that Claimants signed that version. (*See* September 29, 2023 email from Mr. Rainieri in Ex. C-70). Respondents have presented no evidence that Citibank stated that it would delay its work until its Torrecom engagement was concluded. And Respondents had the opportunity to ask Citibank that question under subpoena in Phase 2 in 2024, but declined to serve the subpoena that we had issued upon their application. (*See* Procedural Order 2024-14 of June 13, 2024 at para. 1).

20. We therefore find that Respondents' refusal to engage Citibank, based on their professed concern that Citibank could not begin work on the Company Sale, violated the "no objection" obligation in Section 5.04 and constitutes an additional basis to find that Claimants' claim of an ongoing breach of Section 5.04 should be sustained.

21. In 2023, Respondents also purported to withhold their signature on Citibank's engagement letter on the basis that Citi allegedly had agreed to provide an updated valuation of the Company (having made a prior valuation in 2020). (Ex. C-75 at p. 2). The Parties disagree about whether a pre-engagement valuation by an investment banker engaged by the Company is necessary. We need not resolve that disagreement. It suffices for our decision that Respondents have failed to demonstrate that the updated valuation they wanted was so essential that it should fall outside of their "no objection" obligation under Section 5.04 of the SHA. This conduct by Respondents also supports Claimants' claim of an ongoing breach.

B. Whether Respondents' Contentions That the Torrecom Offer Was Not "Bona Fide"Affect Respondents' Liability for Breach of the Shareholders Agreement in Regard to Company Sale or the Quantification of Damages for Such Breach

22. Respondents have contended in several of their Phase 2 submissions that the Torrecom Offer was not "bona fide." (*E.g.*, Respondents' Second Post-Hearing Brief at 28). But we do not understand Respondents to contend that the offer was not "bona fide" in the sense that it was a sham, a pretense – and if that were the argument, it is squarely refuted by the record. The principal argument of Respondents is that the Torrecom Offer is not reliable as a measure of damages for any of Claimants' claims of breach relating to sale of the Company, because Torrecom, according to Respondents, would not have been able to complete the transaction due to a purported inability to obtain financing. (*E.g.*, Respondents' [First] Post-Hearing Brief at 14 para. 31). They also raise an issue of what they call a "conflict of interest," alleged to result from Claimants having proposed to contribute financially to the Torrecom transaction through an equity investment by Peppertree of Company Sale proceeds in post-merger Torrecom. (*E.g.*, Respondents' Opening Pre-Hearing Memorial at 39 para. 114). These arguments are not persuasive, for reasons we detail in this section. To summarize:

(1) It makes no difference whether Torrecom would have been able to close the deal. That is so because the damages caused by the wrongful rejection of the Offer are not the amount of net proceeds Claimants would have received if Terra had agreed to sell to Torrecom, but rather the net proceeds Claimants would have received from the Company Sale if Terra had made a contractually-compliant rejection of the Torrecom Offer (*i.e.*, by proceeding with the § 5.04(b)(ii) Company Sale Process). Terra's breach lies not in its failure to accept the Torrecom Offer, but in its failure to reject the Offer in the manner the Agreement required. In other words, the "but-for scenario" to measure damages is not the

Torrecom Offer having been accepted by Terra, but the Torrecom Offer having been rightfully, not wrongfully, rejected by Terra.

(2) Even if the Torrecom Offer had been, as Respondents have contended, an unreasonably low bid contrived by Claimants with collaboration from Torrecom, the conclusion Respondents ask us to make – that the Torrecom Offer cannot be used as a measure of damages – is illogical. If the Torrecom Offer was unreasonably low due to Claimants' procurement of a low bid – a contention of Respondents that the evidence does not support – Claimants in this arbitration would be selling themselves short by submitting to the Tribunal, as they have, that they would be satisfied to be awarded damages measured by the net proceeds they would have realized if Torrecom had purchased the Company at the price stated in its offer.

(3) Further, if we do not use the Torrecom Offer as a measure of damages as Claimants contend we should, we would use exclusively the other evidence of the fair value of the Company in January 2021, all of which points to a higher amount of damages. That is so even if we agree with Respondents, as we do, that (hypothetical) deductions from (hypothetical) net proceeds should be made for transfer taxes that allegedly would have become payable upon closing of any transfer of the Company to a third-party purchaser.

23. As a preliminary step in addressing these contentions, we find it appropriate to address whether there was a contractual obligation upon Claimants, express or implied, that the offeror of the Proposed Offer, as opposed to Claimants themselves, had to have a particular state of mind, or that the Proposed Offer, to qualify as a Proposed Offer, needed to be backed by certain objective indicators of the offeror's ability to finance the transaction.

24. We have not found in any of Respondents' submissions a reference to language in the SHA that requires the "unaffiliated Third-Party Purchaser" who makes a "Proposed Offer" to be "bona fide" in this sense of the term (*e.g.*, containing committed financing). The Agreement in Section 5.04(b) defines "Third-Party Purchaser" as "any Person other than a Permitted Transferee." A "Permitted Transferee" in the case of a "Person" is "any Affiliate of such Person." The use of the term "Permitted Transferee" in relation to a potential sale of the Company to a Third-Party Purchaser is confusing, because a "Permitted Transferee" is not a third party to whom the Company would be sold by the Shareholders acting in unison. Instead, "Permitted Transferee" refers to the ability of the Company's Shareholders acting unilaterally to transfer their separate Shareholder interests to certain persons.[17] In Section 5.04(b), "Third-Party Purchaser" is defined by the exclusion of Permitted Transferees, making it clear that an offer by Claimants to buy the Company, or to have one of their Affiliates buy the Company, would not be an offer by a Third-Party Purchaser. Respondents do not assert that Torrecom did not qualify under the SHA as a Third-Party Purchaser. Respondents *do* contend that Torrecom was "affiliated" with Claimants and therefore was not an "*unaffiliated Third Party Purchaser*" as Section 5.04 required. We address this contention separately in Section II.C. below.

25. "Bona fides" as an implicit term of Section 5.04(b) appears to be an undercurrent of Respondents' argument. But even if the record showed – and it does not – that Torrecom never intended to consummate the transaction, what we in all events have to decide is whether the Torrecom Offer of $407.8 million was at or above the amount that the Company would have been sold for, had Respondents not breached the SHA in January 2021, as we determined they did in

[17] *See* Section 5.01(a): "Neither the Initial A Shareholders nor the Initial B Shareholders may Transfer any Equity Interest in the Company during the Lock-Up Period other than (i) to a Permitted Transferee…."

PFA-1. Respondents in November 2020 rejected the Torrecom Offer by presenting a letter from UBS asserting that $407.8 million was inadequate, not that it was a pie-in-the-sky overstatement of value by a phantom buyer that never intended to proceed. (Ex. C-58). Moreover, a Proposed Offer, "bona fide" or not, was *not* a condition precedent of a Company Sale pursuant to the Notice that Claimants delivered in January 2021 that was the foundation for our specific performance decision in PFA-1. In other words, even if the Torrecom Offer had been a sham because Torrecom never intended to proceed, this circumstance would not have provided Terra with a right under the Agreement to extend the Lock-Up Period of Claimants' equity in the Company, perpetually or for any period of time.[18]

26. Respondents have not asked us to decide that Claimants breached the SHA in their procurement of the Torrecom bid, such that any Company Sale Breach damages claim lacks the element of substantial performance by the Claimant. Rather, the "*bona fide*" contention was originally presented by Respondents (Pre-Hearing Mem. at 39) as an argument that "*Claimants' serious conflict of interest for negotiating for the Torrecom Offer with Torrecom*" meant that "*the amount included in the Torrecom Offer cannot be used by Peppertree as a benchmark for damages.*" This argument was not developed further by Respondents, and Claimants appear to have deemed it unworthy of an answer. The premise behind the Respondents' bona fide/conflict of interest argument appears to be found in two related pieces of evidence: (1) a December 16, 2020 "Indicative Term Sheet" issued by the Goldman Sachs Specialty Lending Group ("GSSLG") that proposed a $275 million credit facility for use by Torrecom to buy the Company, upon various conditions, including that the capital structure of Torrecom after the acquisition would include "at

[18] To illustrate, suppose it was believed by Respondents at the time of the Torrecom Offer that the offer was worthless because Torrecom was unable to finance it. Respondents had the right to reject such an offer by having an Investment Bank (as that term is defined in § 5.04(b)(i)) provide to Terra a written opinion that agreed with Respondents that the offer had zero fair value.

least $113,000,000 of rollover equity proceeds owed to Peppertree Capital Management, Inc. ("Peppertree") from the sale of Target," (Ex. C-54 at 5), and (2) the hearing testimony of Torrecom executive Maria Scotti that, in discussions with Peppertree prior to the Torrecom Offer, a concept similar to what was later embodied in the GSSLG Indicative Term Sheet was discussed with Peppertree but was not adopted by Torrecom as a basis for making its offer. (Scotti Witness Hearing Tr., Ex. C-61 at 100-106).

27. While Respondents did not repeat this "conflict of interest" argument after their pre-hearing change of counsel in July 2024, furnishing reason for us to think it had been abandoned, we address it for avoidance of doubt.

28. The SHA also did not prohibit seller financing by the Claimants in regard to the Third-Party Purchaser's offer. If Peppertree had been motivated by its potential equity interest in post-merger Torrecom to encourage Torrecom to make its offer at less than fair value (*e.g.*, so that Peppertree's percentage interest in the post-merger Torrecom would be higher, and perhaps also more easily cashed out by other Torrecom investors than if the debt load resulting from the transaction was greater), then Respondents had recourse under the SHA: to reject the offer as too low if an Investment Bank would so opine in the terms required by § 5.04(b)(i), and proceed with an auction of the Company to a higher bidder. Note that the alleged "conflict of interest" could theoretically support the position that the Torrecom Offer is unreliable as a measure of Claimants' damages because the Offer was below or on the low side of fair value. But Claimants have accepted that limitation in seeking not more than their *pro rata* share of the Torrecom Offer as Phase 2 Company Sale damages.

29. Ultimately, Respondents' "not bona fide" argument was presented explicitly as a contention that the Torrecom Offer, had it been accepted, would have led to nought because

Torrecom could not have assembled financing for the transaction. (Respondents' Post-Hearing Brief at 14). As stated above, we do not agree that the "but-for scenario" of the Torrecom Rejection Breach is an acceptance by Terra of the Torrecom Offer, so that Torrecom's alleged inability to close the deal would be relevant to damages causation. The "but-for scenario" is a rightful, not wrongful, rejection of the Torrecom Offer, by Respondents' collaborating without objection to hire an Investment Bank for a Company Sale.

30. In all events, the record corroborates the bona fides of the Torrecom Offer. Much of the evidence comes from the responses issued by investment banks in late 2020-early 2021 to Requests for Proposals (RFPs) issued by Terra (found in Ex. C-252, a compilation of materials reviewed by Claimants' expert Professor Hitscherich). In Citibank's RFP Response, Torrecom was said to be among "*the most relevant potential partners*" and was classified by Citibank in "*Tier 1*" of "*Strategic Investors*" along with Phoenix Tower and American Tower. Citibank also observed, in regard to availability of capital to companies seeking to make acquisitions: "*Significant dry-powder available from financial investors looking to participate in a very healthy sector.*" In the Response of Greenhill Advisors, Torrecom was listed along with seven other companies as "*strategics*" seen as interested in a "*full take out*" of the Company, and within this group, Torrecom was further classified as among the "*more likely*" counterparties for the Company. In the Response of Banco Santander, Torrecom was identified as being among the six "*most active players*" among "*strategic buyers,*" and Santander observed that these companies "*have proved to be particularly competitive in terms of cost of capital.*" Santander further stated: "*We expect key strategic buyers to fund a potential acquisition with available credit facilities,*" and with respect to Torrecom, Santander stated: "*[Torrecom] is a leading developer, owner and operator of wireless communications sites in Latin America … The company's backlog will allow them to reach a total*

of 1,330 sites and TCF [Tower Cash Flow] of USD 16.8mm (additional to the existing USD 13.2mm)."

31. Ms. Scotti of Torrecom testified that Torrecom lacked the financial capacity to do the deal without supporting equity or debt partners, but she added that Torrecom expected to reach out to "*our existing equity partners or the existing debt partners or any other that can provide equity or debt.*" (Ex. C-61, Tr. at 22-23). Ms. Scotti testified that Torrecom's Board of Directors, when asked to approve the offer, was made aware of Claimants' offer of seller financing but that the transaction was not presented to the Board predicated on adoption of Claimants' financing proposal. She added: "*We also [had] been talking to other lenders, debt providers. Our existing equity partners wanted to participate as well.*" (*Id.* at 46-49).

32. Ms. Scotti further testified, in response to questions by Claimants' counsel:

> Q. In your view, when Torrecom made that offer to purchase Continental through the letter of intent that you testified to, was that a bona fide offer to purchase Continental?
> A. Absolutely.
> Q. Could you please explain why?
> A. We felt comfortable based on what we saw that that was a fair and reasonable offer for that portfolio. We were rather excited about having the opportunity to preview the portfolio. Actually, what went into some of that multiple was, in fact, the synergy and/or the strategic gain that we would equate to. We are not a company that bids high to get the sellers' attention and turn it down at a later date. We try to come in as close as we possibly can to what we hope would be the final multiple.
>
> (Ex. C-61 at 87-88)

33. Respondents rely on alleged facts that have no necessary connection to Torrecom's ability to finance the deal - for example, the fact that Torrecom had a smaller Towers footprint than the Company. (Respondents' Post-Hearing Brief at 14). Respondents also contend that a Torrecom purchase would not have closed because the "market" was "closed" by Covid-19 (Rebuttal Witness Statement of Michael Bühler, June 28, 2024, at 1-2 paras. 3-7). But the RFP

Responses from a variety of investment banks received by Terra, at the end of 2020 or in early 2021, dramatically contradicted this contention. (Ex. C-252).[19]

34. Based on this evidence, we are persuaded that the Torrecom Offer was a transaction that Torrecom intended to pursue to completion.[20]

35. These contentions by Respondents would have been consequential if any of Claimants' claims of Company Sale breach depended on proof that, but for Respondents' breaches, the Company would have been sold to Torrecom. But while Claimants disputed factually Respondents' contentions that Torrecom would not have been able to close — either because Torrecom could not finance the transaction or because Covid constraints would have prevented closing — Claimants did not allege that Respondents' wrongful rejection of the Torrecom Offer harmed them by preventing specifically a sale to Torrecom. Their contention is that wrongful rejection of the Torrecom Offer was part of Respondents' course of conduct that prevented an Approved Sale of the Company. (*See* Claimants' Post-Hearing Memorial at 1-2).

[19] UBS's RFP response reported three confidential Tower advisory engagements in progress as of November 2020. UBS also reported two completed LatAm tower deals during 2020, one for 10,100 sites for $1.7 billion, and the other for 2,500 sites for $462 million. Citibank's RFP response stated that "*COVID related dynamics only serve to reinforce the communications infrastructure value proposition.*" Citibank mentioned a November 24, 2020 transaction for the sale of Phoenix Tower Brazil to Digital Colony. Greenhill Advisors' RFP response identified a November 2020 transaction between American Tower and Entel for 3,242 sites in Peru and Chile. Santander's RFP response stated: "*With the exception of Entel towers there has been a limited number of tower transactions, in a sector that has not been strongly impacted by COVID-19… Overall, there is a relevant latent demand for tower assets, which have to be quite resilient in covid times.*" Santander mentioned an April 2020, 2,000-tower transaction in Portugal, for an initial consideration of EUR 375 million. They also mentioned an October 2020 acquisition by Cellnex of 7,000 sites in Poland and a November 2020 acquisition of 28,500 European tower sites for EUR 10 billion. Santander further stated: "*TowerCo sector demonstrated a strong resilience during covid-19 outbreak … neighbor geographies to Continental's Core Markets are seeing a resume of towers deals put on hold or delayed because of the pandemic. These processes could indirectly compete with a potential divestment from Terra, as Tier 1 bidders are likely to be the same.*"

[20] Had this been the proper framing of the Torrecom Rejection Breach damages issue, two other factors would have also operated in Claimants' favor: (1) an adverse inference based on Respondents' disobedience to our Order to produce communications related to their consideration of the Torrecom Offer, which led us to impose a sanction on Respondents, including the drawing of adverse inferences as appropriate (Procedural Order No. 2024-10 dated May 3, 2024), and (2) the fact that Terra's wrongful rejection of the Torrecom Offer prevented an evolution of the Torrecom transaction that would have brought greater clarity to the question of Torrecom's access to financing.

36. Section 5.04(b) did not obligate Terra to accept the Torrecom Offer under any circumstances. It did obligate Terra, if it elected not to accept the Torrecom Offer, to (i) base its rejection on an Investment Bank's opinion letter about fair value, and (ii) initiate the Company Sale process under § 5.04(b)(ii). Claimants in the Phase 2 hearing presented opinion evidence from their corporate finance expert that the letter from UBS that Respondents provided to Claimants in November 2020 accompanying their rejection of the Torrecom Offer was not an "opinion" as understood in the investment banking world. But Claimants' theory of the Torrecom Rejection Breach was that an "opinion" under SHA § 5.04 (b)(i) was provided, and that Respondents' breach of § 5.04(b)(i) consisted of their failure and refusal to proceed with a Company Sale under § 5.04(b)(ii). Section 5.04(b)(i) states that "if such an opinion is provided… each Shareholder shall vote for, consent to and raise no objection against such Approved Sale…"). Indeed, in the ASOC Claimants relied (at para. 308) on the language in Respondents' Notice of Rejection whereby Respondents admitted that the obligation under § 5.04(b)(i) to proceed with a Company Sale under § 5.04(b)(ii) had been triggered. Whereas Terra thereafter failed to proceed under § 5.04(b)(ii), its rejection of the Torrecom Offer was wrongful, and constitutes a separate breach of contract, but the measure of damages is what Claimants would have obtained from a rightful rejection, *i.e.*, their *pro rata* share of net proceeds to be received upon an Approved Sale (subject to any adjustments required by the Agreement, including any amounts due from one shareholder to another). Effectively, the Torrecom Rejection Breach merges for purposes of the damages remedy with the PFA-1 Breach, but it remains a breach that is separate from the PFA-1 Breach.

37. The evidence submitted concerning what a willing buyer would have paid for the Company in or about January 2021 includes an estimate initially made by Respondents in 2021, submitted as evidence in Phase 1 of this arbitration (Michael Bühler Witness Statement,

September 25, 2021, at 17 para. 43), and re-submitted in 2024 in Phase 2, of $536.8 million gross proceeds. (Michael Bühler Witness Statement, May 20, 2024, at 12 para. 48). That estimate was corroborated by figures in the responses of four investment banks to Respondents' Requests for Proposals (RFPs) near the end of 2020 or early 2021 (found in Ex. C-252).[21]

38. In Respondents' $536 million estimate, they have extrapolated from their net proceeds analysis of the Torrecom Offer, to make projected deductions for escrows and transfer taxes. However the evidence with respect to the escrows was that such sums would eventually be released to the selling shareholders unless there were losses sustained by the purchaser (John Rainieri Witness Statement, June 28, 2024, at 2-3 paras. 6a., 6b., 6c.). Respondents did not attempt to prove that there would have been such payments to the purchaser from the escrow. Witnesses for Claimants, as well as Respondents, did however acknowledge that in an actual transfer of the Company, there would be transfer taxes payable, to certain municipal tax authorities in countries where the Company had operations, reducing net proceeds. (*Id.* at para. 7b.; Michael Bühler Witness Statement, May 20, 2024, at 12 para. 48).

39. We need not determine whether Respondents' estimate of transfer taxes is reliable. That is so because, even accepting Respondents' transfer taxes estimate, but excluding deductions for escrows of proceeds that would later be released to the Parties, Respondents have projected net proceeds of a January 2021 sale of the Company at $486,460,823, of which Claimants' *pro rata* share (44.55%) would have been $216,718,297. Even with deduction of all escrows in addition to transfer taxes, Respondents' projection in 2021 and again in 2024 was that net proceeds would have been $417,414,456.43, of which Claimants' *pro rata* share (44.55%) would have been

[21] Respondents alleged in their 2022 lawsuit against American Tower that in the deal to buy the Company that American Tower allegedly wrongfully refused to close in December 2018, American Tower had agreed to pay $466 million. (Ex. C-63).

$185,958,140 – slightly higher than the $185,752,900 Claimants seek as Company Sale damages. (Michael Bühler Witness Statement, May 20, 2024, at 12 para. 48). We see this as a validation of Claimants' claim that a Company Sale at that time would have yielded for them "at least" $185,752,900, and we will sustain the Claimants' Company Sale breach claims for $185,752,900.

40. This Award of Company Sale damages is not in substitution for the specific performance remedy granted in PFA-1 and enforced in the PFA-1 Judgment. This Award is, in practical terms, a step toward fulfillment of the economic outcome of a Company Sale that the specific performance remedy was designed to achieve. If a Company Sale occurs, there will need to be a reconciliation of the proceeds of the sale with (i) the sums awarded to Claimants plus any accrued interest, and (ii) the amounts actually received by Claimants either by Respondents' voluntary compliance with this Award or through enforcement of this Award and execution upon the enforcement judgment(s). It is not inevitable that this Tribunal will decide that it should still be constituted at the time disputes might arise over such a reconciliation. We retain jurisdiction at this time not to ensure our availability to resolve any such disputes, but because certain of the claims of Claimants as to which we find liability and award damages involve ongoing damages accruals that we have already determined to reserve for quantification in a future award. If an application is made to the Tribunal to hear and determine any such dispute over reconciliation of proceeds at a time when the Tribunal is still constituted, we will consider the application.

C. Whether Respondents' Contention That Torrecom Was Affiliated with Peppertree Affects Respondents' Liability for Company Sale Breaches or the Measure of Damages for Such Breaches

41. Respondents in their Phase 2 Answer alleged (as they had done in Phase 1) that Torrecom was an affiliate of one or both Claimants, which if true would make Torrecom an unqualified offeror under SHA Section 5.04(b)(i), whose defined term "**Proposed Offer**" (boldface in original) covers an offer from "an unaffiliated Third-Party Purchaser." This contention

matters to the Torrecom Rejection Breach claim, because the "unaffiliated" status of the Third-Party Purchaser was a condition precedent to Terra's obligation to reject the Proposed Offer in the manner specified in the Agreement.

42. In the Pre-Hearing Memorials in Phase 2, Respondents did not argue that Claimants' Torrecom Rejection Breach claim was defeated because Torrecom had a disqualifying affiliation with any Claimant and therefore did not present a **Proposed Offer**. But at the time of their final post-hearing brief submitted by new counsel engaged in July 2024 just prior to the merits hearing, Respondents resurfaced this argument in the following terms:

> 26. Section 5.04(b) of the Shareholders' Agreement requires a sale to an "unaffiliated Third-Party Purchaser," not merely to a "Third-Party Purchaser" which is not an "Affiliate." Under the definitions contained in the Shareholders' Agreement, a "Third-Party Purchaser" is "any Person other than […] a Permitted Transferee," and a "Permitted Transferee" is "any Affiliate of such Person." Claimants' attempted reading of §5.04(b), then would be that it requires a sale to "someone other than an Affiliate," who is separately "someone other than an Affiliate," which would render the language in §5.04(b) devoid of any meaning.[22]

(Respondents' Second Post-Hearing Brief at 10).

43. Indeed there is no debate between the Parties regarding the requirement that an offer must be made by an "unaffiliated Third-Party Purchaser." Claimants argued that "[u]nder the SHA, the only requirement for an Approved Sale is that it be pursuant to an offer from an 'unaffiliated Third Party Purchaser.' ... Because Torrecom is not an Affiliate of Peppertree or AMLQ, its offer unquestionably meets this requirement." (Claimants' Phase 2 Opening Post-Hearing Memorial at 5).

[22] For clarity's sake, we note again, as we did in para. 24 above, that "Permitted Transferee" was defined in relation to potential related-party transfers of shares in the Company by the Parties that would be allowed as an exception to the restrictions in the Agreement on such transfer to third parties. "Permitted Transferee" was defined to include "Affiliates" of the Parties so that related-party transfers of their own shares would be permissible. Thus, an "unaffiliated Third-Party Purchaser" was to be a purchaser unaffiliated with the Shareholders or their Affiliates.

44. The Tribunal finds that the language of the Agreement is not ambiguous and that resort to extrinsic evidence, such as the Parties' witness testimony, is not required to interpret the Agreement. Section 5.04(b) as relevant here provides that any time after the end of the five-year Lock-Up Period, Claimants "*may request ... a sale of all or substantially all of the Company's assets or all or substantially all of the Shares in the Company (in one or more transactions) to an unaffiliated Third Party Purchaser (an "**Approved Sale**").*" Section 5.04(b)(i) further stated*: "If the Proposing Shareholders have already procured or received an offer from an unaffiliated Third Party Purchaser to purchase the assets or Shares of the Company ("**Proposed Offer**"), the Proposed Sale Notice shall disclose in reasonable detail the identity of the prospective purchaser and the proposed terms and conditions of the Proposed Offer*." (boldface in original).

45. In rejecting the Torrecom Offer, Respondents referred to it as a Proposed Offer.[23] That is not dispositive, as Respondents raised the affiliation issue in their initial Answer in this arbitration in 2021. But their actions in 2020, before the arbitration, are evidence of their appreciation at that time of Torrecom's connections (or lack of them) to Claimants and the meaning of the SHA.

46. Had the Parties understood, when they entered into the Agreement in 2015, that the participation of Claimants in financing the Proposed Offer would render the offeror ineligible on the basis that such participation created an "affiliation," so that the offer would not qualify as a Proposed Offer, there would naturally have been inquiries from Respondents to Claimants (and/or Torrecom) about this subject before sending the Notice of Rejection. The record reflects no such

[23] On November 24, 2020, Mr. Sagastume, on behalf of Respondents, sent an email to Claimants (Ex. C-54) the "Subject" of which was "Objecting Shareholder Notice re Proposed Offer" and the text of which was "Please find attached the notice from the A Shareholders rejecting the Proposed Offer." The attached Notice, signed by Mr. Sagastume on behalf of Terra (Ex. C-58) had as its subject line "Re: Rejection of ***Proposed Offer***" and stated in its text that the "A Shareholders... reject the ***Proposed Offer*** by tendering the enclosed opinion from an independent and reputable investment bank...." (emphasis supplied).

communication. Further, a prohibition on selling shareholder participation in the financing of a Proposed Offer strikes us as a term that these sophisticated parties, assisted by counsel in the drafting of the Agreement, would have dealt with expressly, and that they would not have deployed an undefined term — "unaffiliated" — to cover potential selling shareholder participation in financing whether by debt or equity or some combination of the two. We need not decide whether "unaffiliated" has a different scope than the defined term "Affiliate," as Respondents contend, because even if we accepted that, we would not accept that "unaffiliated" was intended to mean that the offer had to be entirely financed from sources that would not include any potential equity investment in the acquiring company by a selling Shareholder.[24] And if the Parties had intended to impose a ceiling on the amount, in percentage terms, of equity investment that a selling Shareholder might have in the acquiring company after the acquisition, they would have provided for that in the Agreement.

47. For these reasons, we reject Respondents' contention that there was any relationship between Torrecom and Peppertree, existing or contemplated at any time, that caused the Torrecom Offer to fail to satisfy the "unaffiliated Third-Party Purchaser" requirement in SHA § 5.04(b).

[24] We are skeptical of Respondents' argument that the combination of the adjective "unaffiliated" with the definition of the term "Third-Party Purchaser" (which already excludes an affiliate) necessarily means that the Third-Party Purchaser must have no business dealings at all with a Shareholder; the far more straightforward interpretation is that the provision is simply redundant. Although New York law cautions against "surplusage" and instructs us to find meaning in every contractual phrase, New York law does not require that we depart from common sense, and here the straightforward interpretation of this contractual provision is that the purchaser could not be affiliated with a Shareholder in the usual sense, rather than requiring "a more stringent test than merely being an entity which is not an Affiliate," as Respondents urge. (Respondents' Second Post-Hearing Brief at 10).

D. Whether the Awarding of Company Sale Damages is Barred As a Consequence of the Judgment Enforcing the Award of Specific Performance in PFA-1.

48. Respondents have contended throughout Phase 2 that our Award of specific performance for the breach of Respondents' obligation to cooperate in and facilitate an Approved Sale of the Company prohibits a damages recovery as a matter of law. For example, they state in their opening post-hearing brief (at 11 para. 22): "Claimants cannot receive damages that are excluded by the alternative relief already granted, both under their theory of the case and the need to avoid double recovery." And later in the same brief Respondents stated: "Respondents reiterate here … that the Tribunal lacks jurisdiction to award damages for which it has awarded the alternative remedy of specific performance." (*Id.* at 43-44).

49. Earlier, in Respondents' Opening Pre-Hearing Brief, they had argued (at 42 para. 127):

> There are multiple reasons for which the Tribunal has no power to award money damages for the same breach as to which specific performance was granted in PFA-1, which has been recognized by the SDNY and is now a judgment of the court: a. *First*, and as stated in paragraphs 124 and 125 above, the Tribunal has acknowledged that it is *functus officio* with respect to amending relief granted in an award that has been confirmed in court;
>
> b. *Second*, in accordance with the doctrine of election of remedies under New York law, Claimants already elected the remedy they wanted the Tribunal to grant for their claim of failure to sell the Company. Claimants are therefore prevented from backpedaling now on that decision

50. And in their Pre-Hearing Reply Memorial, Respondents invoked the *functus officio* principle and the merger doctrine as objections to our power to award damages for the breach identified in PFA-1 (at 22-23 paras. 64-65).

51. Claimants contend:

> 1. Respondents' election of remedy argument is incorrect because Claimants "have always sought both specific performance and, as necessary, damages for this

breach, and specifically contemplated pursuing damages in Phase 2 when the Arbitration was bifurcated." (Pre-Hearing Reply Mem at 13).

2. . The Tribunal is not *functus officio* with regard to the PFA-1 breach because the damages claim for that breach was expressly reserved for later determination. (*Id.* at 14).

3.. New York law "unquestionably allows both damages and specific performance to be awarded as remedies for the same breach." (*Id.*).

4.. Respondents' professed concerns about "double recovery" should be addressed not by refusing to award damages, but by providing for the potential deduction of damages awarded and collected from any future sales proceeds due to Claimants. (*Id.* at 16).

52. We first address the contention of *functus officio*. With regard to the Torrecom Rejection Breach claim, the contention lacks merit because that breach was not adjudicated in PFA-1. In PFA-1 we addressed only the breach that consisted of failure to comply with the SHA in regard to Claimants' January 2021 Notice of Proposed Sale. We did not make any Award with regard to the Torrecom Offer, or with regard to conduct by Respondents to obstruct a Company Sale after January 2021. With regard to the Ongoing Breach claim, we understand that claim to be founded on a new set of facts that post-dates PFA-1: Respondents' having in early 2023 supported and accepted the adoption by the Company's Board of a resolution to proceed with a Company Sale (Ex. C-78), and thereafter having raised objections that prevented that resolution from being implemented. As to the PFA-1 Breach, Respondents refer to our determination that money damages were not an adequate remedy at law that precluded specific performance and say that was a determination that money damages could not be awarded for the same breach. (Respondents' Post-Hearing Brief at 42-43). Respondents cite no New York law or other authority for this proposition. Claimants have cited *Laurus Master Fund, Ltd. v. Versacom Int'l, Inc.*, 2003 WL 21219791 (S.D.N.Y. May 21, 2003) where the Court held that "[u]nder New York law, a party awarded specific performance is also entitled to recover damages for losses resulting from the

breaching party's refusal to convey property in accordance with the terms of the contract" (at *4). We are given no reason to believe that to be an incorrect statement of New York law. Accordingly, Respondents' *functus officio* contentions are not adopted.

53. As to election of remedy, neither party has cited authority under New York law concerning governing legal standards. We therefore treat the issue as a factual one and ask if the record shows that Claimants made an election. It does not. The record shows that Claimants adopted the Tribunal's proposal to have an accelerated determination of their right to specific performance on the January 2021 Notice of Proposed Sale, and that Claimants expressly reserved all other claims. Thus, the Claimants in a submission to the Tribunal on August 6, 2021 stated:

> In response to Chair Goldstein's email of August 2, 2021, Peppertree/AMLQ agree that a phased approach makes sense and respectfully request that the Panel allow a "first phase," permitting requests for summary disposition on two threshold legal issues: (i) whether Peppertree/AMLQ are entitled to specific performance of the provisions of Section 5.04(b) of the Shareholders Agreement related to the sale of the Company; and (ii) whether Peppertree, derivatively and on behalf of the Company, is entitled to specific performance of Section 1.1(c) of the Development Agreement and Sections 4.03(d) and 4.04 of the Shareholders Agreement, which do not permit the Company to move forward and develop towers sites that have been rejected by the Development Committee or the Board of Directors. *Peppertree/AMLQ submit that conducting the Arbitration using this "phased" approach would allow the Panel to resolve some of the most important and urgent disputed issues in an expeditious and efficient manner on written submissions, without prejudice to any party's ability to seek damages in a subsequent phase of the Arbitration.*

(emphasis supplied). There was no election of remedy by the Claimants.

54. As to the argument that the PFA-1 Breach claim has been merged into the Judgment enforcing PFA-1, we conclude that there has been no such merger because the claim for money damages is a separate claim, not an alternative remedy for the same claim. Under New York law, a breach of contract claim for money damages requires the non-breaching party to prove damages and causation of the damages as elements of the claim. (*E.g.*, *Pinkesz v. Massachusetts Mut. Life Ins. Co.*, 2025 WL 264073 at *2 (2d Dep't Jan. 22, 2025)). We asked the Parties on multiple

occasions for submissions on whether the Court that entered Judgment on PFA-1 has exclusive authority by virtue of its power to provide a compensatory contempt sanction. Neither party provided authority giving an answer. But whereas the claim for money damages on the PFA-1 Breach is a separate claim, albeit one on which the PFA-1 Judgment has issue-preclusive effect on certain issues pertaining to liability, it is not merged into the PFA-1 Judgment. Therefore whatever powers the SDNY Court, as the Judgment-issuing Court, may have to award a compensatory contempt sanction, we do not have a legal basis to find that our power to adjudicate the damages claim is limited.

55. The cases cited and relied upon by Respondents concerning the merger doctrine are not to the contrary. In *Kotsopoulos v. Asturia Shipping Co.*, 467 F.2d 91, 95 (2d Cir. 1972) (Ex. RL-020), the Court held that "[o]nce a claim is reduced to judgment, the original claim is extinguished and merged into the judgment; and a new claim, called a judgment debt, arises. See Restatement of Judgments §47 (1942)." But here the Claimants' claim for money damages based on the PFA-1 Breach has not been reduced to judgment; it was reserved for subsequent adjudication. *Westinghouse Credit Corp. v. D'Urso*, 371 F.3d 96, 102 (2d Cir. 2004) (Ex. RL-035) states a branch of the merger doctrine specific to the creation of a debt in a contract: "[A] debt created by contract merges with a judgment entered on that contract, so that the contract debt is extinguished and only the judgment debt survives." Our PFA-1 award of specific performance is not "a debt created by contract," and the fact that the Agreement permits awards of specific performance as remedies for specific performance does not bring it within the holding of the *D'Urso* case, which is essentially a rule addressed to the measurement of post-Judgment interest. Respondents paraphrase a portion of a New York Court of Appeals case they cite, *Jay's Stores v. Ann Lewis Shops*, 15 N.Y.2d 141, 147 (1965) (Ex. RL-018), where that Court stated: "The theory

of merger of a judgment and its underlying cause of action, while it has served some other functions, essentially is based on a policy to prevent successive actions on the same cause. Hence it is closely related to the doctrine of *res judicata.*" But this is unhelpful to Respondents here, because the cause of action for damages based on the PFA-1 Breach, while based on the same breach, is a different cause of action, notably because proof of damages, and damages causation, are elements of the cause of action that are not elements of the cause of action for specific performance. The causes of action are related, but they are not the same.

E. Whether Respondents' Challenges to Claimants' Valuation Methodology in Regard to Company Sale Damages Justify the Conclusion Urged by Respondents That Claimants' Failed to Prove Company Sale Damages

56. In addition to arguments about the destiny that might have awaited Torrecom and the Parties had the transaction not been rejected by Respondents, Respondents have made certain other arguments that purport to take issue with Claimants' methods in their approach to Company Sale damages. We summarize those arguments and address them in this section.

57. Respondents argued that Claimants improperly seek "unrealized losses." They stated: "Unrealized losses are, by definition, speculative. The Company could be sold in a few months for an amount much higher than the amount sought by Claimants." In support of this argument, Respondents cited a case that involved "transitory price declines." (Respondents' Pre-Hearing Responsive Memorial at 20). This argument does not correspond to the established facts of this case. The notion of unrealized loss implies that the claimant owns a liquid asset whose value vacillates, such that loss may be avoided or minimized if the claimant simply awaits an opportune time to sell and then sells at that time in a market that offers liquidity. That is not this case. The Company cannot be sold unless Terra agrees to sell or is effectively compelled by legal process to sell. Up to now, despite more than four years of arbitration before this Tribunal that has gone against Respondents at every step, Respondents have not agreed, and they have not recognized the

PFA-1 Judgment (or the Judgments enforcing our other awards) as a source of compulsion. As to a standalone sale of Claimants' minority position, Respondents offer no rebuttal to the opinion of Claimants' corporate finance expert that the minority position is worthless in a standalone transaction because there are no willing buyers.

58. Respondents argued that Claimants adopted a damages framework that depends on proof of the difference in the Company's value between early 2021 and the Company's value at the time of this Phase 2 Award, and that Claimants then failed to present evidence of such values, especially the value of the Company today. (Respondents' Post-Hearing Brief at 12 para. 26). This argument obscures the truth. Claimants in the October 2023 ASOC presented *alternative* approaches to Company Sale damages (in part to address the possibility that a Company Sale would occur before the Phase 2 Award). One of those alternatives was simply to recover "the over $185 million to which [Claimants] should have been entitled from the Proposed Sale" (ASOC at 109 para. A.i.(a)). An alternative measure of Company Sale damages in the same paragraph of the ASOC — made plain by the expression "***and/or***" in that paragraph of the ASOC — did involve alleged diminution in the value of the Company. But when Claimants elected in Phase 2 not to rely on the latter alternative, and not to have an expert opine directly about the value of the Company, it was not a failure of proof or a flaw in damages methodology. It was simply an election to rely on one pleaded theory of damages rather than another, explainable on the basis that there has not been a Company Sale to which the diminution in value formula could be applied.

59. Respondents' written post-hearing argument on this point, under the section heading "**Claimants have not even tried to provide a value of the Company**" (boldface in original), goes on at considerable length. (Respondents' Post-Hearing Brief at paras. 28-36 and accompanying footnotes). We draw attention to this because it was clearly improper argument to

claim that Claimants relied on this approach to Company Sale damages as Phase 2 evolved, when they obviously elected not to do so and in the ASOC had preserved the option to make this election.

60. As to the damages measure Claimants did rely on in Phase 2, *i.e.*, the difference between the Torrecom Offer and the present value of their minority interest if they attempted to sell it to a third party, Respondents state that Claimants "submitt[ed] a defective assessment of the value of [the] minority interest." (*Id.* at 13 para. 30). But they did not offer any contrary assessment of the standalone value of the minority interest from a fact or expert witness, to counter Claimants' expert Professor Hitscherich's opinion that this value is zero. Instead they merely present a distorted depiction of the response of Prof. Hitscherich to a question from the Tribunal, and assert that this was an "admission" that her assessment of the minority interest as having zero standalone value to a third third-party purchaser was "defective." (*Id.* at fn. 80).

F. Whether Claimants' Request That Any Proceeds of an Eventual Company Sale Should Be Placed in Escrow as Security Should Be Sustained

61. In their Pre-Hearing Opening Memorial, Claimants stated: "To prevent Respondents from further flouting their obligations under the SHA by absconding with any sale proceeds, the Tribunal should award Peppertree/AMLQ declaratory relief requiring that future sale proceeds be escrowed and distributed to comply with the Damages Provision and to satisfy any awards or judgments owed to Peppertree/AMLQ by Respondents" (at 45). Respondents state that "Claimants' request is, essentially, a request for provisional measures." (Respondents' Pre-Hearing Responsive Memorial at 19 para. 54). They state: "Claimants fail to meet the necessary legal requirements to put such a dramatic measure in place (they do not even plead them): no irreparable harm will be caused to Claimants if the measure is not adopted; And, Claimants are unlikely succeed on the merits." (*Id.*). A request for a provisional measure — assuming Claimants' request is so viewed — need not always be included in a pleading. The requirements of Rule R-6(b)

apply to "new or different claim(s)" and the Rule requires a written submission to be filed with the AAA. Rule R-6(b) does not insist upon an amended pleading. A request for a provisional measure is not necessarily a "claim." Rule R-37 entitled "Interim Measures" uses the phrases "interim measures" and "measures" and does not use the word "claim." This request is not a claim, it is a measure to provide security for the collectability of damages recovered on claims. Respondents' perfunctory contention that "Claimants are unlikely to succeed on the merits" lacks merit, because Claimants in this Award do succeed on the damages claims for which escrowed Company Sale proceeds would stand as security.

62. Irreparable harm is absent if money damages would be an adequate remedy for the loss anticipated by the applicant for the interim measure. We fail to see how awarding more potentially uncollectable money damages would be an adequate remedy if Respondents sequester or encumber proceeds of a Company Sale to prevent their being applied to satisfy the damages awarded in this Award. For the Tribunal to conclude that there is an absence of irreparable harm here, we would need to find that the collection risk that Claimants perceive is either non-existent or negligible. We cannot do so.

63. Claimants proved irreparable harm by proving that there is a legitimate collection risk justifying the proposed measure. The fact that Respondents have refused a Company Sale despite exhaustion of their legal recourse to vacate PFA-1 is an unlawful sequestration of Claimants' invested funds. It is logical to infer that a party willing to take measures to fail to honor a legal obligation to sell the Company after all lawful means to be relieved of that obligation have failed, would also take steps to prevent the Claimants as beneficiaries of such a Company Sale from having satisfaction of an award or judgment for money damages. The fact that Respondents insisted in 2023 that a Citibank Engagement Letter would only be acceptable if the Parties

specifically agreed that there would be immediate distribution of sales proceeds from a Company Sale – which if Claimants agreed would have positioned Respondents to say that Claimants had waived the right to obtain this type of interim measure – supports an inference that the purpose of such an agreement – whether between the Parties directly or through the Engagement Letter – was to enable Respondents to put any Company Sale proceeds out of reach of Claimants. The fact that Respondents disobeyed our order for production of Terra financial information and DTH financial information supports an inference that they wish to prevent Claimants from having knowledge of Terra and DTH assets that might be applied under applicable laws to satisfy damages awards and judgments on those awards. Collection risk is also inferable, for example, from Respondents' refusal to bear their share of the deposits for fees of the Tribunal, forcing that obligation upon Claimants as a condition for this arbitration to go forward, while they have willingly spent or incurred legal costs for litigation or arbitration that (i) collaterally attacks our prior Awards and the judgments enforcing them, (ii) antagonizes cell tower companies that might otherwise have an interest in buying the Company or the Claimants' minority position in the Company, and (iii) gratuitously attacks the Company's CEO with false charges of criminality.[25]

64. Although AAA Commercial Rule R-37 does not elaborate legal standards for provisional measures other than our finding the proposed measure to be "necessary," there are further considerations international arbitral tribunals frequently take into consideration, including balancing the hardships the measure would impose on the party addressed with the hardship borne by the applicant if the measure is not imposed, and also notions of urgency and imminence of the anticipated irreparable harm.

[25] All of this conduct is addressed elsewhere in this Award.

65. Despite their assertion that this application should be read as a request for interim measures, Respondents make no submission that they would suffer hardship from the measures that is disproportionate to the risk addressed. They make no submission, for example, that other secured creditors have priority over Claimants' claims and that the Company Sale proceeds should be available to be used to satisfy those creditors' claims. Claimants, on the other hand, will be award-creditors for sums, other than the Company Sale damages and interest on those damages, for many millions of dollars after the issuance of this Award, and due to Respondents' disobedience of our disclosure order concerning the financial position of Terra and DTH, Claimants have not been informed by Respondents whether there are any assets other than Respondents' shares in Terra that exist to be applied to satisfy this amount of award/judgment debt. The balance of equities favors Claimants.

66. We address imminence and urgency, because no Company Sale is imminent to our knowledge. Based on the record before us, it appears that absent some fundamental change of position by Respondents from the positions they have taken for more than four years, a Company Sale can only come about if it is imposed as an award enforcement/judgment execution measure by a competent court. That said, we do not know how soon after the issuance of this Award a court in a competent jurisdiction might act and on what terms. Certainly, Claimants are in a position to apply for relief related to enforcement of this Award as soon as they are notified of its issuance. The question is whether we should wait, and only hear and decide this application, if it were to be renewed, when and if a Company Sale is closer to being consummated. We see good reasons not to adopt that approach. The Respondents have yet to comply with any requirement imposed in any of our four Partial Final Awards. They litigated unsuccessfully to vacate PFA-1 up to a Judgment in the Second Circuit. They have litigated unsuccessfully to vacate PFAs -2, -3, and -4 in the

SDNY Court, and are now litigating a consolidated appeal of the three confirmation judgments upon those Awards. It is therefore foreseeable that the relief we are asked to award now will be disrespected by Respondents at least until (and perhaps even after) they have taken legal recourse against this Award in courts of original and appellate jurisdiction in the United States. And in a court outside of the United States where Claimants might seek enforcement of this Award, there is at least the risk that Respondents would seek to have enforcement of this Award stayed pending the completion of their vacatur efforts in the United States. We think it is better to launch that judicial review process (if one is as inevitable as this history suggests) now. In the circumstances, the requirements of urgency and imminent threat are met.

67. Therefore the requested escrow measure is granted upon the following terms (with the proviso, however, that after taking further comments from the Parties, the Tribunal - or another ICDR Tribunal constituted pursuant to the Arbitration Agreement if this Tribunal, having completed its mandate, is no longer sitting - may elect to adopt additional details of such terms without substantive modification of the elements adopted in this Award as stated here):

1. The Parties shall ensure that proceeds of a Company Sale are paid directly by the purchaser at closing to an escrow agent, who shall be appointed by the Company's counsel, Adam Schachter, Esq., (or his duly-appointed successor), in his discretion.

2. The escrow agent shall disburse to the Shareholder Respondents their Net Pro Rata Share (as defined below) of the Company Sale proceeds only when the escrow agent is satisfied that all sums owed to Claimants or either of them by the Shareholder Respondents, Respondent DTH, and/or Respondent Jorge Hernandez, as a result of an award of money under any of the Tribunal's Partial Final Awards have been received by Claimants.

3. As used above in para. 2, the Shareholder Respondents' Net Pro Rata Share of Company Sale Proceeds shall be 54.45% of proceeds that are actually payable by the purchaser at the closing or that will become payable by the purchaser (or its agent, including any escrow agent) thereafter at any time if the conditions for such post-closing payments are satisfied.

4. The escrow agent, upon (i) the written instruction of the Shareholder Respondents, or (ii) the escrow agent being satisfied that there has been a final adjudication in the courts of the United States confirming awards providing for money to be due and payable to Claimants from the Shareholder Respondents, Respondent DTH and/or Respondent Jorge Hernandez, shall disburse such amounts from the escrow to the Claimants and deduct such disbursements from the Respondents' Net Pro Rata Share of Company Sale Proceeds.

5. The escrow agent shall disburse to Claimants the Claimants' Net Pro Rata Share of Company Sale Proceeds on the 60th day after the receipt of such proceeds, unless within the 60-day period the escrow agent shall have been notified that the stay of proceedings on the Respondents' counterclaims has been lifted. In case of such notification, the escrow agent shall treat Claimants' Net Pro Rata Share of Company Sale Proceeds as thereafter directed by the ICDR Tribunal sitting to hear those counterclaims.

6. Except as this Tribunal (or another ICDR Tribunal constituted pursuant to the Arbitration Agreement if this Tribunal, having completed its mandate, is no longer sitting) may otherwise determine, the escrow agent's obligations hereunder shall not be affected by any proceeding in a court outside of the United States concerning recognition and enforcement of any award of this Tribunal, subject to item 8 below.

7. In the event any of the Respondents or any agent of the Respondents shall commence any legal action against the escrow agent, the escrow agent may, upon written notification to the Parties, recoup the escrow agent's reasonable costs of defense of such action from the escrow as a deduction from the Shareholder Respondents' Net Pro Rata Share of Company Sale Proceeds.

8. For so long as the escrow agent shall retain undistributed Company Sale proceeds, the Claimants shall make prompt written reports to the escrow agent, with copies to the Company's Counsel and the Respondents, of sums received from sources other than the escrow in partial satisfaction of amounts due to them under our Awards, and the escrow agent shall make a corresponding reduction in amounts potentially payable to Claimants out of the escrow account.

9. The escrow agent shall be deemed to be an agent of the Company for purposes of this relief and in that capacity shall have the right to apply to this Tribunal (or another ICDR Tribunal constituted pursuant to the Arbitration Agreement if this Tribunal, having completed its mandate, is no longer sitting) for relief that the escrow agent deems necessary to the effective performance of the escrow agent's duties.

III. Claimants' Derivative Breach of Contract Claims Asserted on Behalf of the Company and Seeking Damages to be Awarded Directly to Claimants as Shareholders on a *Pro Rata* Basis

A. Legal Considerations Pertinent to Claimants' Derivative Claims

68. A series of claims for damages made by Claimants are shareholder derivative claims, made to enforce alleged breaches by Respondents of contractual and/or fiduciary duties, or duties of care under tort law, said to be owed to the Company. On certain of their derivative claims, Claimants also seek equitable relief, characterized as a "permanent injunction" or as "specific performance."

69. The New York case law cited by Claimants does not define situations in which a derivative claim plaintiff may recover for itself the damages sustained by the Company on whose behalf it claimed. Rather, that authority defines situations in which the claim should be regarded as direct, not derivative.

70. Thus in *Abrams v. Donati*, 66 N.Y.2d 951, 953 (1985) – the leading New York Court of Appeals case, which was cited and relied upon by Justice Fried in the *Miot v. Miot* case cited by Claimants[26] – the Court of Appeals stated (as quoted in the *Miot* case): "[D]iversion of assets by officers or directors to their own enrichment, without more, pleads a wrong to the corporation only, for which a shareholder may sue derivatively but not individually." And in *Glenn v. Hoteltron Sys.*, 74 N.Y.2d 386, 392 (1989), which is also discussed in the *Miot* case cited by Claimants, the Court of Appeals stated the "general rule" that in a shareholders' derivative suit "any recovery obtained is for the benefit of the corporation." In *Glenn*, the Court of Appeals then stated that "[w]here, however, the plaintiff sues in an individual capacity to recover damages resulting in harm, not to the corporation, but to individual shareholders, the suit is personal, not derivative, and it is appropriate for damages to be awarded directly to those shareholders."

71. Claimants here, however, also rely on an Appellate Division case, cited in *Glenn* and in *Miot*, *Geltman v. Levy*, 11 A.D.2d 411, 413-14 (1st Dep't 1960), where the Court stated:

> [A]lthough ordinarily the recovery in a stockholder's derivative action would be that of the corporation for whose benefit the suit was brought, the court in a proper case where special circumstances exist should adjust the decree to the realities of the situation and prevent unnecessary circuity and hardship…. It would seem that to insist that these plaintiffs, who were the only ones injured by the wrongdoing of the defendants, obtain relief only by instituting a derivative suit in behalf of now defunct corporation is to encourage circuity and to compel them to follow a meaningless legal procedure in complete disregard of the realities of the situation.

[26] 24 Misc.3d 1224(A) (Sup.Ct. N.Y. Co. July 15, 2009).

72. *Geltman* appears to be good law despite its vintage, so we consider how the facts here relate to what was decided in *Geltman*. In that case, plaintiffs were the 100% shareholders of a corporation that had been liquidated, and the claim was brought on behalf of the former shareholders as a direct claim to set aside a transaction involving misconduct that reduced their effective ownership interest in real property that the corporation had owned from 100% to 75%. The Appellate Division held that the plaintiffs were not required to sue in a derivative capacity. But then the Court went on to state (*id.* at 413):

> Even if this should properly have been a derivative suit the circumstances of this case would 'warrant' the Court in the 'exercise of its equitable powers' to 'dispense with the presence of the defunct corporation'. Weinert v. Kinkel, 296 N.Y. 151… Here the corporation has been liquidated and the parties are tenants in common of the real estate in the same proportions as they held the stock. To relegate the plaintiffs to a stockholder suit would, as said in the Weinert case, supra, be disregarding 'the realities.'

While this was evidently *dictum* not a holding in the *Geltman* case, the cited case, *Weinert v. Kinkel*, is a Court of Appeals case and so we regard these principles as New York law that we should apply.

73. The Company here is not defunct. But its existence today is the consequence of Respondents' defiance of the contractual terms of the Company as it was reconstituted at the time of Claimants' investments. This defiance has created an asymmetry in the positions of the majority and minority Shareholders, which was not agreed between the Shareholders. Most of Claimants' derivative claims relate to how Terra's affiliate Respondent DTH profits from its relationship to the Company. Claimants accepted that DTH would enjoy a certain margin of profit – through the stipulated SG&A and per-tower development fees payable to DTH under the Development Agreement – in consideration of the benefit Claimants would achieve through the return on (and of) their investments at the end of the five-year Lock-Up period. But that period ended more than four years ago, and those benefits to DTH should have ended with the sale of the Company.

Further, the Company's relationship with DTH was, under the Governing Documents, to be managed by Company Management who were accepted by Claimants. Instead, Company Management were ousted *de facto* in 2021, in the circumstances addressed in our PFA-2. Despite PFA-2, and despite our directions for DTH to restore them to the functional roles in the Company they held until September 2021, since then "the realities" of the situation have been that Respondent Jorge Hernandez is the self-appointed *de facto* CEO of the Company despite his obvious conflicts of interest, and the CFO, Mr. Quisquinay, spends the Company's money as directed by Mr. Hernandez. How much of that money lands directly in the pockets of Mr. Hernandez and those in his favor that carry out his mandates we do not know, because of Respondents' unexcused violations of our orders for production of financial records that would reveal such facts.

74. This case certainly satisfies one explicit condition, identified in the authorities cited in the *Geltman* case, for equitable adjustment of the normal rule of corporate recovery in a derivative action: Claimants are "in reality" the only ones injured by the wrongdoing of the Respondents. But whether that decides the matter in favor of "personal recovery of [their] proportion of the damages based on the percentage of [their] stockholdings" requires us to take into account two other "realities" : first, Respondents' use of the misappropriated funds ostensibly to develop and operate tower sites that Respondents say are Company-owned; and second, the uncertainty surrounding whether and when and at what cost will Claimants ever realize their share of the value allegedly created through a Company Sale that Respondents have spent more than four years resisting through more than a dozen legal proceedings in addition to this arbitration.

75. New York law, as described above, clearly provides us with a power of equitable adjustment with respect to damages claimed in a shareholder derivative case. But the adjustment

we will make is not the one sought as a first preference by Claimants: awarding them damages. It is closer to the alternative proposed by Claimants: that is to "issue an award ordering specific performance by Respondents of the provisions of the Governing Documents related to the recognition of the Offset Right and development of Approvcd Sites…" (ASOC at 111). The main reason we elect to make an equitable adjustment – as detailed below – rather than to award damages, is that an increase in the size of the damages award in this Award does not contribute in any apparent way to an end to this dispute, while on the other hand a remedy in the form of an interim measure to give security may provide an incentive to compliance with our prior Awards as well as this Award. That is a more equitable adjustment in the circumstances. As a second reason, if we did increase the award of damages, it is unclear whether we would be awarding sums we are already awarding as Company Sale damages and interest on those damages, and doing so would only complicate further the eventual reconciliation of the damages so awarded with the allocation of proceeds of a Company Sale if and when that does occur.

B. Claimants' Derivative Claim for Breach of Obligation to Develop Only Approved Tower Sites

76. It is an uncontested fact that since the commencement of the arbitration, there have been at least 253 tower sites developed on behalf of and at the expense of the Company and that the development of the sites violated the Development Agreement because the Development Committee rejected the sites, as the Development Agreement permitted, upon the opposition of the Peppertree-appointed members of the Development Committee. (Report of Respondents' Expert Arik Van Zandt, May 20, 2024 at paras. 4, 11). The Development Agreement provided that Terra could elect to develop Company-rejected sites at its own expense and for its own account. Terra, DTH and Mr. Hernandez all admit that instead of doing that, the Company's money was used as if the rejected sites were approved sites, at the rate per site of $175,000 stipulated in the

Governing Documents, for a total expenditure exceeding $55 million of which Claimants' *pro rata* share as 45.55 % shareholders exceeds $37 million. (Claimants' Post-Hearing Memorial at 22-26). Claimants seek an award of money damages for their *pro rata* share of the amounts so expended. (*Id.*). Respondents contend that the unauthorized tower development added value to the Company, net of the expenditure, such that neither the Company nor the Claimants was harmed.

77. There are flaws in the positions on both sides.

(1) The damages claimed by Claimants are in effect consequential damages caused by Respondents' breaches of the Company Sale obligation. While the unauthorized tower development was indeed an independent breach of the Development Agreement, had there been a Company Sale, the purchaser might well have elected not to use DTH as an independent contractor for tower site development – that is to say the Development Agreement might well have been terminated – and in all events the buyer would have made tower site development decisions based on its own independent judgment. Claimants have not demonstrated that the Company Sale damages that they have claimed, and that we award today, together with interest on that sum, do not fully compensate them for the value associated with these unauthorized towers. If additional compensation for these towers is due, the proper time to make a claim and to prove it is either after a Company Sale, if one occurs, or when a Company Sale is no longer possible for whatever reason.[27]

(2) But Respondents are wrong to assert that there is no possible harm to Claimants because the unauthorized expenditure added value to the Company. Whether or not value was added – an issue we do not reach, and so we have no occasion to address the

[27] This might depend, for example, on whether the multiple of Tower Cash Flow used by Torrecom in fashioning its offer took into account the growth in the towers portfolio that the unauthorized towers represents, the cost of that growth and the anticipated revenue streams.

analysis of Respondents' expert witness – Respondents' actions do not generate any value for the Claimants if their minority interest in the Company is unmarketable and therefore worthless on a standalone basis (*see* para. 60 above), which we find to be the case, and for so long as a Company Sale continues to be refused by Respondents and until such refusal might be rescinded or overcome by legal process.

78. That the damages relief requested by Claimants is inappropriate in our estimation does not, however, warrant the conclusion that no relief should be granted. That is so because Respondents' conduct is plainly violative of the Governing Documents and the opportunity for that breach is derivative of the Company Sale breach, and also derivative of the breach consisting of the wrongful *de facto* ouster of Company Management that left Mr. Hernandez in a position to instruct the Company CEO, Mr. Quisquinay, as his agent, to disburse funds for development of rejected sites. As we held in PFA-1, denial of corporate governance rights negotiated and obtained in the Governing Documents is an irreparable injury that may warrant equitable relief.

79. Respondents contend that they had no choice but to go ahead with the development of towers that were unauthorized because they had been rejected by the Development Committee, because the purpose of the Company was to build towers. They rely on the initial sentence of Section 3.01 (a) of the SHA which states: "The purpose of the Company is to develop, own, acquire and operate, directly or indirectly through Company Subsidiaries, Towers in the Territory." The remainder of Section 3.01(a) was a recital concerning the amounts of the respective capital contributions of the Shareholders to the Company.

80. There are two dimensions of Respondents' reliance on the "purpose" sentence in SHA 3.01(a). First, they argue that Claimants failed to substantially perform their obligations under the Governing Documents because, according to Respondents, Claimants broadly and

systematically rejected tower site development without good cause. (*E.g.*, Respondents' Opening Pre-Hearing Memorial at 14-19).[28] Second, Respondents contend that Claimants' rejections of tower site development conferred on Respondents a broad mandate to act unilaterally to develop rejected sites for the benefit of the Company and in fulfillment of this "purpose." (*E.g.*, Respondents' First Post-Hearing Memorial at para. 4). Having disposed of the first contention in the preceding footnote, we address the latter contention in the next paragraphs.

81. We find that Respondents' argument that Terra has a broad mandate to construct towers unilaterally in the name of and at the expense of the Company does not comport with the text of the "purpose" sentence. Their argument is that the purpose of the Company was to maximize tower development, and that rejection of tower development contradicts that purpose. But the sentence also refers to owning and operating, and acquiring, Towers in the Territory, and it establishes no hierarchy of importance among developing, acquiring, owning, and operating Towers. The sentence takes no position as to whether the Company might determine from time to time, following its corporate governance procedures, that the ownership and operation of Towers in the Territory that had already been developed or acquired might weigh in favor of limitations on additional development.

82. Moreover, neither the SHA nor the Development Agreement contained any language, in their sections concerning how decisions about the development of Towers would be made, that purported to subject decisions under those sections to any limitation on the

[28] The testimony of Peppertree's witness, John Ranieri, and accompanying exhibits, not meaningfully contradicted and which we credit, demonstrated that Peppertree exercised good faith business judgment in approving or rejecting development of proposed new towers, and that the Offset Right claim arose from DTH's inability to complete development of towers that Peppertree had approved. Further, the Governing Documents addressed the issue of Peppertree rejections of new tower development based on Peppertree electing not to deploy its invested capital for such development, by permitting Terra to develop rejected towers entirely with its own funds. (John Rainieri Witness Statement, May 20, 2024, at paras. 15-32). On this basis, we reject Respondents' defense to the Company Sale breach claims based on Claimants' alleged failure to perform an obligation under the Governing Documents to approve tower development.

Development Committee's discretion as a consequence of the "purpose" sentence in § 3.01(a). One of the established principles of contract interpretation in New York law that we apply is that when two provisions of the contract (or as here, a group of related contracts made at the same time) appear to be in conflict, the more specific provisions of the contract(s) are the better indication of the mutual intention of the parties with respect to that particular matter. (*E.g. Nonuram Home Equity Loan, Inc. v. Nomura Credit & Capital, Inc.*, 30 N.Y.3d 572, 586 (2017): "A specific provision will not be set aside in favor of a catchall clause." (internal citation and quotation marks omitted)).

83. The Development Agreement, entered into in conjunction with the SHA, is the more specific agreement in this instance. It provides that Terra was to propose tower sites for development, that the Development Committee (with membership corresponding to the Parties' respective proportional representation on the Company's Board, *i.e.*, 50-50) would decide by majority whether to approve the proposed sites for development, and that if the Development Committee rejected a site, Terra could develop the site on its own. Effectively, Terra and DTH in exchange for giving Peppertree a veto power over tower site development for the Company (because a deadlock in the Development Committee constituted a rejection), obtained the right to develop rejected sites so long as they bore 100% of development costs from their own funds, rather than only 55% as Terra's *pro rata* share of the $175,000 per approved site that the Company agreed to pay to DTH. It has not been disputed that this was a carefully negotiated arrangement between sophisticated parties. So, Respondents' contention now that they had a contractual mandate *to have the Company* build towers that Peppertree had rejected, which their counsel frames rhetorically as a claim that Respondents "had no choice but to build" the unauthorized towers (Respondents' Post-Hearing Brief at 17), lacks merit and is not adopted.

84. Respondents in their Pre-Hearing Reply Memorial focused their argument on the purportedly value-adding outcome of the unauthorized tower development, relying on the opinion of Respondents' valuation expert witness, Mr. Van Zandt, that the towers in question had a value to the Company of more than $50 million, and a present value to the Company exceeding their costs of development and operation. (Respondents' Pre-Hearing Memorial at 29-31 paras. 77-82). But value to the Company, in our view, expresses what a willing buyer might pay the Shareholders of the Company as willing sellers in a transaction to acquire the Company. For so long as Terra remains an unwilling seller, preventing rather than participating in a Company Sale, the Company's alleged value today and the appropriate remedies for Claimants for an obvious breach of the SHA and the Development Agreement are unrelated. We therefore decline to consider further whether Mr. Van Zandt's valuation opinion has any merit.

85. Accordingly, the amount of the damages claimed by Claimants for the unauthorized expenditures for unapproved tower sites, i.e. $37 million, plus interest from the intermediate date we have selected for all damages claims other than Company Sale, *i.e.* February 15, 2023 — as a joint and several obligation of the Respondents who committed these breaches, Terra and DTH, and the Respondent whose conduct constituted tortious interference with contract with respect to some or all of these breaches, Mr. Hernandez (*see* Section V below) — shall be deposited by Respondents into the escrow account to be established pursuant to para. 67 above as security for eventual satisfaction of the monetary obligations of Respondents arising from this Award, our prior Awards, and potential future Awards.[29]

[29] It is to be understood that when such satisfaction has occurred, any remaining escrowed sums will be returned to Respondents.

86. This measure meets the standard of necessity set out in AAA Rule R-37(a), as the Respondents have – among other things – refused compliance with PFA-1 (now for nearly three years) by blocking a Company Sale; refused compliance with our 2021 and 2022 provisional relief orders, confirmed by our findings in PFA-2, by preventing Company Management from performing their duties; refused compliance with PFA-3 by allowing the Foreign Arbitrations to continue (where our stay of counterclaims founded on Peppertree's tower development rejections poses no obstacle to prosecution of the same claims); refused compliance with PFA-4 by not paying the award of counsel fees made therein; refused transparency of their financial affairs by unexcused non-compliance with our document production orders; and disregarded the carefully-negotiated Governing Documents by spending the Company's money to develop rejected tower sites.

C. Claimants' Derivative Claim for Recoupment of Their *Pro Rata* Share of SG&A Fees

87. Claimants contend that their claim for damages "caused by Terra's continuing failure to sell the Company" should include "Claimants' pro rata share of the $480,000 monthly payment the Company makes to DTH pursuant to the Development Agreement." (ASOC at para. 344).

88. This claim presents difficulties for the Tribunal because each side makes arguments that are correct but are not sufficient to decide the outcome. Claimants are correct in asserting that this monthly payment from the Company to DTH in consideration of selling, general and administrative costs ("SG&A") would not have continued had the Company been sold. Respondents, on the other hand, are correct in stating that the monthly payment is provided for in the Development Agreement and that the Development Agreement has not been terminated.

89. Claimants contend that these are "funds that the Company could have retained and would otherwise be distributed to the shareholders upon the sale." (Claimants' Opening Post-Hearing Memorial at 25–26). The problem with this argument is that if the Company had made no SG&A payments to DTH and received no SG&A services from DTH during an indeterminate period while a Company Sale was being pursued, we do not know how that might have affected the purchase price. Presumably one of the assumptions underlying a purchaser's offer would be that the Company would operate in the ordinary course of its business between the execution of a letter of intent and the final closing date. We have no basis to assess whether $185.7 million would remain an appropriate estimate of an "at least" amount that Claimants would have derived from a Company Sale if we were to withdraw the assumption that full performance under the Development Agreement by all Parties would continue up to the closing. Thus, to a certain extent we accept Respondents' argument that the purchase price in a Company Sale in 2021 "would have already accounted for the entirety of the future cash flows of the company." (Respondents' Post-Hearing Brief at 24 para. 52).

90. Accordingly, we decline to Award additional money damages as requested by Claimants. Whether such damages have been compensated by the Company Sale damages we award, plus the interest we award, might be proved when there has been a Company Sale or when the possibility of a Company Sale no longer exists. But such damages have not been proved at this time.

91. Further, while Claimants have not sought a declaration that the Development Agreement is terminated, prospectively or retroactively, the question of remedy must still take into account that the Development Agreement does not operate today as it was intended to operate

when it was made in 2015.[30] The Company Management regime in which the Development Agreement was supposed to function has been completely displaced as a consequence of Respondents' breaches and their refusals to comply with our orders, our Awards, and the Judgments of the SDNY Court. The premise of good faith that may have operated in 2015 such that Respondents were not required by the express terms of the Governing Documents to make a monthly accounting to the Company for how the monthly SG&A payments were used no longer exists, and Claimants' justified information requests, that we enforced, for information about how that money has been spent, were refused without excuse. This refusal justifies an adverse inference that some portion of the SG&A money has not been spent on SG&A but instead has been put to uses the Respondents wish to conceal because they are not bona fide Company SG&A.

92. While Claimants have focused their attention on obtaining a monetary award to them for all the SG&A monthly payments since 2021, Claimants also seek equitable relief. (Claimants' Opening Post-Hearing Memorial at 26). Based on Respondents' misconduct, we find a breach of the implied covenant of good faith, by DTH under the Development Agreement, and by Terra under both the Development Agreement and the SHA. We address Mr. Hernandez's liability on this breach for tortious interference in Section V. below. There is an implied covenant of good faith that the funds supplied under the Development Agreement will be spent only on legitimate SG&A for the Company, and not on concealed transactions that do not benefit the

[30] Section 3.9 of the Development Agreement permits the Company to terminate the Development Agreement if, *inter alia*, Terra defaults on any material obligation in the Development Agreement, or the SHA. Clearly the breach of the SHA that Terra and Mr. Hernandez committed by refusing to sell the Company, as we determined in PFA-1 with regard to Terra and extend to Mr. Hernandez in this Award is such a breach. But termination of the Development Agreement would require action by the Company's Board (*see* SHA Section 4.04(a)(viii)) and the Board cannot so act because Mr. Hernandez/Terra and their appointees to the Board have the power to protect themselves from such action by voting against termination and deadlocking the Board on this issue. Respondents' wrongful refusal to sell the Company makes it necessary for the Company to function day to day until that refusal may be withdrawn or overcome by judicial compulsion.

Company or that advance a concept of Company benefit unilaterally imposed by Respondents rather than by the Company through its Board and duly designated Company Management. There is irreparable harm – injury not readily measured in money damages – to the Company and Claimants from this misapplication of the SG&A payments to unintended uses. At worst, Claimants may be correct that sums have been applied by Respondents to finance this arbitration and the vast array of related proceedings. At a minimum, we cannot even calculate the value of the lost opportunity to spend the money for the benefit *pro rata* of all Shareholders. That harm is reasonably likely to continue based on Respondents' *de facto* control of the Company's finances unless (and perhaps even if) we enjoin it.

93. Accordingly, we will grant a permanent injunction that (i) restrains and enjoins Respondents and their agents from causing the direct or indirect transfer from the Company of the $480,000 per month SG&A payment, except that (ii) Respondents shall cause the Company to transfer $480,000 per month to the escrow account established in para. 67 and, (iii) the escrow agent upon instruction from the Company CEO, Mr. Gaitán, shall make disbursement of SG&A payments that are requested in writing by DTH and that Mr. Gaitán[31] determines to be reasonable and appropriate.[32]

[31] If Mr. Gaitán is prevented from making such determinations for any reason, they shall be made by a person to be designated by this Tribunal, or if this Tribunal having completed its mandate is no longer constituted, then by another ICDR Tribunal duly constituted pursuant to the Arbitration Agreement if this Award has not at that time been judicially enforced, or by the SDNY Court or another Court that has entered judgment enforcing this Award.

[32] Claimants' evidence also establishes the liability of Respondents on Claimants' derivative claim for the making of unauthorized compensation payments to DTH country managers in certain countries, and unauthorized retainer payments to a law firm that Respondents wished to have the Company retain in place of Company Counsel. (See Claimants' Pre-Hearing Memorial at 33-34 and the evidence cited there). The relief granted on derivative claims in this Award is in our judgment adequate to address these unauthorized payments.

D. Claimants' Derivative Breach of Contract Claim Based on Failure to Honor the Offset Right

94. The ASOC includes three claims for relief that relate to the "Offset Right." (ASOC at pp. 91-94, paras. 346-372). These claims are understood to be derivative claims, as the Offset Right was a right of the Company. (*See* ASOC at para. 352: "The Company has been damaged in an amount to be determined at the hearing of this matter…").

95. The Offset Right claim was summarized in the ASOC as follows (ASOC at 10, para. 21):

> **Failure to Honor Contractual Offset Right**: As early as 2017, Respondents failed to apply funds owed to the Company through an offset credit for the development and construction of future sites. These amounts now total approximately $6.58 million. The governing documents require that if the Board (or Development Committee) approves any projects that are later not completed for any reason, including situations that would fall within a customary definition of force majeure, any funds the Company provided for development of those project sites must then be used for the development of future sites (i.e., the offset credit) for the benefit of the Company. This was an important and heavily negotiated term of the Parties' agreement because in the communication infrastructure industry, especially in Latin America, there is a substantial risk that an approved tower project may not reach completion and may, thus, provide no value to the Company. Respondents agreed to bear that risk because Peppertree agreed that the Company would pay DTH $175,000 for each approved site even though the development and construction cost for building the average tower at issue was materially less. Despite the clear agreement to the offset credit, Respondents have repeatedly and systematically failed and refused to apply it to the development and construction of future sites, resulting in approximately $6.58 million owed to the Company.

96. Claimants' first Offset Right claim is for damages (plus interest). (ASOC at paras. 346-354). The second Offset Right claim is for Declaratory Relief, seeking a declaration, applicable prospectively "in the event the Company is not sold" that Respondents are obligated to respect the Offset Right by proposing and developing Approved Sites to replace sites that could not be completed and for which payments of Company funds were disbursed to Respondent DTH. (ASOC at paras. 355-361). The third Offset Right claim is for Specific Performance, and is also understood to seek relief applicable in the event that, and for so long as, the Company is not sold,

to require Respondents to perform the Offset Right by proposing and developing new Approved Sites without additional cost to the Company until the foregone additional cost equals the alleged amount of the Offset Credit, *i.e.*, $6.58 million plus interest. (ASOC at paras. 362-372).

97. The Offset Right claims are asserted against the Shareholder Respondents and DTH on a theory of breach of contract. In addition, the Offset Right claims are asserted against the Shareholder Respondents and the Terra Directors on a theory of breach of fiduciary duty (*e.g.*, ASOC at paras. 350-351). We address those claims in Section V., but here we address the claims against Terra and DTH.

98. Respondents in their initial Pre-Hearing Memorial did not address the Offset Right claims, save to refer to them in a general way as being among Claimants' "battery of meritless claims." (Respondents' Pre-Hearing Memorial at para. 88). Respondents in their Pre-Hearing Reply Memorial addressed the Offset Right claims in a single paragraph (at para. 46):

> The three Onshore EPC Agreements governing the development of sites in Peru contain the same force majeure provisions, which is sufficient to prevent Claimants' Offset Right claim under the Offshore EPC Agreement. The Offshore EPC Agreement does not have priority over and does not override the Onshore EPC Agreements. To the contrary, the obligations included in the Onshore EPC Agreements are specific to the development of sites in Peru and deal with the consequences of those developments in a very specific manner. The Offshore EPC Agreement is a general agreement and does not include any specificity regarding the development of sites in the different jurisdictions. The specificity of the Onshore EPC Agreements overrides the Offshore EPC Agreement.

99. Respondents in their Merits Hearing opening presentation on July 15, 2024 did not elaborate on their arguments based on the Offshore and Onshore EPC Agreements. Instead, they only questioned the Claimants' entitlement to have their *pro rata* share of the Company's Offset Right credit awarded to the Claimants as damages. (Respondents' July 15, 2024 Opening Presentation Slide Deck at Slide 75). During the Merits Hearing and in the Opening Post-Hearing Memorial, however, Respondents' made clear that they rely upon the terms of the Onshore EPC

Agreement (*e.g.* Ex. R-373, the Onshore EPC Agreement for Peru, first translated into English for purposes of use in the merits hearing, and entered into the record as Ex. R-373 (T)) — and it is not disputed that the Onshore EPC Agreement disallows the Offset Right credit when *force majeure* prevents achievement of Tower development milestones. Respondents also note that the Peru Onshore EPC Agreement is governed by the laws of Peru, and that Claimants have made no submissions about the application of Peruvian law in regard to their Offset Right claims. (Respondents' Post-Hearing Brief at 22 para. 48). Respondents submitted written witness evidence from Kristha Pineda, a DTH employee, accompanied by exhibits, that purported to show that *force majeure* conditions prevented the achievement of milestones in the development of certain Towers in Peru, and that these *force majeure* conditions had been brought to the attention of Claimants as support for the position that no offset credit was required to be recognized by DTH. Claimants elected not to cross-examine Ms. Pineda. If the Tribunal were to accept Respondents' argument that the terms of the Onshore EPC Contracts prevail over the terms of the Development Agreement and the Offshore EPC Contracts, it would be necessary to consider whether *force majeure* conditions did exist in Peru and did prevent achievement of development milestones at the Tower sites implicated in Claimants' Offset Right claims.

100. Our appreciation of the Parties' respective positions concerning the effects of *force majeure* on the Offset Right begins with the Development Agreement, the parties to which were the Company, the Shareholder Respondents and Respondent DTH. That agreement defined a process by which the Company would decide what tower sites proposed by Terra would be approved for development by the Company's Board. The first step was for Terra to provide the Development Committee with a Site Candidate Profile for each proposed site presented to the Company (Section 1.1(a)). The next step was for the Development Committee to notify Terra and

the relevant Subsidiary of DTH whether a proposed site would be developed by the Company, and if that notification was in the affirmative the "Proposed Site" became an "Approved Site." (Section 1.1(c)). Whereas the Parties understood that both the Company and DTH would have obligations between them on the parent-company level, but would also operate through country-level subsidiaries in each of the countries in the territory, the Development Agreement anticipated that there would be an "EPC Contract between the Company and DTH" and an "EPC Contract between the relevant Company Subsidiary and the relevant DTH Entity." (Section 2.1(d)). We understand from the Parties' submissions that the parent-level EPC Contract is referred to by the Parties as the "Offshore EPC Contract" and the country-level agreements are referred to as "Onshore EPC Contracts."

101. The Offshore EPC Contract was executed as of the same date as the Development Agreement and the Shareholder Agreement. It is one of the Governing Documents. With respect to the Offset Right, the Offshore EPC Contract stated:

> [I]f at any time Contractor [*i.e.* DTH] or the Contractor Subsidiary fails to complete any of the milestones set forth in Section 2.1.2.1 - 2.1.2.5 above within 12 months of completion of the previous milestone, (i) Company shall not be responsible for any further payments or distributions with regard to such Approved Site and (ii) Company and the Company Subsidiary shall be entitled to offset any payments made to Contractor or the Contractor Subsidiary for such Approved Site pursuant to this Section 2.1.2 and the applicable Onshore EPC against any amounts otherwise due to Contractor or the Contractor Subsidiary for later Approved Sites (the "**Offset Right**").

102. The Onshore EPC Contract for Peru between the respective Peru subsidiaries of the Company and DTH contained the following provisions concerning *force majeure*:

26. FORCE MAJEURE/ ACT OF GOD

26.1 The Contracting party shall not admit delays caused by unfavorable events or special conditions, of any nature whatsoever, unless they are due to Force Majeure/ Act of God.

26.2 For the purposes of this contract, and without the following list being limitative but only enunciative, the events listed below shall not be considered Force Majeure/ Act of God.

a. Strike or work stoppage, total or partial, incurred by the Contractor's personnel or its subcontractors, whatever the reason for such conflicts may be.
b. Resolutions of a competent authority in the territory originating from acts or omissions of the Contractor, its subcontractors or the workers or representatives of the Contractor or its subcontractors, which constitute a contravention of the applicable laws and which prevent or hinder the Contractor from giving full, timely and complete compliance with the obligations imposed on it by this contract.
c. Delays in the execution of the work caused by inadequate labor, unavailability of personnel, failure of the Contractor to supply equipment and materials sufficiently in advance, acts or omissions of the Contractor's subcontractors or suppliers, and weather conditions at the site of the work or on the access routes that are not extraordinary, unforeseeable and irresistible.
d. Excess demand for materials in the territory.
e. Labor shortages

Contractor may not claim any compensation for the possible application of any of the causes of Force Majeure / Act of God.

26.6 If the Force Majeure/ Act of God lasts for a period of more than forty-five (45) calendar days, either Party shall be entitled to terminate the corresponding Work Order and the Contractor shall be entitled to receive the amount corresponding to all work performed and not paid at the date of termination.

26.7 In the event of termination as contemplated in the preceding paragraph, the Contractor shall stop work, shall place no new orders for equipment, materials, items or services, shall deliver to the Contracting party's Representative a list of all orders for equipment, materials and items, suppliers' orders and/or commitments, and shall, unless otherwise instructed by the Contracting party, suspend as far as possible all orders placed and commitments entered into. The Contractor shall deliver to the Contracting party all work performed prior to the termination of the Word Order and shall also take all other necessary steps to complete the transfer to the Contracting party of ownership of the work and all equipment and materials supplied under the Word Order as resolved.

26.8 In no event shall damages arising solely and exclusively due to Force Majeure/ act of God give rise to any claim for damages between the parties.

103. On our reading, the *force majeure* provisions of the Peru Onshore EPC Contract are not in conflict with the Offset Right provided in the Development Agreement and the Offshore EPC Contract. There is no reference to the Offset Right in the Peru Onshore EPC Contract. Moreover, Article 26 of that Contract insofar as it limits recovery of damages resulting from *force majeure* events, pertains only to the parties to that Contract, the respective Peru subsidiaries of the Company and DTH. Article 26.8 does not foreclose the Claimants' derivative claim for alleged Offset Right damages to the Company, against DTH (based on breach of contract), and the Shareholder Respondents and Mr. Hernandez (based on tortious interference or breach of fiduciary duty). The final sentence of Section 1.1(d) of the Development Agreement states that, if Terra is

unable to deliver an Approved Site, and Terra does not exercise its right to propose a new Proposed Site (or exercises that right, but the new Proposed Site does not secure Development Committee approval), then "*[i]n the alternative, the Company shall have the right to offset any payment made to DTH or any DTH entity for such Approved Site pursuant to the terms of Section 2.1.2 of the EPC Contract between the Company and DTH and the corresponding provision in the EPC Contract between the relevant Company Subsidiary and the relevant DTH Entity.*" (emphasis supplied). We find that Article 26 of the Onshore EPC Contract (Ex. R-373(T)) is the "corresponding provision" and that it does not negate the Offset Right. It "corresponds" in the sense that it provides the definition of *force majeure* for purposes of (i) Terra's eligibility under the Development Agreement to propose a substitute site for an Approved Site that cannot be delivered to the Company, and (ii) the Company's eligibility for the Offset Right with respect to payments made to DTH or its subsidiary for development of an Approved Site that cannot be delivered to the Company.

104. In other words, although under the Onshore EPC Contract (§ 26.6) the Company's subsidiary in Peru is obligated to pay DTH's subsidiary the cost of the work performed by the DTH subsidiary prior to the termination caused by *force majeure* circumstances, nonetheless DTH is obligated under the Offshore EPC Contract to credit the Company itself for any amounts the Company's subsidiary has paid to a DTH subsidiary in respect of terminated projects. In short, the Offshore EPC Contract contains no *force majeure* exception to the Company's Offset Right.

105. In regard to the Offset Right damages claim, it is relevant that the claim accrued as early as 2017, when it became clear that DTH was not complying with the Offset Right provision, well before the Torrecom Offer. We have no evidence in the record on which to base a judgment about how the Offset Right claim would have affected the Torrecom Offer. It is possible but far

from certain that the Company Sale damages we award today compensate Claimants for economic loss sustained as the result of non-recognition of the Offset Right. We also consider, however, Respondents' wrongful rejection of the Torrecom Offer and wrongful obstruction of a Company Sale. Had the Parties proceeded with a Company Sale, a due diligence process presumably would have identified the Offset Right issue and the credit would have been priced into the transaction. If a Company Sale does occur, on a future date, the impact if any of the Offset Right claim on the purchase price may be ascertained, and any damages sustained by Claimants that have not already been covered in this Award may be provable with more certainty. For this reason, as well as the underlying fact that the claim is the Company's claim, we decline to award money damages to Claimants on this claim.

106. As noted, Claimants also seek declaratory relief and specific performance, while observing that they consider these alternatives less desirable than money damages. (ASOC at 92-94 paras. 362-372 & n. 43). The nature of the relief sought is to declare Respondents' obligations to implement the Offset Right by proposing new sites to the Development Committee for approval. We will grant the Claimants' declaratory relief and specific performance claims. The Respondents' obligations under the Development Agreement and the Offshore EPC Contract are clear. There is irreparable injury because the economic harm to the Company (and to the value of the Company in a potential Company Sale) from non-development of the new sites cannot be readily quantified, foreclosing the awarding of damages. In addition, the SHA provides that such breaches shall be regarded as irreparable injuries warranting specific performance. (Ex. C-43 at 48 § 8.12).

107. Claimants also request that the Tribunal "issue an award ordering that Respondents deposit $1,000,000, or any other sum as determined by the Tribunal to secure specific

performance, with the Panel, which sum will be paid to Claimants, or as otherwise directed by the Panel, if Respondents refuse to comply with the award ordering specific performance and/or refuse to recognize or apply the Offset Right as required by the Governing Documents." (ASOC at 111-112 sub. para. B (iii)).) We agree that equitable relief of this nature is warranted in the circumstances. We grant such relief in the form of a mandatory injunction, the terms of which are as follows:

1) Respondents Terra, DTH and Hernandez, jointly and severally, shall deposit $6.58 million, plus interest at the pre-Award interest rate set in this Award with an accrual date of February 1, 2021, with the escrow agent named pursuant to para. 67 within 30 days of the issuance of this Award, and that escrow agent shall have been designated, and the escrow account opened for purposes of receiving such deposit, within 20 days of the issuance of this Award.

2) The escrow agent shall hold such funds in a designated separate Tower Development Account.

3) The escrow agent, upon being notified in writing by Company Counsel Adam Schachter, Esq. that a payment obligation of the Company with respect to new Tower development has arisen under the EPC Contracts, will disburse the required payments from the Tower Development Account.

4) Respondents Terra, DTH and Hernandez, jointly and severally, shall ensure that no other Company funds are disbursed to pay the Company's obligations relating to new Tower development under the EPC Contracts until the funds so deposited are exhausted by their proper application in accordance with this Award.

5) The escrow agent shall render an accounting report to the Shareholders and the Company's Counsel of disbursements from and balances remaining in the Tower Development Account monthly on the first business day of the month.

6) At the end of one year from the date of deposit of the required funds for establishment of the Tower Development Account, if there has not been a Company Sale that disposes of the remaining deposited funds, such funds shall be transferred by the escrow agent to the account established as security for satisfaction of the damages awarded in this Award, as provided in para. 67.

IV. Claimants' Direct Claims Based on Advances of Payments Alleged to Be Company Obligations

A. Preliminary Remarks

108. Claimants allege that Respondents exercised their control over the disbursement of Company funds, through their alleged agent, Mr. Quisquinay, the Company's chief financial officer, to prevent the Company from paying three categories of obligations the Company allegedly was required to pay. Claimants seek to recover as damages 100% of the amounts so advanced.[33] We do not understand Respondents to dispute these premises, but rather they offer what they claim to be justifications for directing Mr. Quisquinay not to make the payments.

109. Claimants allege that they "advanced such expenses on behalf of the Company to avoid damage to the Company that would result if such expenses were not paid." (ASOC para. 220).

[33] *See* ASOC at paras. 390-451; Claimants' Pre-Hearing Memorial at 35-40; John Rainieri Witness Statement May 20, 2024 at paras. 54-66; Expert Report of James S. Feltman May 20, 2024; Supplemental Expert Report of James S. Feltman June 28, 2024; Claimants' Opening Post-Hearing Memorial at 28-32; Claimants' Responsive Post-Hearing Memorial at 22-25.

110. The three categories of Company expense advances claimed by Claimants and the sums claimed are:

1) Company counsel's fees and costs related to this arbitration

2) Salaries and expenses principally of Company Management

3) Company Management's legal fees and costs "related to matters for which they have requested to be — and should be — indemnified by the Company." (ASOC at para. 218).

111. Claimants also assert direct claims for expenses incurred:

1) To defend their interests in the Florida Action, the BVI Action and the Foreign Arbitrations, and

2) To investigate and respond to Respondents' claims of FCPA violations by Company Management and Peppertree.

112. The Tribunal on September 14, 2024 decided in a written ruling that only advances proved in the evidence received up to the close of the July 2024 Merits Hearing will be considered for award in this Award. The Tribunal understands that all or some of these categories of costs continue to be incurred and paid. We retain jurisdiction to consider a further Award for additional amounts.

B. Company Counsel Fees and Costs

113. The Respondents' objection to Company Counsel dates from Fall 2021 when Claimants sought interim measures to redress Respondents' interference with Mr. Gaitán's ability to function as the Company's CEO. In opposing that application, Respondents contended that a March 19, 2021 agreement (the "Framework Agreement") (Ex. C-139) that established the engagement of and the role of counsel for the Company, as a "nominal" Party in this arbitration,

was invalid and unenforceable. Taking that position was an element of Respondents' position that Mr. Gaitán was not the Company's CEO, even though Mr. Gaitán signed the Framework Agreement in that capacity. The Framework Agreement was also signed, on behalf of all Parties in this arbitration, by the counsel then engaged to represent them, and those Parties and counsel thereby also acknowledged Mr. Gaitán's status as Company CEO at that time — which, notably, was after the commencement of this arbitration on February 2, 2021.

114. In our November 12, 2021 Order granting interim relief to protect Mr. Gaitán's status as Company CEO, we rejected Respondents' contention that the Framework Agreement was invalid. We thus confirmed not only Mr. Gaitán's status as Company CEO but the status of the Gelberg, Schachter & Greenberg firm ("GSG") and Adam Schachter, a member of the firm, as Company Counsel.

115. Nothing that has occurred since that time has changed the status of Mr. Schachter and the GSG firm as duly engaged arbitration counsel of record for the Company.[34]

116. The GSG firm engaged Dechamps Law as consulting counsel for the Company. The sums advanced by Claimants and for which they seek damages include fees charged by GSG and by Dechamps Law. Respondents contend that the Company did not and could not engage Dechamps without a Board vote. (Respondents' Post-Hearing Brief at 32 para. 71). We disagree. We addressed that issue in Procedural Order 2022-08 (discussed in more detail below), by interpreting the Framework Agreement as permitting the GSG firm to engage expert assistance

[34] In unsolicited email submissions outside the record, from non-parties who may or may not be acting independently of the Respondents, allegations of misconduct have been raised against Company Counsel that, had they been proven by competent evidence in the Phase 2 proceedings, might have justified a different conclusion. Such unsolicited submissions continued after the formal closing of the Phase 2 record, and additional contentions of misconduct against Company Counsel have been made, outside the record and after the formal closing of the record, by Respondents directly in a communication made to Company Counsel by one of Terra's appointees to the Company's Board. Company Counsel shared that communication with the Parties and the Tribunal.

from consulting counsel outside of GSG: "*The agreed engagement of Mr. Schachter's firm in March 2021 did not prohibit Mr. Schachter from engaging necessary expertise, legal or otherwise, to assist the Company.*"

117. The Respondents contend that "*the GSG and DeChamps [sic] fees are excessive. The matter is either overstaffed, the rates are too high, or there is overbilling. It is plainly inappropriate for a nominal defendant to have incurred more fees than Claimants' counsel…and the Tribunal should either deny the claim or reduce it drastically.*" (Respondents' Post-Hearing Brief at 31 para. 70) (italics supplied). But that position is at odds with the history of this matter. We ruled in 2021 that Respondents could, if they wished, address the reasonableness of the fees in the manner provided under the engagement agreements between Company Counsel and the Company.

118. In fact, the history of this matter is that we first ordered the Company to pay its counsel's fees, which in the context of the dispute as presented to the Tribunal meant that we were ordering the Respondents to direct the Company CFO, Mr. Quisquinay, whose actions they controlled, to issue the payments, given Claimants' consent. In an Order dated December 8, 2021 that the Parties refer to as the Fee Payment Order ("FPO") we stated:

> Whereas the effective assistance of counsel is important to the integrity of the arbitration as well as the right of a party to participate in the arbitration, as a necessary measure of interim relief we direct that proof of the full payment by the Company of all attorneys' fees and expenses invoiced to the Company for services in connection with this arbitration by Mr. Schachter's firm and the Deschamps [sic] firm shall be filed with the Tribunal by December 15, 2021. For the same reasons, we direct that for so long as those firms remain so engaged, the further invoices from those firms shall be paid by the Company within the time frames and upon the terms stipulated in the engagement agreements between the Company and those firms. Such payments shall be without prejudice to the Company's right to contest and potentially recoup all or any part of such fees through dispute resolution under the terms of the relevant engagement agreements between the Company and those law firms.

119. In making their contentions at the Merits Hearing and post-Hearing stages on the basis of the alleged excessiveness of Company counsel's fees, Respondents ignore the fact that the Tribunal ordered Respondents to raise any such issues "*through dispute resolution under the terms of the relevant engagement agreements between the Company and those law firms*." There is no evidence that they did so.[35]

120. While the FPO was in form an Order to the Company, it was in substance an Order to Respondents and Mr. Quisquinay as their agent. Respondents and Mr. Quisquinay did not comply with the FPO or give assurances that they would comply after resolving any disputes over the reasonableness of the charges in the proper forum. What the Shareholder Respondents did do, however, on March 7, 2022 — barely two weeks after the issuance of PFA-1 on February 24, 2022 was to bring a lawsuit in a Florida state court (the "Florida Action"), seeking a judgment that the Framework Agreement was invalid and unenforceable. Named as defendants were not only the GSG Firm and Mr. Schachter, but also the Claimants. The Complaint in the Florida Action was signed on behalf of the Shareholder Respondents by the same counsel who were then representing them in this arbitration. Thus Respondents collaterally attacked the November 12, 2021 interim measures order and the December 8, 2021 Fee Payment Order. After that lawsuit was removed to federal court in Florida, it was transferred to the Southern District of New York and assigned to Judge Kaplan as a related case. There it remains, and a motion to compel arbitration made by Claimants is *sub judice*.

[35] As far as we can recall, the Parties have not informed the Tribunal as to whether such a separate engagement agreement exists for either the GSG firm or the Dechamps firm. In the Florida Action referenced below in paras. 152 *et seq.*, Respondents did not assert claims against GSG and Mr. Schachter based on excessive attorney fees but only sought equitable relief based on the alleged invalidity of the Framework Agreement. (Ex. C-138). The Claimants and Company Counsel have moved to compel arbitration of the Florida Action and Respondents as plaintiffs in the Florida Action have opposed that motion. *See* U.S. District Court for the Southern District of New York Docket No. 1:22-cv-06150-LAK at ECF Docket Entries 17, 50, 61. None of the Parties has asked this Tribunal directly to decide whether any disputes between Respondents and Company Counsel are subject to arbitration under the arbitration clauses in the Governing Documents.

C. Sanctions for Non-Compliance with the FPO

121. With the Company Counsel fee payment issue still unresolved in April 2022, Claimants moved for sanctions against Respondents to be issued under Rule R-58. We resolved that application in Procedural Order 2022-08 on May 7, 2022, in which we (i) ordered Claimants to pay Company Counsel fees, (ii) permitted Claimants to assert a claim for money damages based on the payments made, and (iii) imposed a contingent sanction on Respondents, stating that if we sustained Claimants' claim for money damages based on their having advanced payment of Company Counsel fees, Respondents would be sanctioned in the amount of three times the damages awarded to Claimants. We quote here from Procedural Order 2022-08:

> 18. In the circumstances, we think the immediate solution to the payment issue is for Claimants to pay the bills, with the understanding that they pay under protest an obligation that (in their view) is not contractually theirs to bear, and that they should have a right of recourse to recover the sums paid. Claimants appear to agree, but in their April 29 comments submission they urge that the Tribunal "request" in an Order, not order in an Order, that Claimants pay, and Claimants suggest that the "request" will be honored by Claimants only if the Tribunal also makes certain declarations adopting Claimants' positions including that they have no obligation to make these payments.
>
> 19. Claimants' position is problematic. The Tribunal should not and will not make this kind of a bargain with one party to secure its cooperation. The reasons that supported entry of the FPO as an interim relief measure under Rule R-37(a) now support an Order under Rule R-37(a) for Claimants to make the payments as a matter of necessity. Our doing so implies no finding of fault on the part of Claimants. We so order Claimants to make the payments, as to existing overdue invoices and on an ongoing basis, subject to modification of this Order if and when another solution is found.
>
> 20. However, we impose no deadline for Claimants to make payment, leaving that matter for the time being to be determined by Claimants based on Company counsel's indications to Claimants of their willingness to forebear payment for some period of time, which may be affected in the event proceedings are initiated to replace the Company's CFO.
>
> 21. Further, we adopt Claimants' proposal that in Phase 2 of the arbitration Claimants be permitted to pursue a claim for recovery as damages the amounts paid by Claimants for fees and expenses of Company counsel. Accordingly leave to

> make such claims after payments have been made is granted to Claimants under Rule R-6(b). Claimants shall comply with Rule R-6(b).
>
> ...
>
> 26. In view of the foregoing adopted procedures, at this juncture we adopt only a contingent sanction. Specifically, if and to the extent the Claimants prevail on claims for money damages to recover amounts they are required to pay for the attorneys' fees and expenses of Company counsel, the Respondents will be held liable for such damages, and will incur as a sanction a monetary award in favor of Claimants of three-fold the amount of the actual damages awarded.

122. This contingent sanction was intended to induce Respondents to permit and direct the Company CFO to pay Company Counsel. That incentive failed. Instead, Mr. Quisquinay issued payments of retainers to a different law firm, Fridman Fels in Miami; that firm attempted to appear in this arbitration as Company Counsel; and we rejected that appearance on the basis that the Company had not engaged Fridman Fels. Respondents now contend we should reconsider and vacate the contingent sanction, on the basis that they allegedly acted properly and prudently in contesting fees they regard as excessive. (Respondents' Post-Hearing Brief at 33 para. 75). That contention lacks merit, because it was clear in the FPO that the Company could address questions of the reasonableness of fees incurred through the dispute resolution processes in the engagement letters between the Company, on the one hand, and GSG and Dechamps on the other. *See* para. 119 above.

123. Respondents also contend that the contingent sanction should be vacated because "Respondents have not breached the SHA by seeking to rescind the Framework Agreement or refusing to pay for the unauthorized Dechamps Law engagement." (Respondents' Post-Hearing Brief at 33, para. 75). We do not find merit in this contention. Respondents challenged the validity of the Framework Agreement in opposing Claimants' interim measures application in October-November 2021. They did not succeed. We ruled that the Framework Agreement was valid, and we later ruled in the FPO that the engagement of Dechamps Law was within GSG's authority

under the Framework Agreement. In the SHA, Respondents agreed to arbitrate disputes under the AAA Commercial Rules, one of which is Rule R-58 providing that the Tribunal may impose a sanction for non-compliance with Tribunal orders. By preventing the Company CFO from paying GSG and Dechamps Law, in defiance of the FPO, and by refusing to recognize the validity of the Framework Agreement after we had sustained its validity in the November 12 interim measures order, Respondents have ignored our Orders, thereby violating the arbitration agreement adopted in the SHA.

124. Terra and DTH as Parties to the Framework Agreement had an implied good faith obligation not to obstruct the payment of Company Counsel fees, which were an intrinsic element of the Company's engagement of GSG as Company Counsel that was agreed upon by Terra and DTH in the Framework Agreement.[36] We sustain Claimants' damages claim and their sanctions claim based on Terra and DTH having breached the Framework Agreement, and that finding of breach is the contingency that triggers the treble damages sanction under PO 2022-08. The damages claim is sustained in the amounts reported in Appendix 1 to Mr. Feltman's First Report and Appendix 9A to Mr. Feltman's Second Report, cumulatively $1,754,971.89 for Peppertree, and $724,264.46 for AMLQ. The sanctions claims is sustained in the sums, as also calculated by Mr. Feltman in those appendices, of $3,509,943.78 for Peppertree and $1,448,528.92 for AMLQ.

D. Advances for Salaries of Company Management

125. Claimants' claim, pleaded in paras. 233-244 of the ASOC, is that Respondents, through their control over the Company's CFO, have prevented payment by DTH of Company Management salaries that our rulings have required DTH to pay, and that Claimants have advanced

[36] Moreover, GSG was hired as Company Counsel at Respondents' initiative.

those salaries to avoid loss to the Company of the services of Company Management that would otherwise have been caused by DTH's actions in defiance of our rulings.

126. In particular, Claimants refer to our November 12, 2021 interim measures order that requires "the restoration forthwith of all working conditions and terms and conditions of employment by DTH that were associated with Mr. Gaitán and Ms. Echeverria holding the Company positions they held as of March 19, 2021." (ASOC at para. 234).

127. The ASOC points to the fact that Company Management salaries were, under the 2015 Governing Documents, to be paid by DTH, whose employees were designated to serve in Company Management positions, and that the cost was addressed by the Parties' agreement that the Company would pay DTH $400,000 for administrative support.[37] (ASOC at para. 236-237).

128. Claimants submitted as Appendix 1 to the initial Pre-Hearing Memorial a table showing that the amount claimed for Company Management Salaries through approximately April 2024 was $1,390,126.88, fully advanced by Peppertree only. This amount was updated by Claimants' Phase 2 Exhibits 167-169 that accompanied the Witness Statement of John Rainieri on June 28, 2024 (at para. 32), and in the Second Report of Mr. Feltman at Appendix 9A, which reflects additional salary payments by Peppertree of $106,592 — such that the total claim of Peppertree for Company Management Salaries, exclusive of amounts to be proven if at all in a further phase of the proceedings, is $1,496,718.88. Mr. Raineri asserts that the Company Management Salaries were paid by Peppertree. Claimants provided as evidence of the payments made (i) internal summaries prepared at Peppertree for the salary advances to each of the four persons who received payments (Exs. C-11 to C-14) and "salary backup" documentation with regard to the payments to Mr. Gaitán, Ms. Echeverria, and Mr. Juan Ignacio Berger, a member of

[37] By agreement of the Parties before this arbitration began, the monthly sum was increased to $480,000.

the Company Management team entitled to be compensated.[38] (Exs. C-260 to C-262). Mr. Rainieri testified in a witness statement that if Peppertree had not made the salary payments, the payment recipients would not have been able to remain in their positions with the Company in compliance with this Tribunal's interim measures orders. (Witness Statement of John Rainieri, May 20, 2024 at para. 58).

129. As to the salaries of Mr. Gaitán and Ms. Echeverria, Respondents appear to admit that the November 12, 2021 interim relief order supports Claimants' decision to pay the salaries of Mr. Gaitán and Ms. Echeverria. This is the Tribunal's appreciation of para. 58 in Respondents' Post-Hearing Brief where they state:

> Claimants seek reimbursement for the salaries and expenses of the Company's CEO, Jorge Gaitan, and COO, Carol Echeverria (collectively, "Management"). But then Claimants improperly added amounts sent to Juan Ignacio Berger and Marisabel Umana….There is no board resolution to hire either Mr. Berger or Ms. Humana as company employees and no basis in the November 12 Interim Order to support any claim for reimbursement of these transfers.

130. With respect to the salary payments to Mr. Gaitán and Ms. Echeverria, Respondents argue further: "It is also doubtful that Mr. Gaitán or Ms. Echeverria were doing anything for the benefit of the Company." (*Id.* at para. 59). In our judgment, however, it was not necessary for Claimants to prove that they have conferred benefits on the Company. It was established in PFA-2 that Respondents had prevented them from performing their roles as Company Management beginning in September 2021. Respondents have presented no evidence that the conditions for them to perform their Company Management roles as they were performed prior to September 2021 have been restored at any time.

[38] *See* para. 133 below.

131. The Company remains entitled to their services and Respondents remain obligated under PFA-2 to restore them to their DTH positions insofar as required for them to perform those services to the Company. Their unavailability to perform those services, for reasons (*e.g.*, economic necessity to take on other work) other than Respondents' refusal to allow them to perform would create a condition that is the opposite of what we ordered in our order of November 12, 2021 — which was a restoration of their working conditions and terms and conditions of employment with DTH that were associated with their Company Management roles at the time of the Framework Agreement in March 2021. Further, if Mr. Gaitán and Ms. Echeverria were to resign from their Company Management positions out of economic necessity due to nonpayment of their salaries, the conditions we established in PFA-2 for lifting the stay of proceedings on Respondents' counterclaims – notably Respondents' compliance with our orders for the restoration of Mr. Gaitán and Ms. Echeverria to the Company Management status quo as of March 19, 2021 – would become incapable of fulfillment. Respondents would have grounds to seek to have their counterclaims restored to active status. That would be an inequitable result, legitimating the *de facto* Company management takeover that Respondents have accomplished by their wrongful actions and their refusals to comply with our orders and awards and the judgments of the SDNY Court and the Second Circuit.

132. Respondents question the "investments" label found in the wire transfer documentation that Claimants have submitted as support for their salary expense payment claims. Respondents speculate that the term "investment" connotes something other than salary: "Not a single wire is described as salary or anything similar, and there is no way to account for the ultimate purpose behind each transfer." (Respondents' Post-Hearing Brief at 28 para. 61). We disagree with this. Mr. Rainieri testified that the exhibits in question were documentation of the salary payments,

and Respondents could have cross-examined Mr. Rainieri on this point but did not do so. They also could have called upon the Company to provide Mr. Gaitán and Ms. Echeverría for witness examinations at the Merits Hearing. Respondents did not do that. We therefore accept Mr. Rainieri's testimony about what the documents in question show. We add only that it is perfectly plausible that the salary payments would not be recorded in Peppertree's records as salary because the recipients were not Peppertree's employees. From Peppertree's internal financial perspective, making these payments while claiming against Respondents for recovery as damages of the sums paid reasonably could have been treated as an addition to Peppertree's investment in the Company. This perfectly plausible explanation answers Respondents' argument that "[t]here is no valid reason to classify as an investment any payments to 'Management' and the other two individuals." (Respondents' Post-Hearing Brief at 28 para. 60).

133. Finally, we address Respondents' position that payments to Mr. Berger and Ms. Umana were improper. Mr. Rainieri's testimony was that they were members of Management's team. (John Rainieri Witness Statement May 20, 2024, at para. 58). That testimony was not impeached or rebutted by Respondents. Further, in an earlier stage of this arbitration we received evidence that these individuals were also ousted from their DTH employment due to their perceived (by Respondents) alignment with Mr. Gaitán and Ms. Echeverria, leading to employment litigation between them and the DTH subsidiary that had been their employer. On this record, Claimants have established that the support provided by Mr. Berger and Ms. Umana for Company Management was part of the restoration of working conditions as of March 19, 2021 covered by our November 12, 2021 Order.

134. Peppertree's claim for advances of Company Management Salaries is sustained in the claimed amount of $1,496,718.88 for time periods reported upon in Mr. Feltman's First and

Second Reports. We make no determination at this time as to the further time periods for which salary advances to these individuals by Claimants might be recovered. Our ruling on September 14, 2024 excluded Claimants' proposed update of the claim amounts from consideration in Phase 2, but did not prevent Claimants from seeking an award in a subsequent phase of the arbitration.

E. Advances of Company Management Legal Expenses

135. Claimants contend that Respondents wrongfully caused Company Management to be forced to defend baseless civil and criminal actions instigated by Respondents in (at least) Guatemala, El Salvador, Honduras and the British Virgin Islands, then caused their representatives on the Company's Board to refuse to support indemnification for the defense costs incurred – despite clauses in the Company's Articles of Association and in the SHA providing for such indemnification. (ASOC at paras. 436-451, Claimants' Pre-Hearing Memorial at 38-40, Claimants' Opening Post-Hearing Memorial at 29-30). Claimants claim that they advanced the defense costs that the Company should have reimbursed or advanced as indemnification, and that these sums should be awarded as damages. (*Id.*)

136. Respondents contend in opposing this claim that a failure of the Company to indemnify may be a wrong committed by the Company but is not a wrong by any of the Respondents. (Respondents' Post-Hearing Brief at 29 para. 63). We do not agree. The Company can only fulfill its contractual obligations if the Shareholders and the Directors they have appointed to the Company's Board cause the Company to take the actions it is obligated to take. If the Shareholders fail to do this, it is a breach of the SHA. If Mr. Hernandez and DTH induced Terra to act in this fashion and the elements of tortious interference are present, they are also liable. (Section V. below).

137. Respondents correctly observe that the source of the Company's indemnification obligation is Article 59.1 in the Company's Articles of Association (the "Articles") and they accurately quote Article 59.1 as stating that "the Company shall indemnify" directors and officers in certain instances. But Respondents cut short their quotation of 59.1, which goes on to say what such indemnification covers, including "*legal fees… reasonably incurred in connection with legal, administrative or investigative proceedings*" where the person was a party to such proceedings "*by reason of the fact that the Person is or was … an officer … of the Company*" (partial quotation at Respondents' Post-Hearing Brief at 29 para. 64, more complete quotation in the Articles, submitted by Claimants as Ex. C-47) (emphasis supplied). Respondents also correctly observe that the Articles' provision on **advancement** of legal costs, Article 59.7, sets forth an obligation that is narrower than 59.1. (*Id.*). But the breach alleged by Claimants is based on Respondents' preventing Company reimbursement of legal fees under 59.1, in addition to preventing advancement of legal costs under 59.7.

138. Of relevance is Article 59.2 of the Articles, which states: "Article 59.1 does not apply to a person referred to in that article unless the person acted honestly and in good faith and in what he believed to be the best interest of the company and, in the case of criminal proceedings, the person had no reasonable cause to believe that his conduct was unlawful."

139. Respondents contend that they "acted reasonably in making their decision" not to advance legal costs for Mr. Gaitán under 59.7 because "Mr. Gaitán has been indicted in El Salvador and Guatemala and then fled from the authorities, justifying the decision to deny any advance." (Respondents' Post-Hearing Brief at 29 para. 64). As we base our ruling here on Respondents' blocking reimbursement under 59.1, and not blocking advances of legal costs under 59.7, we address Respondents' argument under Article 59.2.

140. The evidence presented by Claimants' witness, John Rainieri, was that Peppertree proposed to the Company's Board both indemnification (59.1) and advancement (59.7) and that Terra's appointees on the Board rejected both. (Witness Statement of John Rainieri, May 20, 2024, at paras. 60-63). The fact that Claimants then elected to mitigate harm to the Company by paying the invoices of Company Management's attorneys directly does not alter that fact or mean that we must view Respondents' refusal to indemnify (59.1) OR advance (59.7) as if only advancement under 59.7 had been proposed to or considered by the Board.

141. Accordingly, 59.2 is relevant to Respondents' argument that Mr. Gaitán, because of misconduct, was ineligible to be indemnified. In that regard, we observe first that Respondents refer to no *evidence* in the argument made in their Post-Hearing Brief that Mr. Gaitán is a criminally indicted fugitive. Second, after the Merits Hearing and in response to certain communications about Mr. Gaitán's availability to testify – he had been unable to attend the Merits Hearing – Respondents' counsel sent the Tribunal certain documents that, if admitted into evidence, might have supported Respondents' argument. But Respondents did not seek admission of those documents into the record. Further, Respondents do not support their argument by reference to any evidence in the record showing how the Directors of the Company appointed by Terra reached their decisions to oppose indemnification.

142. Even if evidence supported Respondents' argument, the mere fact of an indictment of Mr. Gaitán in El Salvador or Guatemala is not disqualifying under 59.2 with regard to indemnification under 59.1. In PFA-2 we found that the criminal investigations and proceedings against Mr. Gaitán were based on false accounts presented by Respondents to the Guatemala criminal court and/or criminal prosecutor of Mr. Gaitán's conduct. We have sworn statements from Mr. Gaitán that he engaged in no wrongful or dishonest conduct. Respondents declined to cross-

examine Mr. Gaitán in the 2022 evidentiary hearing that led to PFA-2, and in July-August 2024, Respondents, through counsel, contended that the legal proceedings against him in El Salvador and Guatemala made it impracticable for him to be examined as a witness. But when (and after) Mr. Gaitán was present in person for the closing argument on October 15, 2024 in New York, Respondents did not apply to the Tribunal for an opportunity to cross-examine him.

143. To summarize, the evidence before the Tribunal reveals no basis to conclude that Mr. Gaitán is ineligible for Article 59.1 indemnification under Article 59.2, or that the Respondents' appointees to the Company's Board actually made a reasoned determination that Mr. Gaitán was not eligible for Article 59.1 indemnification before refusing to provide such indemnification.

144. Whereas Respondents' liability is for preventing compliance by the Company with indemnification under 59.1 of the Articles, Respondents' argument that Claimants had to provide an undertaking as security against a potential final disposition adverse to the person who benefitted from the advances has no merit. The fact that such an undertaking would have been required from the recipients by the Company as a condition of advancement of legal costs under 59.7 does not mean Claimants must provide an undertaking in order to recover their payments as damages. The Articles do not address the situation of one Shareholder stepping in to cover legal costs of an officer when the Company's indemnification obligation is frustrated by wrongful action of Board members at the behest of another Shareholder.

145. Respondents' final contention is that the legal fees charged by a law firm in Guatemala that was paid by Peppertree are excessive. They refer to Claimants' Phase 2 Ex. C-15, a composite exhibit of invoices from and records of payments to lawyers in Guatemala representing Mr. Gaitán and Ms. Echeverria. They observe that the invoices for a four-month

period exceeded $512,000. This period was from April to July 2022, and the invoices referenced by Respondents were for legal services in relation to two criminal complaints, one against Mr. Gaitán only and the other against Mr. Gaitán and Ms. Echeverria. But the amounts of the invoices from the same law firm for the same proceedings in other time periods, included in Ex. C-15, are considerably smaller, suggesting the period referenced by Respondents in their brief was a busy period, not an episode of overcharge. Also, Respondents contend they have "no visibility into the invoices" (Respondents' Post-Hearing Brief at 30 para. 67), but at least certain Respondents were parties to the criminal proceedings lodged in Guatemala in 2022 and on that basis Respondents have knowledge or access to knowledge of the course of the proceedings. For that reason, a generalized assertion that the sum of two invoices for one four-month period looks high is not an adequate basis to show that the fees are unreasonable. Further, there was a time in the proceedings, after these invoices were presented as evidence on May 20, 2024, when Respondents could have raised the issue of the adequacy of detail in the invoices, but it was never raised prior to the August 30 Post-Hearing Brief. Respondents made no effort to challenge the invoices at the Hearings.

146. Based upon the First Report of Claimants' expert, James Feltman, and in particular the Management Legal Fees summary in Appendix 1 thereto, the reliability of which we accept and which was subject to cross-examination of Mr. Feltman at the Phase 2 hearing, we find that Claimants are entitled to recover $1,390,126.88 — allocable $970,893.82 to Peppertree and $419,233.06 to AMLQ for the period covered by Mr. Feltman's First Report. [39]

[39] It appears that Claimants did not update this category of damages in Mr. Feltman's Second Report, Exhibit 9A of which contains no report on Management Legal Fees. If the Tribunal has overlooked an update of the Management Legal Fees amount that was submitted prior to the Phase 2 hearing, this may be presented as a proposed correction of a miscalculation under Commercial Rule R-50, or in Phase 3.

F. Claimants' Defense Costs for the Foreign Arbitrations and the BVI Action

147. Claimants' seek to recover their legal costs for defense of six proceedings commenced by or on behalf of the Respondents, each of which seeks to litigate outside this arbitration claims or issues that have either been determined in this arbitration adversely to Respondents, or not determined in this arbitration because the stay of counterclaims sanction in PFA-2 prevents Respondents from pursuing those claims until the conditions for lifting the stay are met. *See* ASOC at paras. 171-176, 181-204. While the "relief requested" portion of the ASOC referred specifically to legal costs incurred for the BVI Action and the Florida Action, omitting reference to the Foreign Arbitrations, elsewhere in the ASOC the Claimants broadly claimed for "all expenses incurred by Claimants related to the Company since [January 19, 2021] that would not have been incurred if the Company were sold as required…." *Id.* at para. 344. We do not therefore regard Claimants' claim for the legal costs of the Foreign Arbitrations to be a "new or different claim" that was required to be addressed in an amended pleading under Commercial Rule R-6 (b).

148. Respondents' initial contention in June 2024 after review of the claim as detailed in Claimants' Opening Pre-Hearing Memorial (including the fact witness statement of John Rainieri and the Expert Report of James Feltman) was that Claimants were "double dipping." (Respondents' Pre-Hearing Reply Memorial at 22 para. 62). That is so, Respondents stated, because "Claimants also ask that the Tribunal award them US$61,416,371.17 for the 'escrow amount due for 4 pending Foreign Arbitrations.'" (*Id.*, citing Appendix 1 to Claimants' Opening Pre-Hearing Memorial).[40] Further, the escrow, whose establishment by Respondents we ordered

[40] Insofar as Claimants still seek this relief, we decline to grant it. PFA-3 became a federal court injunction in the SDNY Court when PFA-3 was confirmed. Relief for alleged non-compliance with the SDNY Court's injunction is properly addressed to that Court.

as an element of an injunction in PFA-3, was expressly stated to be security for any damages that might be awarded to the persons who are the claimants in the Foreign Arbitrations. (PFA-3 at 43 paras. 6, 7). Claimants' own defense costs in the Foreign Arbitrations are thus not in the scope of that escrow.

149. Respondents further contend that the invoices of counsel for Claimants in the Foreign Arbitrations and the BVI Action lack sufficient detail (hours spent, activity description, hourly rates) to constitute proof of damages. (Respondents' Post-Hearing Brief at 31 para. 68 and at 35 paras. 78-79). But Respondents appear to assume, without citation to any New York (or other) law, that a party to an arbitration agreement that seeks legal costs incurred in improper collateral proceedings as damages for breach of the arbitration agreement is held to the same standard of proof as a party seeking its counsel fees in the arbitration on the basis that it is the prevailing party. We do not think the standard of proof is the same. As with other damages for breach of contract under New York law, the burden on the Claimants is to provide "a stable foundation for a reasonable estimate" of its damages, which shifts the burden to the wrongdoer. *See Process America, Inc. v. Cynergy Holdings LLC,* 839 F.3d 125, 141 (2d Cir. 2016), *quoting from Freund v. Washington Square Press, Inc.*, 34 N.Y.2d 379, 383 (1974). Further, the contention by Respondents that Claimants paid unreasonable amounts in fees to foreign counsel is effectively a claim that Claimants failed to mitigate their damages, and New York law assigns the burden of proof of such a defense to the party asserting it. (*E.g.*, *Rivera v. Kolsky,* 164 A.D.3d 626, 628 (2d Dep't 2018)).

150. We are not bound to apply New York's procedural law about burdens of proof, but assigning those burdens to Respondents here is appropriate. They or their agents are parties to all the proceedings involved in these claims, so they know what level of effort has been required to

defend them. Respondents conduct business in the Central and South American countries where the Foreign Arbitrations have occurred – continuing despite our PFA-3 injunction and the Judgment entered upon it – and they have reason to know or the ability to know of the stature and reputations of the firms engaged by Claimants. They are also in a position to compare the charges of those firms to the charges rendered by counsel they engaged in those arbitrations, and they have not done so. It is particularly suitable that these burdens of proof should fall upon Respondents, who could have avoided these damages by simply complying with the injunctions directing them to dismiss the Foreign Arbitrations.

151. Based upon the sums incurred by Claimants for collateral litigations as reported in the First Report of Mr. Feltman at Appendix 1 and the Second Report of Mr. Feltman at Appendix 9A, Claimants' claims for collateral litigation costs are sustained in the amounts of $1,106,224.78 for Peppertree, and $405,799.85 for AMLQ. This is inclusive of sums expended for the Florida Action, discussed separately in Section F. below, but quantified by Claimants in an aggregation with the other collateral proceedings discussed in this section.[41]

G. Legal Expenses of the Florida Action

152. As between Terra and Claimants, the Florida Action is an arbitrable dispute. Terra only commenced the Florida Action in March 2022, four months after Terra had arbitrated the issues of the validity of the Framework Agreement and the Parties' recognition of Mr. Gaitán as Company CEO in the Framework Agreement. By naming Claimants as parties in the Florida Action, Terra forced Claimants to make a motion to compel arbitration. But that does not prevent

[41] Respondents also contend that Claimants' claim for counsel fees incurred in the BVI litigation should be dismissed as duplicative because Claimants have lodged the same claim in the BVI court. But Claimants acknowledge that they should not have the same recovery twice, and the damages we award for their counsel fees in the BVI Action are awarded on the condition that Claimants shall deliver to the Tribunal proof of the dismissal of the parallel costs claim made in the BVI court within 20 calendar days of the date of this Award.

us from deciding Claimants' claim that the Florida Action was, as to them, a breach of the Arbitration Agreement. Claimants asserted that precise claim in the ASOC in October 2023 after filing their motion to compel arbitration in the SDNY Court. Respondents have not asked the Tribunal or the SDNY Court to stay our adjudication of that claim. Further, insofar as there is a dispute about the arbitrability of that claim as between Terra and the Claimants, the Parties' agreement to arbitrate under the AAA Commercial Rules was a clear and unmistakable delegation of that issue to an arbitral tribunal. In all events, based on its conduct in this arbitration – having actually arbitrated the validity of the Framework Agreement before this Tribunal in the interim measures proceedings of October-November 2021 – Terra has admitted that the issues in the Florida Arbitration are arbitrable before us at least as they arise between Terra and Claimants, and Terra presents no argument that, by adding Mr. Schachter and his firm to the mix by bringing the Florida Action, that arbitrability admission is altered.

153. Accordingly, we sustain this breach of contract claim and award Claimants, as against Terra, money damages in the amounts claimed for the defense of the Florida Action through the date of Mr. Feltman's June 2024 Second Report.[42]

H. Expenses Incurred for FCPA-Related Investigations

154. Claimants assert that they incurred substantial expenses to three vendors for investigations relating to Company Management's and Peppertree's own possible involvement in misconduct implicating the Foreign Corrupt Practices Act (FCPA). The service providers were a global investigations firm, a law firm that includes a team of former federal and state prosecutors, and a communications firm with experience in investigating defamatory internet content. (John

[42] The amounts expended for the Florida Action are not separately reported in Appendix 1 to Mr. Feltman's First Report or Appendix 9A to Mr. Feltman's Second Report. Rather they were included in an aggregation of all legal costs for collateral proceedings. As we allow recovery of costs for each of those proceedings, we will quantify the claims based on the aggregate amounts identified for collateral litigations by Mr. Feltman.

Rainieri Witness Statement May 20, 2024, at 21 paras. 54-56). Mr. Rainieri in his witness statement refers to the "'false narrative of misconduct'" that was found by the Tribunal in PFA-2 to have been created and disseminated by certain Respondents — including publication of those accusations to (i) the Peppertree appointees on the Company's Board, (ii) criminal prosecutors in Guatemala, and (iii) a prominent American law firm from which Respondents obtained a legal opinion about risks to the Company associated with the misconduct of which they had accused Company Management.

155. Respondents in their Pre-Hearing Reply Memorial stated only that Claimants had taken the decisions to conduct these investigations "on their own" (at 21 para. 61).

156. In their Opening Post-Hearing Memorial, Claimants argued in support of this claim:

> Peppertree/AMLQ are entitled to damages for the fees they incurred in investigating Respondents' horrifically false and malicious criminal allegations against Management and Claimants. Specifically, Peppertree asserts that it was forced to engage Flannery Georgalis LLC, a law firm comprised of multiple former federal and state prosecutors with experience in FCPA and OFAC investigations, to conduct an investigation of the violations alleged by Respondents leading up to the issuance of the SPFA [PFA-2]. They also addressed what was eventually shown to be the sheer folly of the Morrison & Foerster Memorandum. In addition, Peppertree and AMLQ were forced to jointly engage a global investigative firm, Nardello, to investigate such allegations outside the U.S. Ranieri (5/20/24) ¶¶ 55-56. The Tribunal has already determined that those allegations and proceedings were sheer "contrivance" by Respondents and that, in making them, Respondents further breached the SHA. See C.O.M. § I.B.2. Nearly all of these fees were incurred prior to the Tribunal's issuance of the SPFA [PFA-2] on August 12, 2022, and Flannery & Georgalis concluded its investigation in fall 2022 while Respondents were seeking to vacate PFA-2. See Exs. 18-19, 24. But for Respondents' wrongful, bad faith conduct in propounding the "false narrative of misconduct" against Management that the Tribunal confirmed in the SPFA [PFA-2] (conduct that has permeated these proceedings and is consistent with Judge Kaplan's recent noting of "vexatious" behavior by them, see Ex. 161 at 2), Claimants contend they would not have had to engage firms and consultants to investigate these baseless allegations of wrongdoing.

157. Respondents contend that "Claimants have not come close to proving that Respondents were connected to the [NewsZoom] post in any way." (Respondents' Post-Hearing

Brief at 31 para. 69). Respondents offered no affirmative evidence, in Phase 2 or at any other time, that related to the NewsZoom post and reflected their connection or lack of connection to it. During the disclosure phase of this Phase 2, Claimants sought all such documents, and we overruled Respondents' objections and ordered production. Respondents without valid excuse defied the Order.

158. In paragraphs 218 *et seq.* of this Award, we analyze all the evidence, including circumstantial evidence and adverse inferences and conclude that Respondents were, directly or indirectly, responsible for the NewsZoom post.

159. The costs Claimants incurred (about $15,000 per Exhibit C-20) in an apparently futile effort to find cyber-evidence of the provenance of the NewsZoom website and the derogatory article published on that site will be sustained, on the basis that the quest for such evidence was directly in response to Tribunal inquiries to the Parties.

160. Claimants' expenditures to investigate Respondents' allegations of misconduct against Company Management – the sums paid to the Nardello firm and the Flannery & Georgalis (F&G") firm – were made necessary by Respondents' misconduct as described in PFA-2. It was necessary in the fulfillment of Claimants' Board-appointees' fiduciary duties to the Company and to Terra to determine what, if any, merit there was to the allegations of misconduct raised by Respondents with public prosecutors in Guatemala and with the Morrison & Foerster law firm, and in turn to decide on a reliable base of facts whether Claimants should cause their Board appointees to maintain their opposition to the ouster of Mr. Gaitán and Ms. Echeverria. It would have been imprudent for Claimants as fiduciaries to rely entirely on Company Management's denials of wrongdoing. Accordingly, Claimants' claims to recover the investigation expenditures to Nardello and F&G, as damages for breach of contract, are sustained against the Shareholder

Respondents in the amount supported by Claimants' evidence. However, the Tribunal is unable to reconcile the total amount claimed by Peppertree ($448,273.52 per Appendix 1 to the Pre-Hearing Memorial) with the Claimants' exhibits that are identified as invoices attributable to the FCPA costs in Mr. Rainieri's May 20, 2024 Witness Statement (Exs. C-18, 19, 20, 24, 34). One of those exhibits (Ex. C-24) appears to be from counsel in Guatemala that is not a law firm identified by Mr. Rainieri as having carried out FCPA work. The remaining exhibits identified corroborate (i) Peppertree's payment of $134,292.99 paid to Nardello and $48,970.24 to F&G, and $15,542.50 to Hennes Communications and the Minc law firm, and (ii) AMLQ's payment of $134,292.99 to Nardello. Therefore, the FCPA-related damages claims are sustained in the sums of $186,263.23 to Peppertree and $134,292.99 to AMLQ. Any claim of miscalculation may be addressed in the process provided in AAA Commercial Rule R-50. (2013 Rules).

I. Advances of Respondents' Share of AAA/ICDR Deposits

161. Claimants assert a claim for damages based on Respondents' breach of the arbitration agreement, for the sums Claimants have been required to advance as deposits for the portion (50%) of the fees and expenses of the Tribunal that Respondents were obligated to pay but refused to pay. Further, AAA Commercial Rule R-57 (2013 Rules) provides in relevant part that "[i]f arbitrator compensation or administrative charges have not been paid in full, the AAA may so inform the parties in order that one of them may advance the required payment." Rule R-57 as quoted in the preceding paragraph operates in conjunction with subsections (a), (e), and (f) of that Rule, such that the Party, willing to pay another Party's agreed share of deposits to ensure that the case will proceed without suspension (Rule R-57(e)) or termination (Rule R-57(f)), must elect to advance the required sums, and has recourse against the non-paying Party by asserting a claim for damages in the arbitration as contemplated by Rule R-57(a).

162. Claimants in their initial Pre-Hearing Memorial alleged that they had been placed in such a position due to Respondents' refusal to pay their agreed 50% share at a certain point in time, and that the amount advanced to rectify the non-payment was approximately $131,527.20. (Claimants' Pre-Hearing Memorial at 40 and Appendix 1 thereto at p. 2). Following a discussion of the amount of this claim during the Phase 2 Closing Argument on October 15, 2024, it was learned by Claimants from AAA/ICDR that the portion of their payments of deposits that constituted advances of Respondents' share was larger than previously thought. This was reported in an email from Peppertree's counsel to the Tribunal on November 15, 2024. In that email, Claimants reported that the total of Claimants' advances up to that date for Respondents' share of deposits was $946,624.26. It is understood by the Tribunal from the AAA/ICDR that the 70% Peppertree-30% AMLQ allocation, reflected in the Claimants' November 15, 2024 report of the payments of the most recent advances, had been observed in the payment of prior advances. This also corresponds to the allocation reflected in Appendix 1 to Claimants' Opening Pre-Hearing Memorial. Whereas all such sums advanced have been applied by ICDR to pay fees and expenses of the Tribunal, Claimants' claim is sustained in the sums of $662,636.98 to Peppertree and $283,987.28 to AMLQ. Claimants' claim for such advances made after November 15, 2024 (to the extent applied by ICDR to pay fees and expenses of the Tribunal) may be presented in Phase 3.

V. Claimants' Claims for Tortious Interference and Breach of Fiduciary Duty

A. Jurisdiction Issues

163. Claimants assert claims of tortious interference with contract against the Individual Respondents and DTH. They also assert claims of breach of fiduciary duty against Terra as a shareholder of the Company and against the Individual Respondents, each of whom has served at some time during this arbitration as a member of the Company's Board of Directors. The Individual Respondents timely lodged objections to the jurisdiction of the Tribunal at the initial

pleading stage in 2021, and the Parties stipulated that these objections would be reserved for determination in Phase 2 of the arbitration. These issues have been addressed by the Parties in Phase 2 and are ripe for decision.

164. We agree with Claimants that the Tribunal has jurisdiction to determine Claimants' claims against Jorge Hernandez under the doctrine of direct benefits estoppel. We do not agree that direct benefits estoppel, or any other theory of jurisdiction as to non-signatories invoked by Claimants, enables the Tribunal to decide claims against the other Individual Respondents.

165. As sole owner of Terra, Mr. Hernandez personally secured the benefits the SHA conferred on Terra as a Shareholder. Those benefits in pecuniary terms included the right to receive personally or to decide who would receive Terra's share of the proceeds of a Company Sale. In non-pecuniary terms, Mr. Hernandez's sole control of Terra enabled him (among other things) to appoint two Directors to the Company's Board who were in practical terms accountable only to him and he could replace them on the Board at any time.

166. Also, Mr. Hernandez as sole owner of DTH directly obtained the pecuniary benefit of the $400,000 per month (increased by agreement of the Parties to $480,000 per month) with sole control over how that money was spent. He alone was given the ability to decide how much would be spent on support services that DTH was required to provide to the Company and how much would be distributed to himself or his designees as profit, bonus, dividend, etc.

167. In non-pecuniary terms, the Development Agreement between the Company and DTH, accepted by Claimants in 2015 in conjunction with the SHA, conferred power on Mr. Hernandez to select DTH-employed individuals to act as managers of the Company both at the parent level and in the country-level operating subsidiaries. Naturally, this arrangement also conferred power on Mr. Hernandez to compensate those individuals and otherwise influence those

individuals because he held the sole power to terminate them from their DTH positions (and to prevent the Company through Board action from making separate employment arrangements with them).

168. We find that these benefits to Mr. Hernandez fit comfortably within the direct benefit estoppel doctrine as it is articulated in the case law cited by Claimants. *See Hartford Fire Ins. Co. v. The Evergreen Org.*, 410 F.Supp.2d 180, 186 (S.D.N.Y. 2006) where the leading Second Circuit case[43] was cited for this articulation of direct benefits estoppel: "[A] nonsignatory to an agreement to arbitrate containing an arbitration clause may be compelled to arbitrate with a signatory where the non-signatory knowingly accepts benefits directly derived from the agreement."[44] *Accord, Belzberg v. Verus Investments Holdings, Inc.*, 21 N.Y.3d 626, 631-33 (2013).

169. The other individual Respondents do not fall within the reach of direct benefits estoppel. They served as Directors of the Company as appointees of Mr. Hernandez, removable from those positions in his sole discretion. They were officers or employees of Terra because Mr. Hernandez selected them. As the New York Court of Appeals instructed in *Belzberg, supra*, a non-party is not subject to an arbitration provision in a contract if the non-party has merely exploited the relationship among the contracting parties as distinguished from obtaining benefits directly from the contract itself. That distinction plainly applies to Messrs. Arzu, Mendez and Sagastume, as they are indirect beneficiaries of the SHA and direct beneficiaries of their relationships with Mr. Hernandez and, in turn, his relationship with the Company and Claimants. Two other theories of non-signatory jurisdiction mentioned by Claimants as being applicable to

[43] *Thomson-CSF, SA v. Am. Arb. Ass'n*, 64 F.3d 773, 776 (2d Cir. 2001).

[44] Our finding that there is jurisdiction for the claims against Mr. Hernandez based on direct benefits estoppel makes it unnecessary to decide whether alter ego-veil piercing principles would also apply.

them (waiver, veil piercing) have no evidentiary support. These Individual Respondents asserted and preserved their objections to our jurisdiction from the outset. So there was no waiver. No evidence was presented that they have alter ego relationships with other Respondents — and indeed Claimants may have only meant to advance this theory as to Mr. Hernandez.[45]

170. Claimants claim that DTH and the Individual Respondents committed the tort of tortious interference with respect to Claimants' rights under the SHA, and that they are accordingly liable to Claimants for compensatory damages and punitive damages. We focus on Jorge Hernandez, as the only Individual Respondent who we find to be bound to arbitrate with Claimants,[46] and also on DTH.

171. Our dismissal on jurisdiction grounds of all claims against Individual Respondents other than Mr. Hernandez leaves only Terra, DTH and Mr. Hernandez as the Respondents on Claimants' claims. As to Mr. Hernandez and DTH, the fiduciary duty claims are redundant of the tortious interference claim; they are addressed to the same conduct, and money damages and punitive damages are sought on the tortious interference claim in amounts that would not be altered by adjudication of the fiduciary duty claims. As to all breach of contract claims against Terra or DTH, the fiduciary duty claims rely upon the same conduct and seek relief that is already sought on the contract claims. Under New York law such redundancy of a breach of fiduciary duty claim calls for its dismissal. *See Renaissance Search Partners v. Renaissance Limited, L.L.C.*, 2014 WL

[45] Claimants also suggested that the estoppel doctrine of intertwined claims, which permits a non-signatory to estop a signatory from avoiding arbitration, should be extended here to allow a signatory to bind non-signatories to arbitrate. But this extension has not gained a foothold in any case law presented to the Tribunal, and so we decline to adopt it. We have considered only the grounds for jurisdiction over these Individual Respondents formally invoked by the Claimants.

[46] As we decide today that Mr. Hernandez is bound by the Arbitration Agreement, we determine today that he is an obligor of the relief issued against Respondents in PFA-3. The entire text of PFA-3 is incorporated by reference into this Award and constitutes an Award against Mr. Hernandez as of today's date. For ease of reference for readers of this Award, PFA-3 is annexed as Appendix 3.

12770440 (S.D.N.Y. July. 3, 2014), *report and recommendation adopted*, 2014 WL 4928945 (S.D.N.Y. Oct. 1, 2014).

B. New York Law on Tortious Interference

172. Respondents contend that Claimants failed to plead and failed to prove the elements of tortious interference. (Respondents' Pre-Hearing Reply Memorial at 15-16 paras. 36-40).[47] As we are at a post-hearing stage, we focus on what Claimants have or have not proved, and not on any alleged pleading shortcomings. Respondents focus their attention on what they allege to be Claimants' failure to prove (i) intention to cause harm, (ii) causation of harm, or (iii) malice. (*Id*.).

173. We look first to the New York cases cited by Respondents stating the legal elements of a tortious interference claim. In *Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413, 424 (1996) (Ex. RL-021) the New York Court of Appeals – the State of New York's appellate court of last

[47] In their initial post-hearing brief, Respondents contended that Claimants' tort claims against Mr. Hernandez are governed by the law of the place of incorporation of the Company and Terra, *i.e.*, the British Virgin Islands. (Respondents' Post-Hearing Brief at 41). We do not accept this contention. The initial ground advanced in support of it, that Mr. Hernandez is not a party to the Shareholders' Agreement, is unpersuasive because, as we have determined, Mr. Hernandez is bound by the Arbitration Agreement. The Arbitration Agreement and the Governing Law clause both appear in subsections of Article VIII of the SHA. We understand the Governing Law clause in subsections 8.10 to have been adopted with reference to the resolution of Disputes – which the Agreement defines in subsection 8.14 as "*any controversy, claim or dispute arising out of or relating to or in connection with this Agreement*…." Section 8.10 provides that "*this Agreement will be governed and construed in accordance with the Laws of the State of New York, United States, without giving effect to any choice or conflict of law provision or rule (whether of the State of New York or any other jurisdiction).*" The parties also provided in the Arbitration Agreement, subsection 8.15, that the seat of the arbitration would be New York, New York. The sensible harmonization of these clauses is that the phrase "*this Agreement will be governed…*" in subsection 8.10 is not to be construed narrowly to apply only to breach of contract claims under the SHA but rather is to apply broadly to all Disputes under subsection 8.14 that "arise out of" or are "in connection with" the SHA, and in turn to an arbitral tribunal's resolution of Disputes under subsection 8.15.

Viewed from the perspective of the time the Agreement was made in 2015, the construction advocated by Respondents would have held the potential for disputes to be governed by the laws of New York, the BVI, Panama, and/or any of the many countries in which the operations of the Company and DTH would take place. The phrase in the Governing Law clause "*without giving effect to any choice or conflict of law provision or rule*" is indicative of the Parties' intention to avoid the kind of choice-of-law uncertainty and havoc that could arise if New York law were not all-encompassing. The choice of New York as the arbitral seat also supports this view.

Respondents' contention that the "internal affairs doctrine" points to the application of BVI law is also unpersuasive because, under New York law, the "internal affairs doctrine" is a conflict of law rule. (*E.g., Mason-Mahon v. Flint*, 166 A.D.3d 754, 756 (2d Dep't 2018). Thus in the Governing Law clause the Parties' expressly excluded its application.

resort and highest authority – stated: "Tortious interference with contract requires the existence of a valid contract between plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom."

174. Here, the elements of the existence of a valid contract and Mr. Hernandez's knowledge of it are not disputed. We have found that Respondents breached the SHA in numerous respects and the record plainly supports the finding that Mr. Hernandez, as the individual controlling the A Shareholders' appointed members of the Company's Board (of which he himself was one for a substantial period), intentionally procured those breaches. We have also found that Claimants suffered damages caused by those breaches. As a result, the merit of Claimants' tortious interference claim against Mr. Hernandez turns on whether he had legally-cognizable "justification" for his intentional interference with the A Shareholders' performance of their obligations under the SHA. A significant case introduced by Respondents on this issue is *Foster v. Churchill*, 87 N.Y.2d 744 (1996). *Foster* sets forth legal standards for the "without justification" element of liability in a tortious interference case. In *Foster*, the New York Court of Appeals re-affirmed its holding in *Felsen v. Sol Cafe Mfg. Co.*, 24 N.Y.2d 682 (1969) "that economic interest is a defense to an action for tortious interference with a contract unless there is a showing of malice or illegality." 87 N.Y.2d at 750. The Court in *Foster* stated: "We concluded in *Felsen* that '[p]rocuring the breach of a contract in the exercise of equal or superior right is acting with just cause or excuse and is justification for what would otherwise be an actionable wrong....'"

175. The Court in *Foster* then referred to yet another of its earlier tortious interference cases, *Murtha v. Yonkers Child Care Ass'n*, 45 N.Y.2d 913, 915 (1978) and quoted from that case: "[A] corporate officer who is charged with inducing the breach of a contract between the

corporation and a third party is immune from liability if it appears he is acting in good faith as an officer ... (and did not commit) independent torts or predatory acts directed at another." *Id.* Then, again citing *Felsen*, the Court stated in *Murtha*: "The imposition of liability in spite of a defense of economic interest requires a showing of either *malice* on the one hand, or fraudulent or illegal means on the other.... To defeat a claim of tortious interference under *Felsen*, respondents need to establish that their actions were taken to protect an economic interest." *Id.* at 751.

176. It is obvious that Mr. Hernandez, a sole owner of Terra and DTH, has an economic interest in keeping majority control of the Company, continuing the business relationship between the Company and DTH, and retaining in perpetuity (or until Claimants, in a circumstance of coercive illiquidity, accept terms of separation that Respondents dictate rather than those the SHA prescribed) the equity investments made by Claimants in 2015. The questions to be answered that are decisive of the tortious interference claim are whether there was such (i) illegality and/or (ii) malice, as to counter the defense of economic interest by showing that the means used were not justified. We find that malice was present, attributable to Mr. Hernandez and DTH, such that the means used to advance their economic interests were not justified. Having found malice, we find it unnecessary to decide whether there was also illegality (and what "illegality" means in New York law of tortious interference), but our reference in PO 2024-16 (Appendix 5 annexed) and in the Preamble of this Award to a possible referral to law enforcement authorities reflects our belief that, at a minimum, there is a serious question of whether crimes have been committed.

C. Mr. Hernandez's Intent to Interfere with Claimants' Rights Under the SHA

177. Although Mr. Hernandez's controlling position should make further examination of the issue of intent unnecessary, in this case we make the following additional observations for avoidance of doubt about our conclusions.

178. In March 2021, after Terra had rejected the Torrecom Offer, and after Terra had declined to proceed with engagement of an Investment Bank to pursue a Company Sale, Terra sued Torrecom in a Florida state court. (Ex. C-64). Whereas the theory of Torrecom's liability to Terra in that lawsuit was that Torrecom had aided and abetted a wrongful effort by Claimants to wrest control of the Company from Terra, one evident motive of the lawsuit was to have a court rather than an arbitral tribunal conduct proceedings relating to the pending arbitration. The Torrecom lawsuit filing is evidence of an intention to interfere with the performance of the Arbitration Agreement.

179. Sometime in April or May 2021, Mr. Hernandez used the Enterprise Podcast Network, an online website for entrepreneurs to convey their messages to the market by podcast, to convey his message about Terra's dispute with Claimants and why the lawsuit against Torrecom had been filed. (Ex. C-60). He declared that he was prepared to "fight back" against anyone who would try to "take our company away." The podcast omitted material facts about the SHA, including any description of the Company Sale process in Section 5.04(b) and the obligation of Terra to resolve disputes with Claimants exclusively by final and binding arbitration under the AAA Commercial Rules. The aggressive and misleading terms used by Mr. Hernandez in the podcast, particularly coming shortly after the filing of the Torrecom lawsuit, are evidence of Mr. Hernandez's intention to deploy tactics, including self-serving publicity, to make the arbitration process ineffective to resolve Terra's Company Sale dispute, and the Parties' other disputes, through final and binding arbitration. The Podcast as evidence of malign intent is discussed in more detail in the Punitive Damages section of this Award, at paras. 206 *et seq*.

180. We made a final determination in PFA-2 that Mr. Hernandez had wrongfully ousted Mr. Gaitán and Ms. Echeverria from their Company Management positions in September 2021.

Based on facts finally determined in PFA-2, we find that the ouster of Company Management was intended to exert pressure on Claimants to resolve the Company Sale dispute on terms favorable to Respondents by depriving Claimants, for so long as the arbitration process might continue, of the corporate governance rights provided to them in the SHA, including the right to have Company Management chosen by the Board of Directors, not the majority Shareholders.

181. We also made a final determination in PFA-2 that Respondents relied upon their own version of the facts surrounding the ouster of Company Management in September 2021 to bring criminal proceedings through their agents against the Company Management in Guatemala courts. That conduct was intended to contradict and discredit this Tribunal's determination pursuant to the Arbitration Agreement that Respondents were required to restore Company Management to the terms and conditions of employment with DTH associated with their fulfillment of their Company Management roles. And that conduct was also intended to deprive Claimants of their rights in Company management provided in the SHA.

182. The foregoing is sufficient for us to find, and we do find, that Mr. Hernandez had the requisite intent to interfere with Claimants' rights under the Shareholders Agreement. Whereas Mr. Hernandez is the sole owner and controlling person of DTH, and he acted on behalf of DTH to interfere with a Company Sale process, or the imposition through arbitration of a Company Sale process, that would potentially bring an end to the revenue streams DTH derived from its contracts with the Company, Mr. Hernandez's intentions are attributable to DTH under principles of agency. Equally, where actions were taken by DTH or its affiliates or agents, as was the case for example with respect to certain facts determined in PFA-2 regarding criminal proceedings in Guatemala, we attribute those actions to Mr. Hernandez as the sole owner and controlling person of DTH.

183. More conduct that is evidence of Mr. Hernandez's and DTH's intentionality is discussed below in paras. 186 *et seq.*, under the rubric of "malice" as a basis for satisfying the liability element that the interference occurred without justification.[48]

D. "Malice" as a Basis for Determining That Interference Was Without Justification

184. Based on the tortious interference case law provided by the Parties, we have an appreciation for what is meant by "malice" in those cases. We refer to the *Felsen* case cited in *Foster v. Churchill*. *Felsen* involved a company that was then a prominent distributor and retailer in the restaurant industry in New York, in its capacity as sole shareholder of the first-named defendant, a restaurant/café operator. The plaintiff was a terminated employee, employed by the café under a written contract. The Court of Appeals resolved the case in these terms:

> Chock Full O'Nuts, as the sole stockholder of Sol Cafe, had an existing economic interest in the affairs of Sol Cafe which it was privileged to attempt to protect when it "interfered" with plaintiff's contract of employment with Sol Cafe. Plaintiff could show no evidence that such interference was motivated by any "malice" toward him; rather, the evidence tended to indicate that the officers of Chock Full O'Nuts were reasonably concerned with the internal management of the Sol Cafe manufacturing plant, for which plaintiff had general responsibility, and that this concern led them to recommend plaintiff's discharge.

24 N.Y.2d at 687. *Felsen* thus treats as "malice" a motivation for the interference with a contract that is not a reasonable concern about the economic welfare of the contracting entity in which the defendant has an economic interest.

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[48] In authority cited by Claimants (*Renaissance Search Partners v. Renaissance Limited, L.L.C.*, 2014 WL 12770440 (S.D.N.Y. July 3, 2014), *report and recommendation adopted*, 2014 WL 4928945 (S.D.N.Y. Oct. 1, 2014), we find the so-called "third-party rule" (Id. at *4), *i.e.*, that tortious interference "'cannot be based on the actions of a director or officer in his official capacity." While Mr. Hernandez was a member of the Company's Board of Directors at the time of certain of his acts of interference, his actions were not taken in the exercise of any discretion vested in him as a member of the Board. He acted on behalf of himself, Terra and DTH. The SHA in Section 5.04(b)(ii) did not provide that the Board would vote on whether or not to proceed with a Company Sale; there was no discretion to be exercised by the Board – as we determined in PFA-1. Similarly, because the Company Management agreed by the Shareholders at an earlier date could not be changed by a deadlocked 2-2 vote of the Board, Mr. Hernandez resorted to a unilateral ouster as determined in PFA-2, which was clearly not an action taken in his official capacity as a Director of the Company.

185. In *Foster v. Churchill*, the Court of Appeals did not elaborate specifically on the meaning of "malice," but it did state: "The imposition of liability in spite of a defense of economic interest requires a showing of either malice on the one hand, or fraudulent or illegal means on the other. … While the lower court found that respondents did not show good faith in their actions, and may have acted in bad faith, there was no evidence that independent torts were committed, ***nor were respondents' actions taken to advance some personal interest.***" (emphasis supplied). Thus we are satisfied that the "malice" that will serve to vitiate the defense of economic justification is not limited to egregious or outrageous or fraudulent conduct, or conduct involving moral turpitude — though there is ample evidence of just that in the evidentiary record in this case — but extends to conduct that obviously is driven by a self-interested motivation. A finding of "malice," so understood, *does not inevitably* lead to a conclusion that punitive damages are appropriate, as the criteria under New York law for punitive damages to be awarded are more precisely defined, as we discuss in Section V. below.

186. We find it useful, as a basis to analyze the economic justification defense advanced here by DTH and Mr. Hernandez, to take the *Felsen* case as a paradigm, as the Court of Appeals did in *Foster*. To begin, neither DTH nor Mr. Hernandez is a shareholder of the Company. Terra is the majority Shareholder of the Company. DTH and Terra are both owned and controlled by Mr. Hernandez. Further, DTH has a contractual and business relationship with the Company, reflected in the Development Agreement, that was intended to provide services to the Company and corresponding economic benefit to DTH and Mr. Hernandez as its sole owner, during the economic life of the Company under ownership of Claimants and Terra. Finally, the contract allegedly interfered with was not between the Company and a third party but between Terra as a majority Shareholder and Claimants as minority Shareholders, with the Company as a nominal

party. Finally, much as Respondents would seek to frame this case as a conflict between the majority and minority Shareholders over their respective visions for the future of the Company, we do not see it that way. It is a dispute that concerns only the duration of the majority Shareholder's access to the capital invested in 2015 in the Company by the minority Shareholders, and whether any circumstance arose that the contract among the Shareholders, the SHA, treats as a valid reason for extending the majority Shareholders' access to the minority Shareholders' capital — and the collateral benefits to DTH as a service-providing affiliate of the majority Shareholders — beyond the five-year Lock-Up Period unless the minority Shareholders elected to remain invested. They obviously did not.

187. Mr. Hernandez's actions were instead taken on behalf of Terra, DTH and himself. Mr. Hernandez did not act based upon a reasonable concern for the welfare of the Company. As the sole owner of Terra and DTH, his actions to block a Company Sale, deprive Claimants of their Company management rights, and deny Claimants the benefits of the Arbitration Agreement, qualify as having been taken for his purely personal gain.

188. We do not agree with Respondents' argument (made in general terms) that Claimants' tortious interference claim lacks a causal connection to Terra's breaches in blocking a Company Sale. (*E.g.*, Respondents' Pre-Hearing Reply Memorial at 16 para. 39). The Company Sale breach is a continuing breach; it has occurred on each and every day on which Terra at the direction of Mr. Hernandez has maintained Terra's refusal to proceed with the Company Sale. By giving instructions for the filing of the Torrecom lawsuit and for the issuance of the ensuing press release, and by making the podcast declaring his intention to fight to prevent his company from being taken away from him, Mr. Hernandez reaffirmed his commitment to preventing the

Company Sale and declared his commitment to maximizing the damages resulting from that breach by causing illiquidity for Claimants' investment.

189. Further, we do not agree with Respondents' argument that Mr. Hernandez is protected from a tortious interference claim because he has "worked diligently to increase the value of the Company at no additional benefit to [himself]." (Respondents' Post-Hearing Brief at 36 para. 83). This dispute is not over the fair value of the Company. Some day there might be such a dispute if the Company is ever sold. Today this dispute concerns the diminution in the value of Claimants' shares in the Company as the consequence of Mr. Hernandez's actions. The argument made by Respondents disregards the illiquidity of Claimants' minority interest that was persuasively established in the record *in any circumstance other than a Company Sale,* and so the making of such argument while Respondents maintain their unlawful refusal of a Company Sale -- – despite PFA-1 and the PFA-1 judgment – turns a blind eye on Mr. Hernandez's calculated misappropriation of Claimants' investment. Further, every dollar of such misappropriation is for the account of Mr. Hernandez as sole owner of Terra and DTH.

E. Malice in Regard to Company Sale From 2023 to the Present

190. As we have discussed in Section II.A. above, a new and updated version of the Company Sale Breach occurred, and has continued from early 2023 to the present, based on (1) Terra's appointees on the Company's Board of Directors, including the successor to Mr. Hernandez designated by Mr. Hernandez, having signed a resolution to proceed with engagement of Citibank as the Investment Bank to facilitate an Approved Sale, followed by (2) a series of steps by Respondents whereby they objected to Citibank as the Investment Bank unless its engagement letter with the Company (*i.e.,* adopted by all Shareholders) specified that all proceeds obtained in the Company Sale would be distributed upon proceeds being received,

without any reservation of such proceeds, otherwise due to Terra, to be reserved for satisfaction of potential money damages obligations resulting from this arbitration.

191. This was patently self-interested conduct on the part of Mr. Hernandez (and by extension DTH). It had nothing to do with the price obtainable in the Company Sale, or the costs to the Company of the sales process, or the success Citibank might have in identifying interested buyers. Mr. Hernandez and his agents made no pretense to such explanations of their conduct. They only advanced an argument, that we have found to be untenable, that the freedom of Terra to receive distribution of proceeds without reservation for money damages setoffs was mandated by PFA-1. The self-evident motivation for such conduct was to prevent Claimants from seeking the type of sales proceeds escrow for which they have applied to the Tribunal in Phase 2, and to create collection risk for Claimants on money damages that might be awarded to them. The direct beneficiary of such collection risk would be Mr. Hernandez, as sole shareholder of Terra. And the direct beneficiary of continued refusal to sell the Company has been Mr. Hernandez in his capacity as sole shareholder of DTH, because DTH has enjoyed exclusive control over and access to the Company's cash flow.

192. This course of conduct prevented the engagement of Citibank that was contemplated by the 2023 Board Resolution and thereby caused a new breach of Section 5.04(b)(ii) of the SHA by Terra.

193. This course of conduct made the business justification defense to tortious interference with contract unavailable to Mr. Hernandez, as it constituted malice under applicable New York law.

F. Malice As To Other Sustained Derivative and Direct Breach of Contract Claims

194. As to each of the derivative and direct breach of contract claims we have sustained in Sections II., III. and IV. above, the findings of fact we have made support the conclusion that Mr. Hernandez, and by extension DTH, acted from self-interest and not out of any reasonable concern about the economic welfare of the Company or the enhancement of the value of the Company for all Shareholders. Each of the measures taken had as its evident motive one or more of the following: (1) to maximize the revenue stream to DTH from the Company, (2) to entrench Mr. Hernandez's *de facto* control over the Company by generating falsehoods about and vexatious proceedings against Company Management, (3) to eviscerate Claimants' rights under the Arbitration Agreement by re-litigating in unilaterally-chosen fora issues we had already decided, and in the case of Respondents' counterclaims, that we had determined we would not decide unless Respondents complied with our prior orders and Awards, and (4) to pressure Claimants to succumb to the escalating costs of collateral proceedings by taking whatever terms Mr. Hernandez might offer to them to buy their shares, by making any fair value buyout by a third-party purchaser, whether of the Company or the minority interest, effectively unachievable.

G. Causation of the Breaches

195. Without the intervention of Mr. Hernandez to cause Terra and DTH to commit the breaches of contract we have found them to have committed, there would have been no such breaches. These are his companies, and he is their sole decision-maker, whether directly or through agents who act for him.

H. Liability of Respondent DTH for Tortious Interference

196. The reasoning that supports liability for tortious interference with contract of Jorge Hernandez in sub-sections A.-G. above equally supports such liability of Respondent DTH

Holdings, an entity solely owned and controlled by Mr. Hernandez.

VI. Liability of Respondents Hernandez and DTH for Punitive Damages

197. Claimants seek to have the Tribunal award punitive damages on their tort claims of tortious interference and breach of fiduciary duty. (ASOC at pp. 112, 113). However they have not stated a particular sum that we are asked to award, or a formula relating the award of punitive damages to the other relief Claimants have sought.

A. Applicable New York Law and Burden of Proof Considerations

198. Claimants cite *In re Blue Dog at 399 Inc.*, 2020 WL 6390674 (Bankr. S.D.N.Y. Oct. 30, 2020) (Claimants' Opening Post-Hearing Memorial at 37) from which we quote:

> Punitive damages serve a different purpose than compensatory damages. Rather than making the victim whole, punitive damages are intended to punish the tortfeasor and to deter similar future conduct by others. *Ross v Louise Wise Servs.*, 8 N.Y.3d 478, 489 (N.Y. 2007). Punitive damages may be imputed to a law firm for the conduct of its lawyers. *Dischiavi v Calli*, 975 N.Y.S.2d 266, 270 (4th Dep't 2013). "[T]he standard for imposing punitive damages is a strict one and punitive damages will be awarded only in exceptional cases ...." *Marinaccio v Town of Clarence*, 20 N.Y.3d 506, 511 (N.Y. 2013), *denying reargument*, 21 N.Y.3d 976 (N.Y. 2013). The conduct justifying punitive damages must be "egregious tortious conduct" manifesting "spite or malice, or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton." *Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 N.Y.2d 603, 613 (N.Y. 1994) and *Marinaccio*, 20 N.Y.3d at 511; *see also Ross*, 8 N.Y.3d at 489 ("The misconduct must be exceptional, as when the wrongdoer has acted maliciously, wantonly, or with a recklessness that betokens an improper motive or vindictiveness or has engaged in outrageous or oppressive intentional misconduct or with reckless or wanton disregard of safety or rights") (internal citations and quotations marks omitted); *Marinaccio*, 20 N.Y.3d at 512 ("Punitive damages are permitted only when a defendant purposefully causes, or is grossly indifferent to causing, injury and defendant's behavior cannot be said to be merely volitional; an unmotivated, unintentional or even accidental result of a legally intentional act cannot, alone, qualify"); *Sharapata v Town of Islip*, 56 N.Y.2d 332, 335, (N.Y. 1982) (punitive damages "may only be awarded for exceptional misconduct which transgresses mere negligence ....") "Willful" is synonymous with "wanton" and "reckless," and the three terms are "grouped together as an aggravated form of negligence indicating that the actor has intentionally done an act of an unreasonable character in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow." *Metro. Life Ins. Co. v Noble*

Lowndes Int'l, Inc., 192 A.D.2d 83, 90 (1st Dep't 1993), *aff'd*, 84 N.Y.2d 430 (1994), *denying reh'g*, 84 N.Y.2d 1008 (1994) (quoting Prosser, Torts § 34, at 184–185 [4th ed.]) (internal quotation marks omitted).

199. Claimants also cited *Maxan Curtain Mfg. Corp. v. Chem. Bank*, 646 N.Y.S.2d 701, 702 (2nd Dep't 1996), where the Appellate Division of New York Supreme Court sustained a claim for punitive damages for tortious interference with contract where plaintiff's allegations "evince[d] a degree of moral culpability for which a fact-finder may consider the assessment of punitive damages." (*Id*. at 37 n. 40). Claimants also cited *Giblin v. Murphy*, 73 N.Y.2d 769, 772 (1988) for the proposition that punitive damages are appropriate in a breach of fiduciary duty case "where 'defendants' operation of the business amounted, at least, to willful or wanton negligence and to a wanton or reckless disregard of plaintiff's rights, and was [was] grossly negligent and reckless." (*Id.*).

200. A case cited in both *Maxan Curtain* and *Giblin*, *Nardelli v. Stamberg*, 44 N.Y.2d 500 (1978), involved punitive damages for the tort of malicious prosecution. In *Nardelli*, the Court of Appeals held that the "actual malice" element of a claim for malicious prosecution "means that the defendant must have commenced the prior criminal proceeding due to a wrong or improper motive, something other than a desire to see the ends of justice served." 44 N.Y.2d at 503. We read the New York courts' citation to *Nardelli* in tortious interference cases as an indication that New York law treats the initiation of a criminal proceeding for improper motives as an appropriate legal standard for addressing a claim for punitive damages in a tortious interference with contract case. A more recent case cited by Claimants, *Hall v. Middleton*, 227 A.D.3d 590 (1st Dep't 2024), also in a breach of fiduciary duty context, held that punitive damages are "entirely appropriate… as a deterrent against flagrantly unlawful conduct…" This "flagrantly unlawful" consideration adds useful content to the *Nardelli* standard of "wrong or improper motive."

201. We quote these standards at such length because they instruct us that the improper motives that may justify punitive damages need not involve us, as a matter of law, in making judgment about "morality." Instead, whether we consider actual malice, and/or willful and wanton conduct, as our guidepost, we are involved in assessing the means used to achieve a goal, the legitimacy of the goal, and the collateral damage that could foreseeably result from the conduct.

202. Below we treat specific episodes that – separately or cumulatively – show flagrantly improper conduct by Mr. Hernandez. Several of those episodes involve publications on internet websites about this case, as to which Respondents offer no defense that the publications were appropriate, or that the publications were not willful and wanton conduct, or *flagrantly* improper by those who caused the publications, but contend only that they were not involved. Thus we take it as uncontested in this case that these were acts *by someone* who, if that person is a Respondent in this case (other than one of the Individual Respondents over whom we find we lack jurisdiction), would warrant imposition of punitive damages. Whether that someone is Mr. Hernandez — whose conduct as a matter of law is attributable to Terra and DTH[49]— is essentially the only issue of fact or law to be decided.

203. The adjudication of this claim for punitive damages presents the Tribunal with special challenges. If Mr. Hernandez were to admit to involvement in perpetrating certain of the acts we discuss below – in subsection B. entitled "**The Evidence Concerning Mr. Hernandez's Conduct**" – that could expose him not merely to punitive damages, but to criminal prosecution in

[49] Such attribution of Mr. Hernandez's conduct to Terra and DTH is supported by the *Dischiavi* case cited in the quotation from *In re Blue Dog* in para. 198 above, which addresses the requirements for vicarious liability of other partners in a partnership for conduct supporting an award of punitive damages against one party. As Terra and DTH are under the sole control of Mr. Hernandez, they are "complicit in [his] conduct" as a matter of law. *Dischiavi*, 11 A.D.3d 1258, 1262 (4th Dep't 2013).

the United States.[50] This means that in evaluating the evidence of Mr. Hernandez's involvement, balanced against the denials of involvement that were issued only through counsel save for one perfunctory written declaration issued after the merits hearing, we need to take into account an understandable tendency to deny and conceal culpability. We need to take into account that Mr. Hernandez's decisions not to testify in the evidentiary hearings we have held in 2022 and 2024 may have been motivated in part to avoid providing testimony that could be used in a criminal prosecution that might ensue in the future. And if third-party agents helped to facilitate such malign activity (such as the owners of purported news websites, or purported journalists for news websites), there are enhanced incentives to conceal culpability for the protection of those facilitating actors. We mention these considerations because they affect the evidentiary weight we assign to Mr. Hernandez's perfunctory denials of involvement, mainly through counsel, that were not tested by cross-examination.

204. The fact that potentially criminal misconduct is involved does not mean that we apply a criminal standard of proof for determination of a punitive damages claim. While the standard of proof is a procedural issue in the discretion of the Tribunal, it may be informed by the standards that a New York court applying New York law would adopt. Although we do not have submissions on this issue from the Parties, in our view, the record should provide us with a level of high confidence that our conclusions are correct. It does.

205. And our approach in deciding whether we have such high confidence entails the following considerations: (i) whether the alleged malign activity is aligned with Respondents' business objectives, including their objectives to defeat Claimants' claims in this arbitration and

[50] We informed the Parties of our assessment that a course of conduct had occurred in relation to this case that could expose the perpetrators to United States criminal prosecution, in Procedural Order No. 2024-16 issued on July 12, 2024. (Annexed as Appendix 5).

to prevent effective enforcement of arbitration awards issued by this Tribunal, (ii) if Claimants could reasonably be expected to provide direct rather than circumstantial evidence of malign activity by the Respondents, and if so from what sources, (iii) if adverse inferences of culpability arise from concealment of evidence, when the sources from which Claimants would secure direct evidence are the Respondents themselves and Respondents prevented the gathering of such direct evidence, ignoring production orders from this Tribunal and producing nothing, (iv) if conclusory denials of knowledge or information about malign activity when transmitted either by Respondents' counsel, or in perfunctory written declarations, should be given any weight, when the individuals professing ignorance of malign activity did not testify on behalf of Respondents and did not share the contemporaneous records of their written communications with one another or with third parties, and (v) if the conduct that the record shows to be clearly attributable to Respondents and either not denied or not deniable by them circumstantially supports an inference of their responsibility for other malign activity for which their responsibility cannot be proven directly within the framework of the investigative powers available to the Claimants and the Tribunal.

B. The Evidence Concerning Mr. Hernandez's Conduct

1. The 2021 Torrecom Action and the Hernandez Podcast

206. In or about May 2021, after this arbitration had been commenced but before the Tribunal was constituted, and within a few weeks after Terra had sued Torrecom in a Florida court, Mr. Hernandez recorded a podcast interview for the Enterprise Podcast Network ("EPN") (www.epodcastnetwork.com) (*see* Ex. C-60 at p. 20). EPN is a website that enables entrepreneurs to be interviewed by EPN podcast hosts and to have the interviews uploaded on the EPN website where they are accessible to the public.

207. Neither Mr. Hernandez nor any other agent of Respondents testified in Phase 2 to explain why the Torrecom Action was commenced or why the Enterprise Podcast was made. And Respondents did not comply with our orders to produce documents concerning the Torrecom Action and the Podcast.

208. We infer that the reasons for the Torrecom Action and the Podcast were mainly to send a message to Claimants: that Respondents would find ways to impose additional legal costs and legal risks upon Claimants if they did not acquiesce to Respondents' position, which at that point was to have Claimants accept an offer from Terra for redemption of Claimants' shares for a consideration of $150 million (Ex. C-119), about 20% less than Claimants' *pro rata* share of the Torrecom Offer that Respondents had contended was below the fair value of the Company. While it is not necessarily willful or wanton to commence litigation as a means to achieve a business objective, it was inevitable that a lawsuit whose gravamen was aiding and abetting alleged breaches of contract by Claimants (Ex. C-64) could not go forward, and would have to be stayed, pending the underlying arbitration between Claimants and Respondents, in the arbitral forum which was the only forum that could determine allegations of breach of contract between Respondents and Claimants. That is exactly what occurred, and that lawsuit has remained stayed for nearly four years.[51] So the motive we infer from the Torrecom Action and the Podcast is that Mr. Hernandez wanted to demonstrate clearly to Claimants that his "fight" to prevent "taking our company away" would be fought at a cost to Claimants that would not be confined to the costs of this arbitration.

[51] This was reported to the Tribunal by Claimants' counsel in response to its question at the Phase 2 closing argument, without disagreement from Respondents' counsel.

209. Standing alone, this conduct in 2021 would not warrant an award of punitive damages. But this conduct was indeed a precursor to what followed in this case, beginning in September 2021.

2. The Ouster and Legal Harassment of Company Management

210. In PFA-2 we determined after an evidentiary hearing that came about for reasons we discuss below:

> [That] Jorge Hernandez acting for the Respondents forced Jorge Gaitan and Carol Echeverria out of their positions in September 2021 because he considered them to be insufficiently supportive of the Respondents' position in this arbitration. The notion that they were replaced in their DTH positions because they abandoned those positions was correctly rejected by the Tribunal in our November 12 Order, and the record as it has been developed confirms that. Respondents' insistence, in post-November 12 submissions to this Tribunal, in courts of law, and in soliciting the Morrison Memorandum[52] from Morrison, that they abandoned their DTH posts, has been a stubborn and costly adherence to fabricated facts. (PFA-2 at 33 para. 78(1)).

211. The evidentiary hearing that culminated in PFA-2 was impelled by Respondents' refusal to comply with our November 12, 2021 Order; their insistence that we should reconsider that order, their submission of written evidence, much of it unsolicited, purporting to show new instances of misconduct by Company Management; the issuance by DTH affiliates of a public press release denouncing Company Management and declaring their disassociation from them; our issuance of an additional interim measure requiring a corrective press release; and Respondents' refusal to comply with the Order requiring the corrective press release, leading to a further application by Claimants for sanctions. The Tribunal decided that we would allow Respondents to present their evidence in an evidentiary hearing, but as a matter of fairness and procedural good order, we directed Respondents to produce certain categories of documents before that hearing and

[52] More about the Morrison Memorandum in paras. 214 *et seq.* below.

to bring particular witnesses to the hearing so that they could be cross-examined. Rather than seize the opportunity to prove facts that Respondents had spent so much effort insisting upon, Respondents then declared, without any basis, that the Tribunal was *functus officio*, and that the hearing we had ordered was illegitimate because we thus had no power to hold it.

212. If this were the end of the litany of misconduct, it might perhaps not cross the lines dividing cost allocation, sanction, and punitive damages, much less potentially criminal misconduct, not least since we already imposed sanctions in PFA-2.

213. But the fact that we imposed sanctions in PFA-2 does not prevent us from considering the facts determined therein as evidence of malign intent. First, we consider what inferences about intent should be drawn from Respondents having in late 2021 and early 2022 pursued criminal charges in Guatemala against Mr. Gaitán based on what PFA-2 called "fabricated facts."

(1) At the time of these events, the only issue actively being considered by the Tribunal was whether to grant specific performance of the Company Sale obligation in SHA 5.04(b). The issue of Mr. Gaitán's status as CEO had been resolved in the interim measures order of November 12, 2021. As Respondents had effectively declared to the Tribunal their intent not to comply with the Order, it is a fair inference, and we draw it, that Mr. Hernandez's intent, and by extension that of the entity Respondents he controls, was to build a case against Mr. Gaitán that would advance Respondents' position that Mr. Gaitán should not be the Company's CEO. There are a range of possible reasons why Mr. Hernandez may have been motivated to take those steps. We need not speculate about the precise motives of Mr. Hernandez, or about his overall strategy. Had he only been presenting his case to a Guatemala court rather than this Tribunal and was merely

presenting truthful evidence to the wrong forum, we would have only a breach of the arbitration agreement. But our finding in PFA-2 was that the Guatemala criminal case brought by DTH against Mr. Gaitán was based on fabricated facts that were within Mr. Hernandez's personal knowledge – *i.e.*, what happened on September 27, 2021 at DTH's offices in Guatemala City when he orchestrated the *de facto* ouster of Mr. Gaitán as Company CEO. That makes the conduct malign, to an extreme, unless the conclusion that the facts were fabricated was itself erroneous. We lack power to modify PFA-2 – which after all was based only on the testimony of Company Management and a Morrison & Foerster partner, because Mr. Hernandez and his agents refused to testify. But if Mr. Hernandez had appeared as a Phase 2 witness to present proof that we erred in PFA-2, as evidence of his benign motives and in defense against the Claimants' punitive damages claim, we would have considered it. Instead he was absent from the Phase 2 proceedings.

(2) Backed by the justification for an adverse inference that we have because Respondents refused without excuse to comply with an order to produce documents about their pursuit of criminal proceedings against Company Management (Claimants' Stern Schedule Submission at Document Request No. 15), we infer that the Respondents advanced the "fabricated facts" before foreign tribunals in part on the basis that they could persuade foreign courts or foreign arbitration tribunals in Guatemala and El Salvador in late 2021-early 2022, as found in PFA-2, to accept those fabricated facts as authentic and truthful, and to undermine orders and awards in this arbitration by making adjudications in reliance on such fabricated facts. That is willful and wanton conduct, having an improper

motive other than pursuit of justice (as conceived under international standards evident in the New York and Panama Conventions), under New York law of punitive damages.[53]

3. The Morrison Memorandum

214. PFA-2 did however also establish at least one motive for advancing the "fabricated facts" before foreign tribunals such as courts with jurisdiction over criminal matters in Guatemala and El Salvador. Indeed we concluded in PFA-2 that the purpose of the criminal complaint filings in Guatemala was "to manufacture false evidence of criminality on the part of Mr. Gaitán and Ms. Echeverria for the specific purpose of deploying that false evidence of criminality to Respondents' tactical advantage in this arbitration." (PFA-2 at 39 para. 85).

215. We went on to find in PFA-2 that one critical *modus operandi* for the tactical use of the false evidence of criminality in this arbitration was, as an initial step, to obtain a legal opinion about compliance risks from a prominent American law firm, Morrison and Foerster, that could be used to exert pressure on Claimants and/or to obtain favorable relief from this Tribunal. Respondents' undertaking in January 2022 to obtain a legal opinion from Morrison & Foerster upon false pretenses and false facts is detailed at paragraphs 90-104 of PFA-2.

216. Respondents' defrauding of Morrison & Foerster was so effective that they were able to obtain exactly the opinion they wanted. We quote from the final version of the Morrison Memorandum dated February 16, 2022:[54]

> In light of the inherent legal, compliance, messaging, and reputational risks associated with employing as CCO [Chief Compliance Officer] an individual involved in various investigations, we recommend suspending the Officer's duties and responsibilities as the Company's CCO during the pendency of the investigations.… Moreover, while our analysis focuses on the Officer's role as

[53] We rely on all the facts determined in PFA-2 as part of the basis for concluding that punitive damages should be awarded. We annex PFA-2 as Appendix 2- to this Award.

[54] The Morrison Memorandum refers to Mr. Gaitán as the Company's CCO and COO rather than CEO, presumably because of Respondents' argument that he was not CEO. The Morrison Memorandum was Ex. C-82 in the proceedings that culminated in PFA-2. It was not resubmitted as a Phase 2 exhibit.

> CCO, similar arguments could support suspending/terminating the Officer's role as Chief Operating Officer given the senior nature of the position.
>
> 217. We concluded in PFA-2 (at p. 52 para. 103):
>
> Plainly, the reason to present to a Tribunal of US lawyers an opinion delivered by a law firm of Morrison's stature was that this stature would potentially lend credence to the underlying position that DTH's disassociation from Mr. Gaitán was justified and the Peppertree Board Members' refusal to support the Company's disassociation from Mr. Gaitán was unreasonable and potentially a breach of their fiduciary duties. The submission in evidence of the Morrison Memorandum was a substantial factor in the Tribunal's decision to conduct the evidentiary proceeding that now culminates in this Award. If Morrison had reviewed evidence that supported Respondents' purported concerns about Mr. Gaitán, that could have led the Tribunal potentially in one direction. If on the other hand Morrison had been misled about underlying facts, that would lead in another direction and affect the range and severity of sanctions for Respondents' disobedience of our Orders. It turns out the latter was the case.

As was also found in PFA-2, not only did Respondents' agents solicit and obtain the Morrison Memorandum based upon contrived facts about Company Management, they obtained it on the false premise that they were engaging Morrison to represent the Company, and on that basis they caused Morrison to issue its Memorandum to the Company – concealing from Morrison the fact that Respondents had no authority to engage counsel for the Company. In simplest terms, the Morrison Memorandum was procured by Respondents as part of a plan to defraud the Tribunal. (As determined in PFA-2, the contacts between Morrison & Foerster and Respondents were through Danielle Kirby, William Mendez Araujo, and an associate lawyer in the law firm Mayora y Mayora – the latter then co-counsel for the Respondents in this case – all of whom were agents of Mr. Hernandez acting within the scope of their authority). As we determined in PFA-2, Respondents planned to ask the Tribunal, based on the supposed compliance risk of having an accused criminal as CEO, to excuse Respondents' disregard for the Tribunal's interim measures orders pertaining to Mr. Gaitán. The fraudulent procurement of opinion evidence was intended to persuade us – or some other forum more receptive to the evidence – to excuse without sanction

Respondents' non-observance of our orders to restore Mr. Gaitán to an effective status of Company CEO. The fraudulent procurement of a legal opinion, by employees of Respondents, with intent to defraud the Tribunal (or another adjudicative forum) and/or Claimants, surely qualifies as willful and wanton conduct, intended to subvert the arbitral system of adjudication in this case.

4. The NewsZoom.click Article

218. On February 25, 2022, which was nine days after the date of issuance of the Morrison Memorandum and three days after the Tribunal's issuance of PFA-1, the following article appeared on a website called www.newszoom.click, under a large graphic depicting a statuette of Lady Justice holding the Scales, against a background of large-denomination U.S. dollar bills (Ex. C-137) (Fonts in the following quotation are reproduced from Ex. C-137, which reproduces the website version of the article) :

EXCLUSIVE: PEPPERTREE CAPITAL MANAGEMENT CAUGHT UP IN CORRUPTION SCANDAL, WHISTLEBLOWER ALLEGES

February 25, 2022 News Zoom Click

Following high-profile arrests of two lawyers by Guatemala's public prosecutor on corruption charges, new information leaked to the press alleges a direct financial connection to an American private equity firm based in Ohio, Peppertree Capital Management. According to local media reports, the lawyers, Juan Miguel Ordoñez Zea y Julia Cristina González Vizcaíno, were arrested on Sept. 2, 2021 and accused of having plundered more than $7.5 million dollars in a corruption scheme involving a series of non-governmental organizations. The arrests and charges are part of a sprawling legal affair known as the "Banco de Crédito" case, one of the country's biggest corruption cases in recent years. And now, with the involvement of an American investor, could entail expanded enforcement efforts under the Foreign Corrupt Practices Act (FCPA).

According to internal documents and testimony leaked to News Zoom Click by a whistleblower confirmed to be a former employee of Peppertree, the company has allegedly been paying a salary of $13,320 every month to their executive Jorge Gaitan Castro, and to his subordinate Carol Echeverria, a monthly salary of $7,840, who in turn have allegedly been funneling this money into the Banco de Crédito scheme operated by their appointed legal counsel, Ordoñez Zea and González Vizcaíno at the law firm of Aguilar & Aguilar.

Both Gaitan and Echeverria have confirmed that Peppertree is their employer, according to court records viewed by News Zoom Click.

Documents shared by the whistleblower included letters from a company where Gaitan was employed, disavowing his involvement in their operations and warning investors at Peppertree that they were allegedly funding unlawful activity and could be liable in US

courts. Nevertheless, even after these facts were revealed internally, Peppertree continued to employ Gaitan Castro as part of a scheme to allegedly seize control of the company, sources say.

According to a legal opinion shared with News Zoom Click, Mr. Gaitan, “has allegedly committed crimes in several countries.” The legal opinion states: “In fact, Mr. Gaitán has been criminally denounced for the commission of the crime of aggravated theft, ideological falsehood, use of information, destruction of computer records and illicit association before the Tenth Court of First Criminal Instance for Drug Trafficking and Crimes against the Environment in Guatemala.” Additionally, the whistleblower shared further correspondence sent to company shareholders, expressing the group’s profound concerns over the continued employment of Gaitan by Peppertree despite his alleged links to corruption and ongoing investigations.

The letter referred to a forensic accounting investigation of Mr. Gaitan which allegedly revealed that he had been “defrauding and embezzling hundreds of thousands of dollars” from the company accounts into his own pockets, which would represent a clear FCPA violation for US law enforcement to investigate.

According to sources consulted, there is a high level of discomfort and frustration with Peppertree’s continued employment of an executive allegedly linked to corruption, which some say builds on a record of unethical business practices across Latin America.

The whistleblower from Peppertree indicates that they are motivated to bring all this information forward in an effort to separate themselves from the unlawful activity.

Speaking on the condition of anonymity, the source says the majority of Peppertree’s team strongly disagrees with the position of the fund’s directors in the handling this matter, as executives fear potential liability for criminal prosecution under a future FCPA case. “The decision taken by Peppertree’s directors to continue to stand by this individual is reckless, unnecessary, and inconsistent with the company’s ethics policies – and the rest of us are not going to have our careers ruined because of their misconduct,” the source said. When contacted, the local telecommunications firm said that they could not comment on this matter. When asked if Mr. Gaitan and Ms. Echeverria were employees of the firm, the representative indicated that those two individuals were no longer employed by the firm. Efforts to obtain comment from Peppertree’s executive leadership were unsuccessful.

News Zoom Click will continue to follow this story closely and encourages other whistleblowers to come forward with further details and revelations of Jorge Gaitan’s involvement in corruption activities and potential Foreign Corrupt Practices Act violations.

219. Claimants have consistently maintained, including in their oral Phase 2 testimony that was subject to cross-examination but not impeached, that there could not have been a whistleblower who had been privy to the relevant facts, because there were no former employees of Peppertree in the relevant time frame who would have had access while employed to the information imparted in the article. (Howard Mandel Witness Statement, May 20, 2024 at para. 50). While Respondents have issued perfunctory denials through their counsel in response to our inquiries about the Parties' knowledge, and a set of perfunctory and nearly identical declarations after our merits hearing — at which none of those declarants was presented as a witness[55] — many attributes of the "NewsZoom.Click" article, and the contemporaneous developments in the case, are evidence that the Respondents are responsible for its publication. The article's reference to a "scheme to allegedly seize control of the company," attributed to "sources," is readily traceable to the Complaint in the Torrecom lawsuit and Mr. Hernandez's Podcast that followed the filing of that Complaint, and the article makes express reference to what is almost certainly the Morrison Memorandum ("a legal opinion shared with News Zoom Click") (*See* paras. 214-217 above).

220. The article reports that the lawyers in Guatemala representing Mr. Gaitán and Ms. Echeverria were the same lawyers who had reportedly been arrested in September 2021 in connection with the Banco de Credito matter.[56] Respondents knew about that engagement because

[55] For these reasons, we are unable to credit either the denials transmitted through counsel or the post-hearing declarations. The latter, treated as belated witness statements by witnesses who are Parties (Mr. Hernandez) or persons who are within the control of a Party, fall within our procedural rule stated in 2021 that the Tribunal reserved the discretion to omit from the record the witness statement of a witness who declined to be cross-examined. Effectively, the only evidence in the record from the Respondents, concerning Respondents' association with the NewsZoom article or lack thereof, is the adverse inference arising from their unexcused refusal to provide evidence that we ordered them to produce.

[56] The lawyers, though arrested, were quickly exonerated, and had been before this article was published. *See* PFA-2 at 25 n. 18, citing Claimants' Ex. 73 in the PFA-2 proceedings.

the lawyers were engaged to defend Mr. Gaitán and Ms. Echeverria in the Guatemala legal proceedings commenced against them in December 2021 and January 2022 by persons associated with DTH as the Claimants, as discussed in PFA-2. Further, an effort to connect Mr. Gaitán and Ms. Echeverria to corruption in Guatemala by referring to the alleged involvement of their Guatemala counsel in corruption had already been made in this arbitration by Respondents. The precise amounts per month of Mr. Gaitán and Ms. Echeverria's salaries were known to Respondents, because DTH had paid those salaries until Mr. Hernandez terminated Mr. Gaitán and Ms. Echeverria's employment.

221. The NewsZoom article says its knowledge about these matters was obtained from a "whistleblower" who was a former Peppertree employee. But Mr. Mandel of Peppertree testified without contradiction that no employees left Peppertree in the relevant time frame. (Howard Mandel Witness Statement May 20, 2024 at para. 50). Mr. Mandel also testified without contradiction that the NewsZoom post (i) "parroted false allegations of misconduct against the Company's Management that Respondents had been advancing for months in correspondence Respondents had sent …" and (ii) "disclosed specific amounts that Peppertree advanced for Management's salaries…which Peppertree had only disclosed in the arbitration for the first time in early 2022." (*Id.* paras. 49-50). The persons who had (i) knowledge of these facts, (ii) a motive to publish them, (iii) a motive to falsify the sources for the publication, and (iv) a motive to claim that the source was within Peppertree, can only be persons associated with Respondents. And whereas the controlling person of Respondents is Mr. Hernandez, and there is no evidence in this case that any decision of Respondents is or can be taken independently of Mr. Hernandez, logically the publication is attributable to Mr. Hernandez.

222. The NewsZoom article refers to "a legal opinion shared with News Zoom Click." The quotations of the "legal opinion" are from the Morrison Memorandum, which on February 25, 2022 had only been issued ten days before, and at that point was known, as far as the record in this case shows, only to the Parties and the Morrison & Foerster firm. The article does not assert that the "legal opinion" was shared by the alleged "whistleblower" — it furnishes no attribution of this "sharing." But the article does admit that the preparer of the article had contact with a "representative" of "the local telecommunications firm" that had formerly employed Mr. Gaitán and Ms. Echeverria. That is Respondent DTH.

223. And yet Respondents did not offer any witness to testify about the contact between the NewsZoom representative and DTH's representative, or to deny that any such contact occurred. Further, we ordered Respondents to comply with Claimants' document production request concerning the NewsZoom article and Respondents inexcusably produced nothing. (Claimants' Stern Schedule submission at Document Request No. 10). This misconduct supports an adverse inference that the NewsZoom article was the product of Respondents' efforts. This conclusion is also supported by the similarity of technique between this use of a website and Mr. Hernandez's resort to the Enterprise Podcast Network to spread his messages about this dispute.

224. Respondents advance no benign account of the motives for or potential consequences of the NewsZoom article in response to Claimants' claim for punitive damages, instead relying only on their perfunctory non-testimonial denials of any role in its publication. They advance no contention, much less any evidence, that there was any truth to the insinuations of corruption and criminality at Peppertree made in the article.

225. Still, it is important that we articulate why the article contributes toward our conclusion that Mr. Hernandez and DTH engaged in a pattern of conduct that warrants punitive

damages under New York law. The date of first publication, February 25, 2022, was two days after the issuance of PFA-1. We consider that the NewsZoom article was meant to convey a message to Claimants: that PFA-1 would not end this dispute but would only be a step in a highly personal fight that would be waged indiscriminately with accusations of corruption and potential criminality lodged against Claimants directly, without any regard for the truth or falsity of the accusations. If Respondents could not prevail before this Tribunal, they would seek to prevail by exerting pressure upon Claimants by creating an implied threat that the NewsZoom article would be brought to the attention of Peppertree investors and U.S. law enforcement authorities. We do not hesitate to conclude that the advancement of false and defamatory accusations of criminality and corruption in the business conduct of the prevailing party in an arbitration, as part of a strategy of resistance to an arbitration award or its enforcement, by parties that made a contract for final and binding arbitration before the Tribunal that was about to issue an award that might be adverse to them, constituted malicious conduct under New York punitive damages law.

226. Our conclusion that this was part of a strategy of resistance to PFA-1 by counterattack is corroborated by many other elements in the history of this matter. Shortly before Respondents filed their petition to vacate PFA-1, which they did on April 1, 2022,[57] there were two significant contemporaneous developments: (1) the publication of another defamatory article, this one concerning the Chair of the Tribunal, on a different obscure website, on March 15, 2022 (the "Wall Street Whistleblower Article," discussed in sub-section 5 below, and (2) the filing of an action in a Florida state court on March 7, 2022 that named as Defendants the Company's Counsel and the Claimants (the "Florida Action," discussed in Section IV.G. above where we have

[57] SDNY Docket at Entry No. 27.

sustained Claimants' claim that the commencement and prosecution of that action were in breach of the Arbitration Agreement).

5. The Wall Street Whistleblower Article

227. On or about March 15, 2022 – 22 days after the NewsZoom article, 21 days after the issuance of PFA-1, eight days after the filing of the Florida Action, and 13 days after Claimants had filed in the SDNY Court a petition to confirm PFA-1[58] –an article was published on a website called wallstreetwhistleblower.org (herein "WSW") that reported upon an alleged "whistleblower" having determined that Goldman Sachs paid a $250,000 bribe to the Chair of the Tribunal at the time of his appointment in June 2021. The article – published underneath a graphic consisting of a photo of a securities trading floor with the Goldman Sachs name and logo, and legended by the website editor with the word "FRAUD" – stated:

Exclusive: Whistleblower Exposes Alleged Goldman Sachs Bribery Scheme

Goldman Sachs is a Wall Street investment bank so massively large and ever-present that at one point the media nicknamed them "the giant vampire squid" for literally having its tentacles reaching into transactions everywhere, from lenders to buyers, on mergers, acquisitions, credit, currencies, derivatives in every business sector imaginable, from the cup of coffee you buy in the morning to the punishing mortgage that you pay at the end of the month.

But one thing Goldman Sachs has not been is *accountable* – having largely skated straight through a number of controversies without any serious liability, from defrauding clients during the 2007-2008 financial crisis to more recent troubles such as the Malaysian sovereign wealth fund fraud or the purchase of Venezuelan sovereign debt in 2017.

This impunity has prompted one whistleblower employee at Goldman Sachs to come forward recently to contact **WSW** with evidence and testimony of what he describes as a specific methodology allegedly used by the bank to pay bribes to key figures, including American citizens.

[58] SDNY Docket at Entry No. 1

In the course of his duties this past week, the whistleblower came across an account which had been opened, received a single large deposit in the exact amount of $250,000.00, which was followed by a withdraw via a cash instrument (cashier's check or hard currency), and then the account was immediately closed on June 29, 2021, and scheduled for archive. The account was further flagged by security citing reasons of "identity theft," which blocks access in the system for review.

When the whistleblower saw that the account had been registered under the name "Marc Goldstein," he sought to further investigate the anomaly given that this individual could be a known individual, a Senior Vice President at competing firm Morgan Stanley, according to his LinkedIn.

But instead what he discovered is that the account was in fact registered to completely separate individual with by the same name, "**Marc J. Goldstein**" with a correct corresponding social security number on the account ending in []59.

Who is Marc J. Goldstein?

[The photograph here on the WSW website page, copied from the Chair's professional website, is omitted]

According to independent verification, the holder of this ghost account is believed to be **Marc J Goldstein**, the proprietor of MJG Arbitration & Mediation (dba Marc J Goldstein Litigation) located in New York City. According to his website, Goldstein describes himself as "an independent arbitrator and mediator of complex international and domestic business disputes."

[Omitted here is a paragraph that concerned the Chair's credit score, omitted in the interest of privacy and security.]

According to the whistleblower, whose employment status at Goldman Sachs was independently verified by WSW, the bank allegedly seeks to buy out individuals ...[60] like Mr. Goldstein and force them to act in their interests.

"This is their methodology – they find a point of weakness in whatever transaction or dispute they are in, open a ghost account for the single purpose of a deposit and a cash withdrawal, and then archive the account under a false 'identity theft' flag which means that the bank absorbs the bribe as a cost," the whistleblower alleged in a recent interview with WSW. "This is far from the only time a single use account like this has

[59] The last four digits of the Chair's social security number were published in the article at this point. That data is omitted in the interest of privacy and security. But it is noted that some breach of the security of a website where the Chair's social security number could be found evidently was involved in the preparation of the article.

[60] Words omitted in the interests of privacy and security.

been open and shut presumably to conceal something untoward — but it is the first time I've seen it in such plain sight."

Seeking further confirmation of the whistleblower's testimony, WSW confidentially reached out to a separate financial services expert with access to Federal Reserve, ACH, and SWIFT databases. This second source was able to confirm the existence of Mr. Goldstein's account at Goldman Sachs, and further received verbal confirmation of the account in a phone call with Goldman Sachs customer service.

The whistleblower indicated it was not clear to him/her what the purpose of the alleged payment to Mr. Goldstein was related to, however that the unusual nature of the transaction, the exact amount, and sudden closure of the account should warrant a close examination from regulatory authorities.

If any sources are able to further corroborate or inform on this story, please get in touch via our contact page.

Share this:

228. On April 1, 2022 – the same day Respondents filed their petition to vacate PFA-1 in the SDNY Court – the New York law firm then acting as co-counsel to Respondents in this arbitration wrote a letter to AMLQ's counsel, demanding a full investigation into and explanation from Goldman Sachs concerning the WSW article, and stated that "[s]ince the Article first came to our attention we have proceeded cautiously and assured ourselves that the inquiries we are making in this letter are appropriate." On April 7, 2022, counsel for AMLQ issued a response, which we quote below. On April 26, 2022, Respondents' New York co-counsel for Respondents withdrew as counsel in this arbitration and in the SDNY Court vacatur and confirmation action.[61]

229. The response on April 7, 2022 from AMLQ's counsel stated:

> Goldman Sachs categorically denies the allegations in the web posting. As explained below, not only is it clear that this so-called "bribe" never happened, the circumstances suggest that persons associated with your clients, Terra Towers Corp. and TBS Management S.A. (collectively, "Terra") and DT Holdings Inc. ("DT"), as well as Jorge Hernandez, are the source of this latest baseless smear against your clients' adversaries in the arbitration.

[61] Copies of the April 1 and April 7, 2022 letters were provided to the Tribunal by AMLQ's counsel, together with a copy of the WSW article, on May 2, 2022.

First, the post came to Goldman Sachs's attention on Friday, April 1. Given the serious allegations of bribery alleged, Goldman Sachs immediately conducted a review to determine the veracity of the assertions in the post that included the following: (i) Goldman Sachs conducted a firmwide search to identify whether the firm had accounts in the name of Marc J. Goldstein and MJG Arbitration & Mediation at or around the time of the alleged bribe. It did not locate any such accounts; (ii) Goldman Sachs conducted a broader firmwide search for accounts with similar names or names containing "Marc Goldstein," "Goldstein," or "MJG," but the results were not related to our arbitrator; (iii) Goldman Sachs conducted a firmwide search for accounts with an associated Social Security Number ending in []62. It did not locate any such accounts; (iv) Goldman Sachs conducted a firmwide search for, and also failed to identify, any fund movements corresponding to those described by the so-called "whistleblower." Simply put, the claim in the post was simply made up – no bribe was ever paid.

Second, the notion that a Goldman Sachs employee who supposedly identified (nine months after the fact) what that person thought was evidence of a $250,000 bribe paid by the firm would share their findings on a virtually unknown website is ludicrous. Goldman Sachs employees receive extensive training on how to identify misconduct and promptly escalate it. In addition to raising such misconduct internally to managers, Legal, or Compliance, the firm also provides employees with the ability to communicate such matters on an anonymous basis through an independent third party that specializes in the discreet reporting of integrity concerns, via toll free hotlines or a web form. Finally, of course, employees can report matters directly to criminal or regulatory authorities. Instead, the "whistleblower" allegation appeared for the first time on a website approximately nine months after the "bribe" supposedly occurred, on or shortly before April 1, 2022 – which happens to be the date that Terra's motion to vacate the arbitration award was due to be filed in federal court in the Southern District of New York. It is a fake post.

Third, wallstreetwhistleblower.org is not a credible source of information. Based on an initial review, the website – which purports to be "dedicated to anonymously exposing the secrets, fraud, corruption and misconduct of the world's most powerful financial institutions" – does not appear to have existed prior to late 2021. The Facebook page for "Wall Street Whistleblower" indicates that it was first created on March 16, 2022, and has a total of seven followers. Moreover, the content posted on the website and the related Facebook page consists primarily of publicly reported information aggregated or paraphrased from other news outlets, as opposed to stories based on confidential "whistleblower" allegations. Indeed, the post concerning Goldman Sachs and Mr. Goldstein appears to be the only one on the website purportedly sourced by a confidential whistleblower.

[62] This was the last four digits of the Chair's social security number, omitted here in the interests of privacy and security.

230. Respondents, despite knowing that Claimants relied in part on this attack on the Chair as evidence in support of the punitive damages claim, did not seek to cross-examine the Goldman Sachs internal investigators who made the findings reported in AMLQ counsel's April 7, 2022 letter. And whereas Respondents did not otherwise challenge the veracity of that report by evidence presented in the Phase 2 hearing, effectively Respondents conceded its accuracy in the Phase 2 proceedings. They thus conceded that the public disclosure of such facts by a whistleblower was effectively not possible. And they conceded that the website itself only first appeared on the internet at the time of its article about a bribe of the Chairman, and that the surrounding republished material was deployed to make the website appear legitimate and to extend that appearance of legitimacy to the bribery story. These effective concessions alone provide us with a high level of confidence that the WSW website and the article in question were created at the direction of Mr. Hernandez.[63] Also, the timing of the article's first appearance on March 15, 2022 –following so closely after other matters already discussed, including the interim measures orders, the sanctions motions that ensued from non-compliance with those orders, the Fee Payment Order, the Respondents' commencement of criminal proceedings against Company Management in Guatemala, the Respondents' procurement of the Morrison Memorandum, the publication of the NewsZoom post, the issuance of PFA-1 on February 23, 2022, and the filing by Claimants in the SDNY Court of a petition to confirm PFA-1 on March 2, 2022 — is additional circumstantial evidence of Respondents' responsibility for this Post.

[63] The Tribunal put the question of Respondents' desire to submit evidence of the truth of the WSW Report, in mitigation of the post as evidence of malice, at the closing Phase 2 oral argument on October 16, 2024, (Transcript, Rough Draft, at pp. 40-46), and Respondents elected to rely only on their contentions that they had no knowledge of the website or the source of the article. The Tribunal notes that in 2022 Respondents had presented a draft declaration of a purported expert in support of the technical plausibility of such a transaction within Goldman Sachs's account systems. *See* para. 237 *infra*.

231. Mr. Hernandez's use of the Enterprise Podcast Network to spread his messages about this dispute is circumstantial evidence of his use of an internet site on this occasion, as we have found it to be in regard to the NewsZoom post.

232. The similarity of method in the publications on the NewsZoom website and the WSW website is circumstantial evidence that the same source was responsible for both. As noted in the AMLQ Counsel letter of April 7, 2022, quoted above, most if not all of the other content on both websites consisted of summaries generated from news stories originally published elsewhere, and these stories about Peppertree, Goldman Sachs and the Chair stood out, exceptionally, as supposedly original journalism based on whistleblower accounts, one from a Peppertree whistleblower, the other from a Goldman Sachs whistleblower.

233. That there would have been independently-acting and independently-motivated whistleblowers, one from Peppertree and one from Goldman Sachs, both electing to allege corruption relating to this case by sharing their separate stories with websites whose owners and operators were not readily identifiable, and who otherwise were not in the business of publishing whistleblower-sourced news or journalism sourced from their own journalists, but mainly if not exclusively news captured from other websites, strikes this Tribunal as highly implausible.

234. It also strikes the Tribunal as highly implausible that if indeed a whistleblower at Goldman Sachs had discovered a bribe paid to the Chair of the Tribunal prior to June 29, 2021, he/she only discovered it in the week of, or following, Claimants' filing in the SDNY Court of their petition to confirm PFA-1. Just as the substance of the NewsZoom post coincided with Respondents' efforts to advance an FCPA-compliance excuse for non-compliance with our interim measures orders concerning Company Management, the substance of the WSW post coincided with the Respondents' need to generate a Tribunal bias basis to support a motion to vacate PFA-1.

235. The April 1, 2022 letter of Respondents' then New York co-counsel, disclosing the WSW article to AMLQ counsel and demanding a Goldman Sachs explanation, was sent on the same date that the same counsel on behalf of Respondents had filed the vacatur petition. We have a high level of confidence that these events were related and that Respondents intended to convey that the alleged bribery of the Chair of the Tribunal either was or would become an element of their effort to vacate PFA-1. Had there in fact been a whistleblower in Goldman Sachs who in fact discovered that a bribe had been paid to the Chair of the Tribunal, it makes no sense that the first place the whistleblower would turn to disclose his discovery would be an obscure and newly-created internet website that apparently had essentially no following on Wall Street. It makes sense that he/she would have reported such a matter to an ombudsman-type confidential source within Goldman Sachs, or to Respondents, or to the American Arbitration Association or to law enforcement. But there is no evidence before us that any such thing was done.

236. If Respondents were not responsible for the WSW Post, they had significant self-protective reasons, of exposure to civil suits and criminal accusations, to build a record exonerating themselves, and that would have entailed conducting their own investigation to determine who was responsible. But Respondents have provided no evidence (in Phase 2 or at any time) that this was ever done, save for the April 1, 2022 letter to Goldman Sachs counsel from their former counsel, which, due to its contemporaneity with the vacatur petition filing, we assess to have been tactical.

237. Indeed, Respondents did the very opposite: In 2022, they engaged persons purporting to be forensic experts to corroborate at least the plausibility of, if not indeed the truth of, the alleged whistleblower's alleged discoveries in Goldman Sachs accounting records. The Tribunal learned of this on May 31, 2022 when Respondents submitted to the Tribunal an unsigned

witness declaration with a Southern District of New York caption purporting to be made by one Nigel Nicholson, identified as the CEO and a founder of Greylist Trace Limited. The content of this declaration purported to support the existence of an account at Goldman Sachs in the name of the Chair. The Chair had, two weeks earlier, delivered a sworn declaration to the Parties that he did not have and never had any account with or any financial relationship with Goldman Sachs (save for his prior service as sole arbitrator in a case where a Goldman Sachs entity was the Respondent, a matter covered in the Chair's initial disclosures in 2021). Not only was this unsigned Greylist Declaration submitted in support of the untenable proposition that the Tribunal should preside over a sweeping investigation of the Chair's guilt or innocence, but the submission of the Greylist Declaration as an as-yet-unfiled Southern District of New York declaration could be perceived as a form of intimidation, indicating that the document might be filed on the public docket of the Court to disseminate the false charge of bribery if Respondents remained unsatisfied with the Tribunal's response. AMLQ responded with two lengthy declarations prepared by senior compliance officials of Goldman Sachs that (i) reported upon the thorough internal investigation that revealed the allegations of surreptitious payment to the Chair through Goldman Sachs to be false, and (ii) explained why the *modus operandi* for such surreptitious payment suggested in the Greylist Declaration was implausible.

238. Ten days after the issuance of PFA-2, on August 22, 2022, Respondents filed a petition in New York Supreme Court to disqualify the Tribunal on grounds of bias. Respondents again invoked the bribery allegations as the foundation of their petition – stating no position as to the truth or falsity of the allegations but still insisting that they originated with a third party. Respondents sought to exploit the existence of the defamatory website by suggesting that, whether the allegations were true or false was beside the point because the Tribunal was so inflamed with

animus toward Respondents because of its suspicions about their responsibility for the publication that the Tribunal lacked capacity to adjudicate fairly.[64] After this petition was removed to federal court, Judge Kaplan of the SDNY Court dismissed it.[65] Respondents moved for reconsideration and Judge Kaplan denied that motion.[66] Respondents have appealed to the Second Circuit.[67] This tactical use of the WSW Post is further circumstantial evidence that Respondents were responsible for the publication of the post. The Post served two tactical approaches to the dislodging of the Tribunal Chair: actual bias if the ICDR or a court were convinced the report was true, and the attempted generation of animus/antagonism as a source of bias even if (and particularly if) the report was untrue.[68]

239. Other circumstantial evidence of Respondents' responsibility for the WSW Post emerged more than a year later, when yet another obscure website, this one called ArbitrationMonitor.com, published an article accusing the Chair of helping the Claimants to win this case, allegedly using his Arbitration Commentaries website (https://arbblog.lexmarc.us), a web location on which the Chair occasionally posts analyses of legal issues of interest to the arbitration community, as a vehicle to telegraph winning arguments to the Claimants, and conducting the arbitration in a way that is unfair to Respondents, in violation of principles he had

[64] This account of the New York Supreme Court petition, which is not in the record and is under seal in the SDNY Court, was furnished by AMLQ's counsel during the Phase 2 post-hearing oral argument on October 15, 2024, and was not disputed by Respondents.

[65] U.S. District Court Southern District of New York, Case No. 1:22-cv-07301-LAK, Docket Entry No. 59.

[66] *Id.* Docket Entry No. 73.

[67] *Id.* Docket Entries Nos. 63, 74.

[68] In PFA-2 we noted that the Tribunal had considered resignation but concluded that this would not be appropriate. (PFA-2 at 15 fn. 8). We stated the same position in paragraph 4 of Procedural Order No. 2024-16 on July 12, 2024 (Appendix 5 annexed), where we elaborated our views, and the authorities supporting them, that a jurist's inevitable displeasure with evidence of misconduct by a party in connection with the very proceeding over which the jurist is presiding does not (and should not) amount to disqualifying bias unless the jurist determines that it would make fair judgment not possible.

advocated in Commentaries on that website. We address this matter in detail in sub-section 6 below.

240. To bring to a close the discussion about the WSW Post we make this observation: The publication by Respondents of this baseless accusation in 2022 as a tactic to disrupt the arbitration was a willful and wanton act. It reflected an attitude of win-at-any-cost. It was consistent with Mr. Hernandez's public vow in early 2021 to fight to prevent the Company from being taken away *from him*. Logically, the only person in a position to assess, on behalf of the Respondents, that taking the calculated risks of civil liability involved in this publication were risks worth taking to forestall or prevent entirely the contractually-required Company Sale, was Mr. Hernandez. And it was consistent with the win-at-any-cost personal attacks on Company Management in the criminal justice systems and news media in Guatemala and El Salvador, as detailed in PFA-2 and as further detailed in sub.-sections 7 and 8 below.

6. Arbitration Monitor Article #1

241. On or about March 14, 2024, the Tribunal discovered that a website called ArbitrationMonitor.com was carrying an article dated February 28, 2024 entitled "*Marc Goldstein and the Problem of the Sua Sponte Arbitrator*." The article did not identify its author. In fact there are no articles on the ArbitrationMonitor.com website that identify any author or journalist. This was the first of three articles about this case that were posted to the ArbitrationMonitor.com website prior to the closing of the Phase 2 record. An additional article published in recent weeks while the Parties awaited issuance of this Award is discussed in the Preamble of this Award.

242. Below is the March 14, 2024 article as it has appeared on the website since that date (with the same photo of the Tribunal Chair that was copied for use in the WSW article):

Every once in a while, an arbitration takes on a life of its own, where the panelists of a tribunal become more than mere impartial managers of procedure and turn into protagonists themselves against one or both of the parties.

It appears that such concerns have arisen among at least one party in a commercial arbitration before the AAA-ICDR, Telecom Business Solution and others v. Terra Towers and others.

Normally the hearings and procedures of AAA arbitrations are kept private and are hidden from public record, but this particular case, we get to have a rare look at what's going on inside the sausage factory. The enforcement of the award is being contested before the Southern District of New York, while other documents from the arbitration have leaked to the public on websites like Jus Mundi and available in other foreign jurisdiction court cases.

The dispute, referred to as Telecom Business Solution, LLC et al v. Terra Towers Corp. et al, (Case 1:2022-CV-01761) is [sic] question is a fight over control of a portfolio of telecommunications towers across Latin America. As summarized by Law360, "an alleged corporate coup involving a Latin American telecommunications tower operator has made its way to a court in New York, which is being asked to vacate an arbitral award issued by a tribunal that has 'careened from misstep to error to abject refusal to apply the law,' according to a court filing."

An examination of the publicly available filings on this case shows some very surprising – and very unorthodox – behavior by the arbitration panel, which is chaired by the New York-based arbitrator Marc J. Goldstein, along with Richard F. Ziegler, appointed by the claimant, and Mélida Narcisa Hodgson, appointed by the respondent. According to one document available in the federal case, the Cross Petition to Vacate the Second Partial Award filed by attorneys for the respondents, the panel chair, Marc Goldstein, issued multiple *sua sponte* orders of questionable motivation.

In one instance cited by the cross-petition, Goldstein ordered the parties, *sua sponte*, to forward all company communications to the tribunal, an order described as "comically broad and unworkable."

The filing states: "No party requested the order; the tribunal provided no party with notice or an opportunity to be heard; the order does not recite any facts to support its conclusions; the order cites no legal authority. The tribunal ultimately rescinded that order."

At later points in the arbitration, Goldstein continued with more *sua sponte* orders, demanding massive amounts of translated documents and witnesses that the claimants never asked for, a subpoena for the respondent's outside counsel, and evidentiary hearings described as "burdensome and invasive." This sudden flurry of *sua sponte* orders appears related to protecting Goldstein's own personal interests against third party accusations made against him referenced throughout this and other filings in the case. Although the accusations were not specifically elaborated in that document, a quick Google search reveals a whistleblower had accused Goldstein of allegedly taking a bribe from Goldman Sachs. In other filings, Goldstein denies the accusation.

Perhaps more controversially than the *sua sponte* orders was Goldstein's strange insistence that it was within the authority of the panel to issue judgments overriding foreign criminal prosecutions. The cross petition makes reference to the respondent attempting to present evidence of the company's former CEO, Jorge Gaitan, allegedly involved in "various schemes to embezzle" from the DTH subsidiaries in El Salvador. Instead, Goldstein sided with the claimant, Peppertree Capital Management, and rejected the introduction of evidence and implied that Mr. Gaitan was innocent and in good standing, and ordered that he be put back in charge of the company.

Now, however, Gaitan is wanted on an arrest warrant in El Salvador along with six others in relation to an alleged $1.2 million fraudulent scheme to steal money from the companies where they worked.

Imagine what it would be like if everyone could use arbitration panels to override criminal cases?

Sua sponte actions by arbitrators, where decisions are made without a request from the parties, can have significant implications for the arbitration process. These actions risk undermining the principles of fairness and integrity which are foundational to arbitral proceedings, and can be catastrophic in terms of the trust and credibility of arbitration forums like the AAA.

As one seasoned practitioner writes:

"For American arbitrators this question of sua sponte interjection is often considered under the rubric of impartiality of the Tribunal (and the appearance thereof throughout the proceedings). The open suggestion to the parties, in the middle of the case, that the case might be resolved on a theory that neither party has raised, ***threatens to foster the***

impression that at least the arbitrator making the suggestion, if not the full Tribunal, is predisposed toward the position of the party advantaged by the new theory thus advanced*. And whereas this will be a large risk even if the arbitrator(s) making the suggestion have serious reservations about the novel solution, American arbitrators will be reluctant to advance such proposals. We sometimes display such reluctance by invoking the bromide that the Tribunal should receive the case as the parties present it, under the party autonomy principle, but probably the root concern is about the perception of prejudgment of the case."*

The author of the above passage from 2017 is Marc J. Goldstein, who himself thinks that Marc Goldstein shouldn't be issuing sua sponte orders. Time will tell if this sort of conduct will become the new standard or if the AAA will begin to impose stronger adherence to guidelines.

243. The only contact information for ArbitrationMonitor.com on its website was (and remains today) a street address in Casper, Wyoming. That address is associated with a UPS Store location, as can be shown by a Google search based on the published contact address. Procedural Order No. 2024-16 at 7 para. 11.

244. The method of the Arbitration Monitor website is essentially in lockstep with the NewsZoom.Click website and the WSW website: A universe of articles republished from other websites (or created by summarizing or paraphrasing from such articles) constitutes the vast majority of the content and is curated to fit with the ostensible theme of the website, here to "monitor" arbitration. This content then serves as host for a small number of case-specific articles about this arbitration – — essentially the only content that is not republished from another source. All of the content is credited to the "AM Editorial Team"; no individual author or editor is identified. The only content on the website that expresses an opinion about the behavior of the Tribunal or the positions of the Parties in an ongoing case consists of three articles about this case –

now at least four, including the recent one mentioned in the Preamble of this Award -- each of them aligned with positions advocated by Respondents.

245. The corresponding *modi operandi* of the NewsZoom, WSW, and Arbitration Monitor websites are evidence that their content about this case emanates from the same source, which we find to be the Respondents in each instance, directly or through agents acting for Mr. Hernandez as the sole owner and sole decision-maker, the only person in a position to approve the taking of the risks associated with these publications. However, the direct connections between the Arbitration Monitor articles' content and the Respondents are somewhat closer, as compared to the NewsZoom and WSW posts, because the Arbitration Monitor articles purport to be based on portions of the record in proceedings in the SDNY Court and in the BVI Action. As to AM Article #1, quoted above, a review of the chronology of proceedings, in this arbitration and in the SDNY Court, reveals the direct connections of the AM article authors to the Respondents.

246. On February 16, 2024 — 12 days prior to the AM Article #1 publication date - — the Tribunal received a submission from Respondents' then- co-counsel Juan Rodriguez that used the term "*sua sponte*" with reference to the conduct of the Tribunal in this case *six times*. In substance, the Rodriguez letter accused the Tribunal, and particularly the Chair, of bias and accused the Tribunal, and particularly the Chair, of using the Chair's Arbitration Commentaries website (http://arbblog.lexmarc.us) as a back-channel to signal Claimants on how they ought to respond on issues for which written comments had been invited by the Tribunal.[69]

[69] By making any submission to the Tribunal that Submissions Counsel did not at least join, Mr. Rodriguez violated the Submissions Counsel sanction that had been imposed on Respondents in PFA-2. That sanction resulted in part from Mr. Rodriguez's conduct as described in PFA-2.

Respondents overcame the Submissions Counsel sanction's requirement of primary representation by suitably experienced New York Bar-admitted lead counsel, by terminating all the remaining Respondents' co-counsel, including Mr. Rodriguez and his firm, whose continued participation in the arbitration had been made contingent on having Submissions Counsel. That occurred in early July 2024, less than two weeks before the Phase 2 merits hearing.

247. No journalist could have prepared an article based on Mr. Rodriguez's February 16, 2024 letter by looking at the SDNY docket between February 16 and February 28, because Respondents made no filings on the docket in that interval. If there were any similar allegations in earlier submissions by Respondents on the SDNY docket, they were not available to any journalist because those submissions were under seal by Orders of the Court. That fact squarely points to Respondents as the source for, if not indeed the creators of, AM Article #1.

248. Respondents were of course free to make allegations of Tribunal bias in submissions to the Tribunal, to the AAA/ICDR in support of any challenge they wished to make to the continued service of the Tribunal, and to the SDNY Court in support of a claim that an award should be vacated on grounds of evident partiality. And if Respondents had merely found a public platform on the internet to repeat their contentions of Tribunal bias, we would probably have had occasion to consider the matter only if Claimants claimed a violation of the Confidentiality Order, and not as evidence of willful and wanton conduct warranting punitive damages. But the fraudulent conceit of the Arbitration Monitor site is that some self-appointed independent watchdog ostensibly concerned with the integrity of the arbitration process – — and not merely an aggrieved party that had received adverse rulings — had, based on its own independent investigation, singled out the conduct of this Tribunal in this case for criticism in its own public webspace. We conclude — based not only on AM Article #1, but also on AM Articles ## 2 and 3 discussed below — that the Arbitration Monitor website was and is an ongoing[70] fraudulent scheme of the Respondents in connection with this dispute.

The then-appointed Submissions Counsel, who had prepared and submitted two rounds of pre-hearing memorials, was also terminated at that time.

[70] We reached this conclusion before learning of the new 2025 Arbitration Monitor mentioned in the Preamble, on the basis that the earlier articles discussed in this Award have remained accessible on the site. The new article reinforces this conclusion.

249. Had any independent journalist concerned with the integrity of the arbitration process in this case examined the SDNY Court docket between February 16 and February 28, 2024, that person would have noticed several developments that are not mentioned in the Arbitration Monitor article of February 28, 2024:

1) On September 6, 2023, Judge Kaplan had entered an Order enforcing PFA-3 (Appendix 3 annexed) and denying the Respondents' cross-motion to vacate PFA-3 (and that on October 5, 2023 Respondents had filed a Notice of Appeal from the Clerk's Judgment entered on September 6).

2) On February 8, 2024, Judge Kaplan had entered Orders denying Respondents' motion to vacate PFA-4 (Appendix 4 annexed) and confirming that Award.

3) On February 20, 2024, Judge Kaplan had entered Orders denying Respondents' motion to vacate PFA-2 (Appendix 2 annexed) and confirming that Award.[71]

4) Also on February 20, 2024, Judge Kaplan granted Claimants' motion for an anti-suit injunction to restrain pursuit of the BVI Action, and the text of the Order published in the docket entry itself read (in most pertinent part) as follows:

> IT IS HEREBY ORDERED that Respondents, their officers, agents, servants, employees, attorneys and all other persons who are in active concert or participation with them, acting on their behalf, and/or at their direction or within their control, including but not limited to Juan Francisco Quisquinay and any directors of the Company appointed by Terra shall immediately withdraw, dismiss, and/or terminate the BVI Action with prejudice and take all actions necessary to do so.[72]

5) On February 27, 2024, the Second Circuit Court of Appeals entered Judgment affirming the District Court's Judgment enforcing PFA-1.[73]

[71] SDNY Docket at Entry No. 207.

[72] Id. at Entry No. 208.

[73] Id. at Entry No. 209.

250. The omission from Arbitration Monitor Article #1 of any reference to each of these significant developments in the SDNY Court and Second Circuit proceedings, each of them plainly contrary to the notion that this arbitration had been conducted unfairly, cannot be a coincidence but must have been deliberate, and – especially because there are no indications that Arbitration Monitor had any journalists – may sensibly be attributable to Respondents themselves. Moreover, this was a fraudulent scheme, because the design of the website was to attribute to the publication a benign purpose of defending the integrity of arbitration against abuses.

7. Arbitration Monitor Article #2

251. On April 9, 2024, the Arbitration Monitor website published the article reproduced below, and updated it on April 11, 2024 (The article refers to Respondents in this arbitration as "Claimant" or "Petitioners," and Claimants in this arbitration as "Respondents," evidently because this was the posture of the parties in the application made by Respondents in the SDNY Court that is the principal subject of the article) :

NEW FEDERAL COURT FILING ACCUSES NY-BASED ARBITRATOR OF CONCEALING CONFLICT OF INTEREST

AM Editorial Team
Updated on: April 11, 2024

Lawyers acting on behalf of majority shareholders of the telecommunications infrastructure firm Continental Towers LATAM Holdings Limited have issued a new filing under public record before the Southern District of New York which raises a number of controversies regarding the misconduct of an arbitration tribunal operating under the American Arbitration Association (AAA).

The case, number 22-cv-I761, was brought by Terra Towers, Corp. et al. against Telecom Business Solution, LLC et al., the minority shareholders of Continental led by private equity firm Peppertree Capital Management. Terra requested the court to vacate the arbitral award based on a series of shocking claims that the arbitrators allegedly exhibited evident bias against them, refusing evidence, and

even ordering them to re-hire two executives currently wanted by law enforcement on corruption charges in Latin America, according to media reports.

Now, in the latest filing, lawyers for Terra reveal that the chair of the arbitration tribunal, Marc Goldstein, concealed a critical conflict of interest in his Arbitrator's Oath – failing to disclose his contact with a family member who works at the investment bank which is party to the dispute in the context of a bribery allegation.

Previously Arbitration Monitor has covered other filings in this case, including the revelation that the arbitration chair maintained a public blog in which he allegedly criticized and attacked the claimant, threatened him with jail, and gave legal guidance to minority shareholders — without directly referring to names in the blog posts.

In this new reply filed on April 8, 2024, counsel for Terra Towers argues, "the public nature of the Chairman's blog, coupled with its opinions and advocacy favoring one party in an ongoing arbitration satisfies the standards of a Rule 59 (e) motion that relief is warranted where newly discovered evidence may reasonably have led to a different result. See Morisseau v. DLA Piper, 532 F.Supp.2d 595, 598, 624 (S.D.N.Y., 2008)."

Terra's filing (download PDF) highlights some explosive claims regarding the tribunal:

First, there was an internet post purporting to report on a whistleblower at Goldman Sachs, an affiliate of Respondents, accusing the Chairman of potentially having accepted a bribe. Second, despite Petitioners attempt to resolve the matter privately with the ICDR, Respondents brought it to the attention of the tribunal and baselessly accused Petitioners of planting the post and tainting the Chairman's reputation. Third, the tribunal then began its own investigation into the allegation against the Chairman himself, rather than appropriately reserve it for the ICDR. Fourth, only at this point did the Chairman disclose a familial relationship to a former Goldman Sachs partner with whom he admitted to discussing the arbitration and potential conflict of interest implications prior to the commencement of the arbitration. Nevertheless, he still failed to disclose this relationship in his Arbitrator's Oath.

Thus far the SDNY has declined to vacate the award, however given this newly discovered evidence and the explosive allegations highlighting alleged misconduct of the tribunal – including orders interfering with foreign law enforcement proceedings – it seems probably that the messy dispute could still yet prompt action, either before the federal courts or within the AAA itself.

252. For the following reasons, we find that Mr. Hernandez directly or through agents whose conduct binds him is responsible for the April 9, 2024 article on the Arbitration Monitor website:

1. Our analysis begins with the facts of what had occurred in the SDNY Court on April 8, 2024, since the article purports to be based on the author's review of Terra's brief filed on that date, and indeed the filing was uploaded to the Arbitration Monitor website in an embedded link. The brief referenced in AM Article #2 was Respondents' Reply Brief in further support of their motion for reconsideration of the Court's Orders dated February 20, 2024 denying Respondents' motion to vacate PFA-2 and confirming PFA-2 as requested by Claimants. This is not mentioned in AM Article #2.

2. The Parties' respective submissions in support of and in opposition to the cross-petitions to confirm and vacate PFA-2 had been filed under seal in compliance with Orders entered by Judge Kaplan upon applications by both parties for such under seal filing. Respondents' April 8, 2024 Reply Submissions on their motion for reconsideration were marked on the public-facing electronic docket with the notation "Motion or Order to File Under Seal" and a cross reference to Judge Kaplan's Order entered March 11, 2024 that all submissions on the motion for reconsideration were to be under seal.[74] Our understanding is that the April 8 reply brief was immediately under seal in compliance with Judge Kaplan's March 11, 2024 Order, because it was filed in relation to a motion affected

[74] SDNY Docket at Entry Nos. 228, 229.

by that Order. This means that the authors of AM Article #2 must have obtained the April 8, 2024 Reply Brief from Respondents, because it was never public on the public docket, and was automatically under seal upon its filing. This explains why AM Article #2 begins with the assertion that Respondents had "*issued a new filing under public record before the Southern District of New York…*" because without that explanation of the source, Respondents could not deny responsibility for the article. But in fact, according to the docket, the brief was under seal from the moment it was filed. Despite the sealing order, the April 8, 2024 reconsideration reply brief has remained accessible on the Arbitration Monitor website for nearly a full year.

3. AM Article # 2 treats arguments in Terra's reply brief as revelations of undisputed fact: "[L]awyers for Terra reveal that the chair of the arbitration tribunal, Marc Goldstein, concealed a critical conflict of interest in his Arbitrator's Oath — failing to disclose his contact with a family member who works at the investment bank which is party to the dispute in the context of a bribery allegation." Such misleading description indicates Respondents' involvement in the publication of the article.

4. AM Article #2 turns a blind eye to truth when, for example, it states: "Given this newly discovered evidence and the explosive allegations highlighting alleged misconduct of the tribunal – including orders interfering with foreign law enforcement proceedings – it seems probable that the messy dispute could still yet prompt action, either before the federal courts or within the AAA itself." A diligent and authentic journalist would have located, in proximity on the SDNY docket, the Court's order granting enforcement and denying vacatur of PFA-3, which had enjoined the Foreign Arbitrations.[75]

[75] SDNY Docket at Entry No. 182.

> Instead, the article argues a position that, even if it had been raised by Respondents, had been rejected by the Tribunal and the Court, *i.e.* that the injunction interfered improperly with the Foreign Arbitrations. This is yet another indication of Respondents' involvement in the creation of the article.

253. These considerations by themselves point decisively toward Respondents' responsibility for the publication of AM Article #2. Our findings with respect to their conduct in regard to the other Arbitration Monitor articles (#1 above and #3 below) and all of our other findings in this Section furnish additional support for this conclusion.

254. We address here the question of whether this conduct was willful and wanton, or reckless, or malicious. AM Article #2 was fraudulent on multiple levels. The information related in the article was never on the Court's public docket, and so the pretense that its provenance was a journalist's scouring of the public docket was just that: pretense. Moreover, effectively everything that Respondents knew about the history of the allegations of Tribunal bias was concealed by omission. Insofar as Respondents had sought to challenge the Chair or the Tribunal before the AAA/ICDR, they knew those challenges had failed. They knew their separate lawsuit to disqualify the Tribunal had been dismissed. They knew Judge Kaplan had addressed the matter of the Chair's family relationship to a retired Goldman Sachs partner in the Judgment confirming PFA-1, rejecting this as a basis for vacatur based on evident partiality.[76] They knew the allegations of bribery of the Chair by Goldman Sachs had not persuaded the Court to vacate any of the four awards that had been confirmed up to April 8, 2024. The same is true of their allegations that the Chair had deployed posts on his Arbitration Commentaries website to provide direction to the

[76] SDNY Docket at Entry No. 124, p. 18.

Claimants. And Respondents also knew that, insofar as they had relied on any of these allegations in the AAA/ICDR to challenge the Chair or the full tribunal, they had failed.

255. We can see on this record only two motives for this conduct, both of them malign. One is potentially to impel the Tribunal or some of its members to withdraw from the case, forcing the replacement of one or more arbitrators and kindling disputes about what portions of the proceedings ought to be repeated before a partially or entirely new Tribunal. The other is to use the narrative of tribunal bias before foreign arbitral tribunals and courts, to explain why those fora should make *de novo* decisions directly opposite of rulings this Tribunal has already made. At least four such Foreign Arbitrations are established in the record. We have not been informed that any of them have been dismissed, even though they are taking place in nations that, as contracting parties of the New York and Panama Conventions, are ostensibly committed to enforcement of foreign arbitral awards and agreements to arbitrate in international contracts. Would the Respondents cite an allegedly independent website dedicated to the integrity of arbitration as a source in support of an argument, to a court in those countries, that the awards of this Tribunal should not be recognized and enforced? Conduct that creates the opportunity for such abusive litigation tactics is improperly motivated, flagrantly so, because it connotes a preliminary but meaningful step toward achievement of a miscarriage of justice.

8. Arbitration Monitor Article #3

256. On May 14, 2024, the article excerpted below was published on the Arbitration Monitor website. It is excerpted to avoid the risk of republication on a public judicial docket of allegations of a highly personal and private character. But it is our intention that any court invited to consider this Award should review the unexpurgated article on the Arbitration Monitor website, which is fully functional and continues to carry this article as of the date of issuance of this award:

AFFIDAVIT IN CONTINENTAL TOWERS BVI ARBITRATION ALLEGES GROSS MISCONDUCT OF KEY EXECUTIVES AND LAWYERS

AM Editorial Team
Updated on: May 15, 2024

According to the latest public record filing in an arbitration proceeding concerning the control of the telecommunications infrastructure company Continental Towers, one of the key figures in the corporate dispute is accused of a wide variety of misconduct, from organizing black media campaigns, threats of violence …[MATERIAL OMITTED] – supposedly with the full knowledge of lawyers and arbitrators who presented him as an innocent victim who must be reinstated to the company.

The third affidavit of Jose Alejandro Sagastume Figeroa filed before the Eastern Court of the Caribbean in the British Virgin Islands (Case #BVIHCOM2023/0042) contains more than 100 pages of exhibits, including sometimes shocking screenshots of text messages, handwritten notes, and images that allegedly contradict a series of statements made by key figures under oath in the proceedings.

The Continental Towers dispute has been widely covered in the media, sprawling through multiple arbitral procedures and even a federal court case aimed at dismissing the enforcement of an award based on alleged arbitral bias. Key figures in the case include Terra Towers, the majority shareholders of Continental Towers, and AMLQ Holdings and Telecom Business Solutions, LLC et al., the minority shareholder group mainly controlled by Goldman Sachs and the private equity firm Peppertree Capital Management.

Two other key figures are the former CT CEO Jorge Alberto Gaitan and COO Carol Echeverria, who were fired from their [ ][77] for misconduct, but continue to receive backing from the minority shareholders to be reinstated allegedly in order to force the sale of the company, according to multiple court records.

[MATERIAL OMITTED]

[77] Omitted word in original

Sagastume's affidavit sheds light on new evidence brought forward by Gaitan's wife, Maria Cristina Gonzalez Flores de Gaitan, who contacted the compliance department of the companies …[MATERIAL OMITTED] Gaitan… has allegedly been aided by millions of dollars paid in legal support fees [MATERIAL OMITTED] by the minority shareholders.

[MATERIAL OMITTED]

Ms. Gonzalez's letter references the arrest warrant for Gaitan for financial crimes in El Salvador [MATERIAL OMITTED]

In a later letter to the same compliance officers, Gonzalez writes: [MATERIAL OMITTED]…" as of now, I make all companies related to him, Peppertree, Continental, AMLQ, Goldman Sachs, Tandem Infrastructure[78] and Ropes and Gray LLP, responsible."

[MATERIAL OMITTED]

EMPLOYMENT WITH A DIRECT COMPETITOR

Aside from these lurid and concerning behaviors revealed by the affidavit, perhaps the most important for the actual arbitrations is the revelation that Echeverria was working for a direct competitor of Continental Towers when all the corporate intrigue was playing out before the arbitration process.

Sagastume writes: "There is a document from the Guatemalan Social Security showing the social security fees paid by on behalf of Ms Echeverria by the payroll company of Tigo, proving that she had a labour relationship of at least 10 months, from February to October 2023, with a competitor of the Company, this evidence shows that she was an employee. (…) In their text messages at Ms. Echeverria, Mr. Gaitan and Mr. Juan Ignacio Berger acknowledge their concern about a situation with Millicom.

[78] Misspelling in Original

PEPPERTREE DENIES PAYING FOR GAITAN'S FAMILY LAWYERS

The Affidavit does however indicate that counsel for Peppertree Capital Management in the US arbitration have already responded to the letters from Ms. Gonzalez on May 1, 2024 [MATERIAL OMITTED] arguing their position that it is "simply a personal dispute between Mr. Gaitan and his wife and disclaimed any involvement by Peppertree and Goldman."

Undoubtedly these parties in the dispute are likely to contest the allegations shared to argue their case, but the introduction of such explosive evidence the potential to raise new questions across the various venues of this sprawling dispute

8.1 Procedural Context Pertaining to AM Article #3

257. The publication of AM Article #3 coincided with a raft of activity by Respondents by which they (i) attempted but failed to prevent Phase 2 of the arbitration from moving forward on its agreed procedural timetable, and (ii) attempted but failed on the Saturday (May 11, 2024) before the first pre-hearing Memorials were to have been filed, to obtain leave from the Tribunal to file a Petition for Emergency Relief on the basis of a new factual dossier filed by Respondent Sagastume in the BVI Action on May 9, 2024 that allegedly was comprised of materials provided voluntarily by the estranged wife of Mr. Gaitán.

258. On May 7, 2024, Respondents' Submissions Counsel had applied to the Tribunal for an extension of the May 15 deadline for the Parties' initial pre-Hearing Memorials, telling the Tribunal that Submissions Counsel was required "to file a post-hearing memorial in another ICDR arbitration on May 14. This filing will occupy essentially all of our time between now and then." That letter did not disclose, and we only learned in the comments of Claimants' counsel on that same date, May 7, that on May 3, 2024, the Individual Respondents "through new counsel who has not appeared in either this arbitration or any of the related SDNY actions between the parties,

filed a Petition to Stay this arbitration, in New York state court, on the purported basis that they are not properly parties to this arbitration, even though Messrs. Hernandez and Arzu have been parties for over 3 years and Messrs. Sagastume and Mendez have been parties for over 6 months." (That Petition to Stay was later removed to the SDNY Court by Claimants, where the Petition was denied).[79]

259. The Respondents' application on Saturday May 11, 2024 for leave to file a Petition for Emergency Relief included the following elements, most or all of which appeared four days later in the third Arbitration Monitor posting:

(1) A letter from Submissions Counsel to the Tribunal that began with this statement: "The legal representative of Continental Towers Limitada and Collocation Technologies Limitada (Mr. Hugo Ortiz), both subsidiaries of the Company in Guatemala, has recently received unsolicited information demonstrating beyond any doubt that Jorge Gaitán and Carol Echeverría have been actively working against the interests of the Company for several years." The letter concluded by saying that the proposed emergency relief petition would ask the Tribunal "pursuant to AAA Commercial Rule 37 (i) to remove Gaitán and Echeverría from management of the Company and (ii) to terminate the Company's engagements with Gelber Schachter & Greenberg ("GSG") and Dechamps International Law ("Dechamps") due to Mr. Schachter and Mr. Dechamps' breaches of their engagement letters with the Company by exceeding the scope of their engagement and breaching the covenants of the March 19, 2021 Framework Agreement to remain neutral, not to align with any party and to act in the best interest of the Company."

[79] U.S. District Court Southern District of New York, Case No. 1:22-cv-07301-LAK, Docket Entry No. 59.

(2) As one exhibit, a Mutual Confidentiality Agreement dated November 12, 2021 between a U.S. investment advisory firm, on the one hand, and Mr. Gaitán and Ms. Echeverria as representatives of a company to be formed to operate in the Latin America telecommunications infrastructure market.

(3) As a second exhibit, an Affidavit dated May 9, 2024 made in the BVI Action by Respondent Sagastume and filed in the BVI Court on that date.

(4) As a third exhibit, a dossier of documents consisting mainly of materials that, according to the May 9 affidavit of Respondent Sagastume, had been delivered to Hugo Ortiz – the co-manager of the Company's subsidiary in Guatemala and a nominal Claimant in the enjoined-but-not-terminated Foreign Arbitrations in Guatemala and El Salvador – by the wife of Mr. Gaitán.

260. The Tribunal denied Respondents' motion for leave on May 13, 2024 in Procedural Order No. 2024-13 which is annexed as Appendix 7 and made a part of this Award. That Order largely speaks for itself, but we make a few additional remarks about Respondents' conduct in Phase 2 of the Arbitration that in retrospect bear directly on the issue of willful and wanton conduct:

1) There was no issue before the Tribunal in Phase 2 concerning the status of Mr. Gaitán and Ms. Echeverria as, respectively, CEO and COO of the Company. Insofar as Respondents may have wanted to interject such an issue, it would have been a counterclaim, and the prosecution of a counterclaim required compliance with the stay of counterclaims sanction that was imposed in PFA-2 and became a Judgment of the Court in the PFA-2 Judgment.

2) If Respondents wanted to present a defense in Phase 2 to Claimants' claim for money damages concerning Claimants' advances of sums for Mr. Gaitán's and Ms. Echeverria's salaries and legal costs, they could have done so by presenting evidence in a reliable fashion. But even after being put on notice in PO 2024-13 that the Tribunal would not regard as reliable, without more, the material presented in support of the motion for leave on May 11, Respondents did not make an effort to prove the alleged facts by evidence meeting what they knew to be the Tribunal's expectations. There were no Phase 2 Witness Statements submitted by Mr. Hernandez, Mr. Sagastume, Mr. Mendez, Mr. Ortiz, or Ms. Gonzalez (Mrs. Gaitán). Respondents also made no application to the Tribunal to require Mr. Gaitán or Ms. Echeverria to appear so that they could be cross-examined.

261. Before we even reach the question of Respondents' responsibility for the Arbitration Monitor Article #3 on May 14, 2024, which was the very next day after PO 2024-13 had been issued denying the May 11 Emergency Relief Motion, we need to separately identify a number of elements in this saga that, independently and/or in conjunction with one another, constitute willful and wanton conduct by Respondents.

262. The BVI Action was a collateral attack on the Tribunal's interim measures orders and PFA-2 concerning the status of Company Management and the conduct of Respondents toward Company Management. This was determined by Judge Kaplan in the Judgment granting the anti-suit injunction. The commencement of this BVI Action by Mr. Quisquinay purporting to seek a judicial declaration to contradict something we had already declared on multiple occasions – that Mr. Gaitán was the CEO of the Company – was malicious under the actual malice standard applied under New York law for malicious prosecution, *i.e.*, the proceeding was commenced "due to a

wrong or improper motive, something other than a desire to see the ends of justice served." (*Nardelli v. Stamberg*, 44 N.Y.2d 500, 503 (1978)). While purporting to have complied with the SDNY Court's anti-suit injunction by not prosecuting the BVI Action on its merits, Respondents then purported to use the platform of an end-of-case costs application by Mr. Gaitán in the BVI Action to (i) put the curated documents dossier allegedly provided by Mrs. Gaitán on the docket in the BVI Action, and 24 hours later (ii) submitting that same dossier to the Tribunal via Submissions Counsel as an ostensible basis to re-open, on a new set of facts allegedly proven by this documents dossier, the questions we had resolved in November 2021 about the status of Company Management and Company Counsel.

263. It was unreasonable conduct, unjustified by any means/ends calculus, to introduce in the BVI Action any evidence concerning the personal life of Mr. Gaitán. And this is aggravated by the fact that the evidence purports to come from the wife of Mr. Gaitán, who made no offer to come to a hearing before the Tribunal to be cross-examined. Whether Respondents' conduct was a contempt of Judge Kaplan's anti-suit injunction is not an issue before us, but the punitive damages issue is before us, and Respondents placed the May 9, 2024 portion of the BVI proceedings before us and we are entitled to consider it. From our perspective, the anti-suit injunction (quoted in para. 249 above) required all agents of Respondents to bring about the termination of the BVI Action, and this included Mr. Sagastume and Mr. Ortiz and (if she had become an agent of Respondents, Mrs. Gaitán). Evidently the only matter that was before the BVI Court on May 9, 2024 was the Company's and Mr. Gaitán's applications for costs of the terminated proceeding. Even if we assumed that opposing a costs application in the terminated action was not a violation of Judge Kaplan's injunction, which it was, Respondents' conduct was egregious. If Respondents wished to persuade the Court to reduce or deny Mr. Gaitán's costs claim

because he allegedly had acted in some inequitable way in the BVI Action toward Mr. Quisquinay as the Plaintiff in the BVI Action, that would be a plausibly relevant argument if they were not enjoined from making it.

264. But we are convinced that Mr. Gaitán's relationship with his wife and other aspects of his personal life had absolutely no relevance to the BVI's Court's costs determination. It was in our assessment a pretext to put material about Mr. Gaitán's personal life on a public court docket in a matter that did not involve his personal life (and so that it could be presented to this Tribunal). Further, there was no evident reason to exert pressure on Mr. Gaitán by exposure of personal facts to a judge in the BVI or to some BVI-centered legal journalist who might scan the public docket (to the extent the BVI docket is public). It is, on the other hand, evident that putting this dossier of personal material on a public docket somewhere would enable that material to be publicized elsewhere – on a website like Arbitration Monitor – with Respondents having some ability to deny being the source of the information.

265. Respondents' proposed Emergency Relief application served no legitimate purpose. As Respondents were continuing to prevent Company Management from performing their duties, they had no urgent need to change the status quo, which was, and is, that Company Management's day-to-day authority has been unilaterally and unlawfully delegated by Respondents to their chosen agents. In our view, the proposed Emergency Relief motion had the same objective as the Petition filed by the Individual Respondents in New York Supreme Court the preceding week: to derail the timetable of the arbitration – in which, at that time, submission of the first Phase 2 Pre-Hearing Memorials was imminent (and was ultimately achieved on May 20, 2024).

266. The branch of Respondents' proposed Emergency Measures application that sought removal of GSG and Dechamps as Company Counsel was just as transparently a dilatory tactic. Respondents had expressed their dissatisfaction with our November 2021 and December 2021 Rulings concerning Company Counsel's status and payment of their fees, by filing a lawsuit to remove them in a Florida state court in March 2022. As of May 2024, Respondents and Claimants were still awaiting an adjudication of Claimants' motion to compel arbitration of that dispute (in the SDNY Court as a consequence of the action having been removed to federal court in, and transferred by, the U.S. District Court for the Southern District of Florida). At any time, Respondents could have dropped the lawsuit and sought leave under Rule R-6(b) to introduce the dispute before this Tribunal. But Respondents did not even mention that lawsuit in their motion for leave, did not apply under Rule 6(b), and did not offer any credible explanation of why persuasive evidence of Company Counsel's failure to act neutrally had suddenly landed in their hands – ostensibly from Mr. Gaitán's wife –just a few days before their Phase 2 opening pre-hearing memorial was due.

267. The AM Article #3 is partisan in ways that effectively foreclose the conclusion that it is the product of efforts by anyone other than Respondents.

(1) To begin, if as the article asserts it is based on a review of the public docket of the BVI Court (assuming that court has a public docket), that docket would have disclosed proceedings prior to May 9, 2024 related to the discontinuance of the action as a consequence of Judge Kaplan's anti-suit injunction Order. The appearance on the BVI docket of those elements of the case would have led to mention of these elements had the article been written by an objective legal journalist, and indeed an objective legal journalist

presumably would have then consulted the SDNY Court Docket to read Judge Kaplan's anti-suit injunction Order.

(2) There was evidently a hearing before the BVI Court on May 9, 2024 concerning the assessment of costs for the discontinued action. Any journalist looking at the May 9 docket entries for Mr. Sagastume's filing on May 9, in the period between May 9 and May 15, would have also seen – assuming the docket was public and electronic and had sufficient detail – docket entries for what happened at that hearing, and what submissions relating to that hearing were filed by persons other than Mr. Sagastume. But the only item reported upon in the AM Article #3 is Mr. Sagastume's affidavit and its exhibits.

(3) AM Article #3 refers to "a federal court case aimed at dismissing the enforcement of an award based on alleged arbitral bias" but does not report that in that federal court case the aim of dismissing enforcement of award on the basis of arbitral bias had failed as to each award challenged on that basis. The article also did not mention that in the related federal case before the same judge, seeking to disqualify the Tribunal on the basis of alleged bias, the case had been dismissed on February 21, 2024 and a motion for reconsideration of that dismissal had been denied on May 1, 2024.[80]

(4) AM Article #3 refers to Company Management as "the former CT CEO Jorge Alberto Gaitán and COO Carol Echeverria, who were fired from their [positions]for misconduct…." Obviously this is the contention of the Respondents that has been rejected by the Tribunal in the interim measures orders and in PFA-2.

[80] U.S. District Court, Southern District of New York, No. 1:22-cv-07301-LAK, ECF Docket Entries 59 and 73.

(5) AM Article #3 does not include comments from, or references to, any attempt by the supposed journalist to obtain comments from Peppertree, AMLQ Holdings, Mr. Gaitán, Ms. Echeverria, or their respective counsel.

(6) AM Article #3 is predominantly focused on allegations about the personal life of Mr. Gaitán. Indeed AM Article #3 was illustrated by a photograph of Mr. Gaitán and another person in a personal context. That presentation on the Arbitration Monitor website continues to this day.

268. We find it to be unlikely – indeed nearly inconceivable – that in the narrow window of four calendar days (two business days) between May 10 and May 14, 2024, the AM Article #3 could have been generated by the "AM Editorial Team" unless that "editorial team" included or was comprised of agents of the Respondents. And as noted in the discussion above concerning AM Articles ##1 and 2, we find no evidence on the Arbitration Monitor website that Arbitration Monitor had an "editorial team" consisting of journalists producing articles based on any form of investigative journalism. Moreover, a product of independent journalism by anyone other than Respondents would not have yielded at random a product as systematically focused only on Respondents' allegations and not on what courts and this Arbitral Tribunal had decided, or on what any party in interest other than Respondents had alleged.

269. Stated differently, and more directly, it is established to a standard of high confidence that Respondents caused AM Article #3 to be published. That conclusion is based not only on what we have stated in this subsection concerning the text of the article and its timing in relation to the evolution of the arbitration and related litigation at that time. It is also based on what we have found to be the facts concerning AM Articles ##1 and 2 above and on our findings in each other subsection of Section VI. of this Award. Were it not for the fact that we closed the Phase 2

record in December 2024, we would also place reliance on the Arbitration Monitor 2025 article identified in the Preamble of this Award.

270. This conduct qualifies as willful, wanton, reckless and malicious for a number of reasons. Most significantly, the Respondents have demonstrated their intention to secure adjudications, in foreign arbitral tribunals and foreign courts, of issues that have been, or should be, adjudicated only before this Tribunal or another arbitral tribunal constituted under the AAA Commercial Rules. The reportage of even credible and reliable news media counts for little as evidence before AAA tribunals. How news media reports, such as those described here and the more than two dozen articles on websites in Latin America that accused Mr. Gaitán of involvement in corruption, as Mr. Gaitán reported to the U.S. Federal Bureau of Investigation[81], may be treated in other forums that purport to exercise jurisdiction that they do not legitimately have may be a different matter.

271. The second principal reason this course of conduct is willful and wanton, to the point of being actually malicious, is that its natural tendency is to advance a business objective through personal coercion. If Company Management decide that more years of defending themselves in criminal cases, and more years of reading about their personal lives on the internet, are no longer tolerable, and that such activity would subside if they simply resigned from their positions, they might do precisely that. An actual, as opposed to a *de facto* vacancy in Company Management positions at the CEO and COO level would complicate this dispute in ways that risk to postpone for an even longer period its eventual just resolution.

[81] Mr. Gaitán's FBI Internet Crime Complaint is Ex. R-317 at p. 90. The Tribunal referred to this in Procedural Order No. 2024-16 at 6 para. 9 as one of the bases for our concern that federal crimes may have been committed.

9. The Foreign Arbitrations

272. Claimants contend that the filing and prosecution of the Foreign Arbitrations forms part of the foundation for a punitive damages award. We agree.

273. In para. 200 above, we referred to the New York law test for actual malice as an element of the tort of malicious prosecution, *i.e.*, "due to a wrong or improper motive, something other than a desire to see the ends of justice served." (*Nardelli v. Stamberg*, 44 N.Y.2d 500, 503 (1978)). The Foreign Arbitrations were a calculated effort to nullify our stay sanction that prevents proceedings on Respondents' counterclaims until conditions for lifting the stay are met. That stay sanction is a product of the arbitration process under the Arbitration Agreement that binds Respondents. By virtue of that Agreement, the "ends of justice" for the Parties as to their disputes with one another are not unbounded; they are confined to what is achievable within this arbitration and the judicial proceedings in relation to it that applicable law permits.

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274. The analysis in this Section of the Award perhaps does not exhaust the range of conduct by Respondents that could satisfy the New York law standards for punitive damages. But it is sufficient.

275. Our high confidence that Mr. Hernandez is responsible for the actions is reinforced by his absence from nearly all of the proceedings in this case as either a witness or a party representative, sending instead his proxies in both roles to the Phase 2 hearing – Mr. Bühler, Ms. Kirby and Ms. Pineda (to whom Mr. Hernandez had purported to assign Mr. Gaitán's CEO responsibilities after ousting him in September 2021) – preventing any Respondent-affiliated witness from testifying in the hearing that preceded PFA-2, and submitting his and his agents' self-serving declarations that they knew nothing and had no roles in this misconduct (doing so on July 27, 2024 after the Phase 2 evidentiary hearing had been completed). We were motivated to

issue Procedural Order No. 2024-16, on July 12, 2024 (Appendix 5 annexed), before the commencement of the Phase 2 merits hearing on July 15, 2024, in part so that Respondents could seek leave from the Tribunal (i) to present witnesses who would confirm under oath and upon cross-examination that Respondents were not involved in any misconduct, and (ii) to corroborate the unsolicited information submitted by non-parties but evidently aligned with Respondents that had been electronically delivered to us on multiple occasions. We are strongly influenced to disbelieve perfunctory denials of involvement in malign activity by Parties like Mr. Hernandez who ask us to believe those denials but then refuse to submit to cross-examination and refuse to produce any documents or comply with disclosure obligations so that the denials of involvement may be corroborated or disproved.

276. By reason of all the foregoing in this Section VI., Respondents Hernandez and DTH are liable for punitive damages. Claimants have not identified a particular amount of punitive damages, or a ratio of punitive damages to compensatory damages, that they advocate for selection by the Tribunal. In their Responsive Post-Hearing Memorial, Claimants suggest that if their damages claim for their *pro rata* share of SG&A monthly payments to DTH should fail we could award that sum as punitive damages (at 21 n. 19). We interpret that as a proposal for an amount to be included in punitive damages and not a proposal for a specific sum. In all events, as we have denied compensatory damages relief with respect to SG&A payments from January 2021 to the date of this Award, and given prospective equitable relief, that is not a suitable reference point.

277. One source of guidance is case law cited by Claimants. In *Int'l Minerals & Res. S.A. v. Am. Gen. Res., Inc.*, 2000 WL 97613 (S.D.N.Y. Jan. 27, 2000), a jury verdict provided for punitive damages in a sum nearly equal to the compensatory damages verdict (for slightly less than $40 million), but the Court in a post-trial ruling decided this amount was excessive and denied a

post-trial motion to vacate the punitive damages verdict entirely on the condition that plaintiffs accept a remittitur of the punitive damages award to $1.5 million. The court found this to be "the maximum amount that the district court would have upheld as not excessive." *Id.* at *3. The standard that guided the Court's exercise of discretion was whether the amount of punitive damages is "sufficient to punish these offenders and deter them and others from acting in similar manner in the future." *Id.* Further, the Court's review of the trial record indicated that it was a "close call" whether the defendants acted with the requisite state of mind, but that the jury had not made an unreasonable determination. (*Id.*). Also, Judge Baer observed, quoting from an opinion by Judge Weinfeld in *Brink's Inc. v. City of New York*, 546 F.Supp. 403, 412 (S.D.N.Y. 1982), that "[t]he imposition of punitive damages is not for the benefit of the successful private litigant, but for the good of the public, principally for its deterrence against a repetition by the same offender or by others who may be bent on the same offensive conduct." 2000 WL 97613 at *2.

278. These standards would often caution a private commercial arbitral tribunal against wielding its remedial power to award punitive damages, because private commercial arbitration should be, and often is, entirely a private matter and the outcome of the arbitration will not reach the public. In that scenario, a miscreant respondent is unlikely to receive a *public* rebuke that would deter future procedural misconduct by that respondent or others. But this is not such a case. PFA-1 was filed on the public docket of the SDNY Court in connection with confirmation and/or vacatur, and was soon thereafter uploaded by the *Jus Mundi* website where it could be viewed by arbitration practitioners all over the world. The PFA-1 Judgment and its Second Circuit affirmance are public documents. The SDNY Court's anti-suit injunction against the BVI Action is on the public docket.[82] So too, by way of example, is the SDNY Court's order denying Respondents' motion for

[82] SDNY Docket at Entry No. 208.

reconsideration of its order confirming, and denying vacatur of, PFA-2, wherein the SDNY court included a public rebuke, stating: "It is long since time that [Respondents'] counsel and his clients recognize that they have lost. Their endless repetition is vexatious and inappropriate…." [83] And of course there is public attention that has been attracted by Respondents' efforts to make this private arbitration a public spectacle. As noted in the Preamble and elaborated in paras. 283-284 below, we have determined to enter a procedural order granting the Company's application to modify the Confidentiality Order to make it clear that publication of our orders and awards is permitted. (Appendix 6 annexed). We have urged in the Preamble, and reiterate here, that we believe it would serve the interests of justice for the SDNY Court to vacate its prior sealing orders and deny any application for the sealing of this Award.

279. Further, we believe it would be inequitable to refrain from an award of punitive damages based on the ordinarily-private nature of international commercial arbitration, where the offending conduct by Respondents consists largely of publicly denigrating other participants in the arbitration who are constrained not to respond in defense of their own reputations: the Claimants, Company Management, Company Counsel, and the Tribunal, all of whom are bound – ethically, contractually, and/or by the Confidentiality Order – not to speak out publicly against how they were depicted in publications and collateral proceedings initiated by Respondents.

280. Given the win-at-all-cost attitude reflected in the Respondents' conduct, there is perhaps no sum that would serve effectively to deter such conduct on another occasion by these Respondents. But we should award a sum that is substantial enough that it will, if publicized, have deterrent impact on others similarly situated who might be tempted to disrupt an international arbitration in the same manner. At the same time, there are reasons for moderation. One is that the

[83] *Id.* at Entry No. 233.

amounts involved in the compensatory damages and mandatory equitable relief we grant, with associated interest, are already very large. Another is that the Tribunal having been a target of the Respondents' malice as discussed above, we should not create any basis to be accused of being vindictive.

281. Thus, we find that the appropriate sum of punitive damages is ten percent of the sum of (i) compensatory damages awarded in this Award, (ii) costs awarded in this Award and (iii) the sums required by this Award to be deposited into escrow by the Respondents, all without related interest. The total of those three components is $251,666,430, yielding punitive damages of $25,166,643. We believe that amount likely corresponds to what Respondents have spent in legal and other costs to defend and resist this arbitration, extrapolating from the $2 million in legal costs for a relatively small fraction of these proceedings and related proceedings that have been submitted by Respondents as referenced in paragraph 296 below.

282. Post-Award interest will accrue on the punitive damages from the date of issuance of this Award until the Award is fully complied with, save as such interest may be limited by law in an award-enforcing jurisdiction.

283. While not precisely a punitive damages remedy, but clearly addressed to the same misconduct and supported by the same principles that underlie our punitive damages award, today we grant in Procedural Order 2025-02 an application made by the Company –supported by Claimants and not opposed by Respondents (as noted above in footnote 4) – to modify the Confidentiality Order to permit the Parties to make public any and all of our orders and awards. We annex PO 2025-02 for the sake of completeness. (Appendix 7). The purpose of confidentiality in arbitration is defeated when one side respects it while the other abuses it by spreading public falsehoods that might be accepted by persons not exposed to the actual facts and circumstances.

284. Consistent with PO 2025-02, we respectfully suggest to the SDNY Court that it (i) reject any application by Respondents for this Award to be placed under seal, and (ii) vacate prior sealing orders that prevent publication and public exposure of our prior awards and orders. It is perhaps an exceptional step that an arbitral tribunal would express directly to an enforcing court its views on an issue within the Court's discretion. But we are convinced that the continuation of the one-sided public debate about this case does not serve the rule of law or the interests of justice.

VII. Claimants' Declaratory Relief Claim for Interpretation of Section 5.04(b)(ii) of the Agreement

285. In conjunction with their request that we prospectively order an escrow of the proceeds of any Company Sale that may occur in the future, Claimants seek a declaration as to the meaning of the concluding language of Section 5.04(b)(ii). This language pertains to the potential scenario of a Company Sale for total consideration that is less than the Torrecom Offer. The relevant language is:

> In the event that the consideration to be received for the Shares or assets of the Company upon the consummation of such Approved Sale is less than the Proposed Offer provided by the Third Party Purchaser pursuant to Section 5.04(b)(i), the difference between the amount of the Proposed Offer and the purchase price of the Approved Sale shall be deducted from the proceeds otherwise due to the Objecting Shareholders.

286. Claimants contend that the meaning of this sentence is that Claimants are entitled to receive — at least *a priori*, that is, before the complication injected by the Company Sale damages awarded in this Award — "not just their *pro rata* share of the proceeds, but also … the full amount of any decrease in the Company's total value between the time of the Torrecom Offer and the present, deducted from Terra's share of the proceeds, plus all other amounts owed to them by Respondents." (Claimants' Opening Pre-Hearing Memorial at 41-42).

287. Respondents in their Responsive Pre-Hearing Memorial did not offer an interpretation of the operative language in Section 5.04(b)(ii), but merely questioned its prospective application to the Torrecom Offer, the unknown amount of any future Company Sale, and the outcome of Phase 2 on Claimants' claims for damages (Respondents' Responsive Pre-Hearing Memorial at 18-19 paras. 50-53). In answering a question posed by the Tribunal in their Responsive Post-Hearing Memorial, Respondents did not offer an interpretation. Instead, they (i) repeated the contention that the relief was barred by its omission from the 2023 Amended Statement of Claim, and (ii) contended that if we awarded Company Sale damages of $185.7 million, then whether or not that damages award is satisfied prior to a Company Sale, "no economic theory supports additional compensation." (Respondents' Second Post-Hearing Brief at 32).

288. We first address what this sentence in the SHA — termed the "Damages Provision" by Claimants" — means. After that, we turn to how it would be applied in the contingency of a Company Sale for less than the Torrecom Offer, combined with the circumstance of the damages awarded in this Award.

289. The Damages Provision involves a calculation that begins with "the consideration to be received… upon consummation of such Approved Sale…" That means the total offering price, including amounts if any that might be placed in escrow for post-sale contingencies that would be released to the selling Shareholders if the contingencies for non-payment did not arise.

290. Further, the Damages Provision reflects an allocation to the Objecting Shareholders of the risk, arising from rejection of the Proposed Offer, that the Objecting Shareholders have mistakenly assessed (or wrongfully assessed) that the price offered by the Third-Party Purchaser was lower than the market would yield in Investment Bank-facilitated auction. It causes a reduction in the proceeds payable to the Objecting Shareholder and a corresponding increase in the proceeds

payable to the Shareholders who presented the Proposed Offer. This created, in rational business terms, a risk-based incentive to consider the market conditions carefully in relation to the price in the Proposed Offer.

291. This is not a liquidated damages provision, as Respondents have argued in oral submissions. It does not relate to a breach of contract, but to a rejection of the Proposed Offer that the Objecting Shareholders were entitled to reject if they proceeded with a Company Sale and furnished an investment banker's opinion that the Proposed Offer was too low. Thus, the "Damages Provision" is not about stipulating the amount of damages for breach of contract. It is an agreement between sophisticated parties about risk allocation in performance of the post-Lock-Up Period Company Sale provisions in Section 5.04 (b). The Parties were at liberty to make a forward-looking agreement in 2015, about dividing up Company Sale proceeds in a transaction to occur five or more years later, for any reason – subject to the constraints of law and public policy (and no such constraints have been brought to our attention).

292. Finally, the deduction was agreed to be made "from the proceeds otherwise due to the Objecting Shareholders." The transaction envisioned by Section 5.04(b)(ii) was a final business separation between the majority and minority shareholders, at least with respect to the Company, and in that context it is evident that the Parties meant "otherwise due" to include taking into account any setoffs that would potentially make the division of Company Sale consideration something other than strictly *pro rata* based on share ownership percentages.

293. One issue that received considerable discussion at the Hearing is the treatment of transfer taxes. This arose in the context of argument presented by Respondents about the actual proceeds that would have been received had the Torrecom Offer been accepted and consummated. It could arise in the context of applying the final sentence of § 5.04(b)(ii) to a Company Sale, and

so we address this point briefly here. Transfer taxes that are paid by the purchaser in an Approved Sale, in fulfillment of the Shareholders' respective obligations for such taxes arising from the Approved Sale, would (in principle and unless otherwise agreed) reduce proceeds received by the Company and therefore also "proceeds otherwise due" to each selling Shareholder. But this does not affect 'consideration to be received,' 'the amount of the Proposed Offer,' or 'the purchase price of the Approved Sale.' Transfer tax payments by the purchaser on behalf of the sellers would be a different potential deduction from "proceeds otherwise due" and would be in addition to the deduction contemplated by the final sentence of Section 5.04(b)(ii).

294. We turn now to how the Damages Provision is to be applied, in the event of a Company Sale for a consideration less than the Torrecom Offer, in light of our award of $185,752,900 in this Award for Company Sale damages. We start by supposing a Company Sale had occurred in February 2021 for $350 million, and that all potential setoffs against the Parties' respective shares of the consideration had been waived. The amounts "otherwise due" — *i.e.*, but for the fact that the consideration was ~$57.8 million less than the Torrecom Offer — would have been, in approximate terms, ~$192.5 million to Terra and ~$157.5 million to Claimants. But the Damages Provision would have shifted ~$57.8 million to Claimants, such that Terra would have received ~$134.7 million and Claimants ~$215.3 million. Suppose now that a Company Sale occurs in May 2025 for $350 million and Claimants have not only been awarded $185,752,900 but have already collected that sum. Excluding considerations of interest, another ~$27.8 million would be due to Claimants (~$215.3 million - ~$187.5 million), and Terra would be entitled to a distribution of Company Sale proceeds remaining after proceeds are applied to satisfy the ~$27.8 million Damages Provision obligation, and all other monetary obligations from Respondents to Claimants resulting from this Award and our prior partial final awards. To the extent the

$185,752,900 has not been otherwise collected, the proceeds (assuming for the sake of illustration they are not reduced by transfer taxes) of $350 million would be distributable – after the earlier of a final adjudication upon Respondents' efforts to judicially annul our Awards, or Respondents' withdrawal of those efforts – as a first priority, to satisfy the monetary obligations arising from our Awards, including post-Award interest accruals, plus the monetary obligation arising from the application of the Damages Provision as interpreted in this Award. After the completion of such distributions to the Claimants, any remaining proceeds would be distributable to Respondents.

295. Nothing we have stated here is meant to foreclose any new claim that might arise after a Company Sale that the consideration obtained was lower than it would have been if a Party had not taken actions that allegedly prevented achievement of a higher price.

VIII. Costs

296. We come to the issue of awarding costs to the Claimants as the prevailing parties. We acknowledge that this arbitration award is already very long, but that is mainly because of the need to address unusual claims resulting from Respondents' unusual actions, and to address a multitude of arguments by Respondents that deserved to be swiftly dismissed, but have attracted more systematic treatment as proof of conscientious deliberation – proof we offer because we are mindful that, as reported in Claimants' costs submission, members of the Tribunal have been challenged for bias by Respondents five times (without success) and in a separate failed lawsuit to disqualify the Tribunal, the dismissal of which is now being appealed to the Second Circuit.[84]

297. We find it useful to begin with the Respondents' submissions, reaching Claimants' submissions after we have considered what Respondents have to say. We note first that

[84] SDNY Case No. 1:22-cv-07301-LAK at Docket Entry Nos. 63, 74

Respondents' current counsel, who entered the case on the eve of the merits hearing in early July 2024, present a tabulation showing that they accrued nearly $1.1 million in attorney fees in about four months, through October 31, 2024. The same exhibit shows that Respondents' former Submissions Counsel accrued nearly $900,000 in attorneys' fees for the ten-month period from September 2023 when they were first engaged until June 2024 after which they were replaced by current Respondents' counsel. We do not mention these sums to suggest that the work was done inefficiently or was unwarranted, but instead to observe that these sums are corroborative of the magnitude of the fees and expenses claimed by Claimants, especially when one considers several notable differences in the scope and nature of the engagements: (1) Claimants' counsel have been actively engaged at least since some date in late 2020 when Notices of Dispute were transmitted in the pre-Arbitration phase of this case; (2) Respondents give no account of the fees and expenses incurred by Respondents to the three Florida-based law firms, five other New York law firms, one Washington, D.C.-based law firm, and one Guatemala-based law firm, who appeared in this arbitration on behalf of some or all of the Respondents from February 2021 until July 2024, and (3) Respondents give no account of the fees and expenses incurred by them for the Florida Action, the Torrecom Action, the Disqualification Action, the SDNY Court vacatur and confirmation actions and Second Circuit appeals therefrom, the BVI Action, the four Foreign Arbitrations, and the criminal proceedings instigated by them against Company Management in Guatemala and El Salvador. We believe the costs omitted from Respondents' presentation are so extensive that two things must be true: (1) Respondents do not reasonably believe they are entitled to their costs as the prevailing party, because if they did they would present far more if not all of what was spent and incurred, and (2) the presentation that they have made is mainly in service of an argument that Claimants' application is excessive by comparison. But that argument is belied by the unreported

legal costs of the battles Respondents have waged as aggressors and Claimants have been forced to defend.

298. Respondents purport to object to the recoverability of Claimants' U.S. counsel legal costs for the Foreign Arbitrations by invoking a distinguished arbitrator and scholar, Bernard Hanotiau: "*Another issue that is less easy to decide is whether the costs of ancillary proceedings may be added to the parties' costs. One will normally expect that the costs incurred in another arbitration proceeding cannot be claimed as costs of the arbitration.*" It is, however, "eas[ier] to decide" to allow such costs, when the other arbitrations involved are exercises in blatant forum shopping in defiance of a sanction that stayed prosecution of counterclaims in this arbitration, that were enjoined by our Tribunal for that reason, that went forward in violation of our injunction Award and the SDNY Court Judgment confirming it, and that forced Claimants' U.S. counsel as part of their engagement to liaise with foreign counsel in four Latin American countries, to protect their English-speaking U.S. clients' interests in Spanish-language arbitrations under the laws of Guatemala, Honduras, Peru and El Salvador, notwithstanding that their clients had an agreement with Respondents to arbitrate all disputes in English in New York under New York law. The "normal[] expect[ation]" referenced by Professor Hanotiau pertains to jurisdictionally-valid arbitrations, arbitrations that the applicant for costs agreed to participate in, according to the agreements made and rules adopted governing cost-shifting – not cases like the Foreign Arbitrations at issue here.

299. We do not consider that Respondents are justified in questioning the reasonableness of Claimants' legal fees on the basis that Claimants should have acted mainly or entirely through one outside counsel. (Respondents' Responsive Submission on Costs, January 17, 2025, at 3). Claimants did not make duplicative submissions but almost invariably joint ones. In a case

involving such large sums and such complex issues – complexity mainly arising from Respondents' disobedience of our rulings and breaches of the agreement to arbitrate – it was reasonable for Claimants, who are independent entities entirely, and whose counsel therefore have separate reporting relationships to separate clients, to have separately contributed in a substantive way to nearly all their joint submissions. It is also evident from the different amounts sought by each of the unaffiliated Claimants that Peppertree's counsel performed most of the work, supplemented in a coordinated manner by AMLQ's counsel, a division of labor consistent with the Claimants' different ownership interests.

300. Also, we do not agree that Claimants' fee submission lacks necessary detail. In a case of this long duration involving stakes this high and so many issues, the potential losing party objecting to the reasonableness of the potential prevailing party's legal costs would need to point to objective evidence of the excessiveness of those costs to justify the expenditure of even more time and cost, by the Parties and the Tribunal, to evaluate the expenditures in a more granular manner.

301. Respondents submit that certain of Claimants' evidence in support of the fees submissions shows that they seek a costs award for activity outside of Phase 2 of the arbitration. To advance this point, Respondents adopt a conception of "Phase 2" that is considerably narrower than what we intended, at least concerning costs. We invited the Parties to make submissions for costs, claimed to be recoverable, that up to this time had not been awarded. Claimants have not misunderstood our invitation for submissions.

302. There is one category of Claimants' costs claim that we find not to be appropriate for cost-shifting. That is the proceedings in the SDNY Court concerning confirmation or vacatur of our four prior Awards. The SDNY Court and the Second Circuit of course have their own rules

concerning cost-shifting, and they apply those rules with discretion in the context of arbitration award enforcement litigation. We are not aware of any principle of New York or federal law that *requires* a New York-seated arbitral tribunal to treat award enforcement litigation costs as being beyond the universe of costs that may be shifted in an award. We do however believe that the shifting of such costs should be part of the arbitration agreement of the Parties (as provided in AAA Commercial Rule 47(d)(ii)); Section 8.15 of the Shareholders Agreement is not sufficiently specific to demonstrate the Parties' intention that the Tribunal, rather than the enforcement court, would address cost-shifting of the legal costs devoted to that activity.

303. Moreover, we do not have sufficient evidence before us to make an informed calculation of the Claimants' award enforcement costs, and prolonging this phase of the case to receive and assess such evidence would not be efficient. We know from the public docket in the SDNY Court, which broadly identifies the submissions made and the exhibits that accompanied them, even while the Court's sealing orders bar access to the contents for the Tribunal, that the proceedings have been extensive and therefore costly. We will treat ten percent of the total attorneys' fees claimed by each of the Claimants as a rough estimate of the amount attributable to award enforcement proceedings in the SDNY Court and the Second Circuit that is also sufficient to encompass other ancillary matters addressed in the next paragraph; we therefore deduct that amount in reaching our decision on the allowable amounts of the Claimants' cost claims.

304. In light of the deduction noted in the preceding paragraph, we make no specific determination about whether other proceedings in the New York Supreme Court and the SDNY Court come within the agreement of the Parties concerning cost-shifting. We think it is generally true that counsel costs incurred to defend judicial proceedings brought in violation of the arbitration agreement are recoverable, and that their classification as damages or as legal costs for

cost-shifting is not determinative of recoverability. Here, the Florida Action appears to have violated the arbitration agreement, as it sought to relitigate an issue we had already decided. The same is true of the BVI Action. The Disqualification Action was arguably a violation of the arbitration agreement, as the AAA Commercial Rules adopted by the Parties submit the issue of arbitrator partiality or lack of independence to the AAA as administrator for "conclusive" determination (Rule R-18(c)), which Respondents sought and the AAA provided. We also make no conclusive determination of whether the 2024 action to stay the arbitration pending a judicial determination of arbitrability with respect to the Individual Respondents was the type of judicial proceeding the Parties' contemplated as being subject to the courts' cost-shifting rules. There is ambiguity because, on the one hand, the Parties, including the Individual Respondents, made an agreement during the arbitration that the Tribunal would address the arbitrability issue in an award, but on the other hand the Individual Respondents may or may not have clearly and unmistakably agreed that the Tribunal rather than a court should finally decide that question subject only to the limited judicial review available to matters, within arbitral jurisdiction, decided in an arbitral award.

305. But we find it unnecessary to delve deeper into these issues. However we might decide them (which we do not do), we believe it would not materially reduce or enlarge the ten percent reduction we apply to Claimants' legal fees claims for award enforcement proceedings in the SDNY Court and Second Circuit, allocable in equal proportions to Peppertree's and AMLQ's claims.

306. Respondents fairly raise the contention that Claimants should not be awarded fees for issues on which Claimants were not the prevailing party, although Respondents' pointing to Claimants' derivative claims in this regard (Respondents' Responsive Submission on Costs,

January 17, 2025, at p. 3) leads us to a nuanced analysis on the question of which party has prevailed. Claimants cited certain authorities for the proposition that in certain circumstances a shareholder rather than the Company may be viewed as the injured party on a derivative claim and may be awarded direct damages. We have relied on those authorities, found the factual circumstances here to be distinguishable, and awarded equitable relief rather than money damages. But we do not share Respondents' position that Claimants should be penalized heavily, in cost-shifting terms, for an erroneous approach to derivative claim relief. As we have explained in our analysis of the claims, the circumstances that make these derivative claims difficult from a relief perspective result from Respondents' misconduct: the failure to permit a Company Sale; the failure to recognize and give effect to the Offset Right; the failure to permit Company Management to manage the Company; the failure to permit Company Counsel to function on behalf of the Company without additional accusations of non-neutrality; the failure to respect the agreed Towers expenditures approval process; and the failure to account to Claimants honestly and openly for the expenditures made with $480,000 per month of SG&A payments. What is more, the extent to which Claimants are already compensated for the derivative claims damages allegedly sustained, by the Company Sale damages we award today, is presently a theoretical matter that can only be meaningfully addressed after a Company Sale, which Respondents have unlawfully resisted since November 2020.

307. The net of all of this, in cost-shifting terms, is that Claimants have prevailed on liability on the derivative claims, their submission of authorities on the question of remedy was helpful to the Tribunal, and their efforts devoted to (i) the impeachment of the testimony of Respondents' expert witness about the value allegedly contributed to the Company by the unauthorized development of Towers, and (ii) answering the arguments of Respondents' counsel

that the development of unauthorized Towers was not only appropriate but necessary, were necessary steps of the proceedings even if the relief we ultimately granted did not depend on a determination of contributed value from unauthorized Towers. It is also true, however, that Claimants' arguments in favor of a direct award of damages were not accepted and were not entirely helpful in our fashioning of equitable relief. Thus, as a matter of discretion, we reduce each of the Claimants' claims for legal fees by an additional $100,000.

308. A clearer instance of an issue on which Claimants have not prevailed concerned jurisdiction over the Individual Respondents other than Mr. Hernandez. We accepted Claimants' legal submissions concerning the principle of direct benefits estoppel, as applied to Mr. Hernandez. We have rejected Claimant's contention that the same principle extends to other Individual Respondents. In that regard Claimants have not prevailed, but Claimants made no particular effort to develop factually a case for direct benefits estoppel against the other Individual Respondents, thus limiting the fees within their costs claim that are attributable to that activity. As a matter of discretion, we reduce the total costs claim by $150,000 based on the outcome less than entirely favorable to Claimants on the jurisdiction questions, allocable 50 percent to Peppertree's claim and 50 percent to AMLQ'S claim, for a reduction of $75,000 each.

309. The fee submissions of the Claimants demonstrate that the key indicators of what constitutes reasonable fees and reasonable hours of counsel have not materially changed since we last assessed fees for cost-shifting in PFA-4. Claimants are represented by the same counsel now as then, mostly without personnel changes at senior or junior levels. The hourly rates of the firms in terms of market position have not changed, the increases being reasonable in relation to inflation and operating costs, and AMLQ's counsel continues to provide services that are at a discount to the hourly rates normally applicable to their other work for Goldman Sachs. (Declaration of Gregg

Weiner, Esq. in Support of AMLQ Costs Submission, January 10, 2025 at 2 para. 4). The amounts and rights at stake in this arbitration, the difficulty of the issues presented, and the need for Claimants' counsel to coordinate their prosecution of this arbitration with monitoring and/or defense of foreign legal proceedings being pursued by Respondents with the evident purpose of affecting the enforceability of our awards and the prospects of a Company Sale remain as significant now as it was two years ago.

310. Thus, we are prepared to adopt, as Claimants advocate without opposition from Respondents, the "lodestar" approach to reasonableness of legal costs elaborated in *Johnson v. Georgia Highway Exp., Inc.*, 488 F.2d 714, 717-20 (5th Cir. 1974) (the so-called "Johnson Factors," (*see* Claimants' Submission Establishing Certain Fees and Costs, dated January 10, 2025, at 12), as an expression of the considerations that guide New York courts and in turn are suitable when adopted by the Parties as guidance for the Tribunal in a New York-seated arbitration under New York law. And we conclude that, with the exceptions noted above, the fees and expenses applied for by Claimants satisfy this reasonableness requirement.

311. Accordingly, we award to the Peppertree Claimants for legal costs and expenses claimed (i) $7,869,961.62 for legal costs that have not yet been awarded, other than the amounts ordered as a discovery sanction in May 2024, calculated as follows: ($8,938,846.25 x .90) - $175,000; and (ii) non-duplicatively, $282,796 in legal fees and $163,830.10 in expenses for the 2024 information exchange process. The sum in sub-para. (i) is inclusive of $1,233,718.10 paid by the Peppertree Claimants to the AAA/ICDR for fees and expenses of the Tribunal and AAA/ICDR administrative fees of which $669,636.98 was advanced for Respondents' share of

fees and expenses based on Respondents' non-payment. (Declaration of Michael Ungar, Esq. dated January 10, 2025 at 11 para. 31).[85]

312. We award to AMLQ for legal costs and expenses claimed (i) $6,501,306.14 for legal costs that have not yet been awarded, other than the amounts ordered as a discovery sanction in May 2024, calculated as follows: ($7,462,562.38 x .90) - $175,000; and (ii) non-duplicatively, $219,756.68 in fees and $93,147.67 in expenses for the 2024 information exchange process. The sum in sub-para. (i) is inclusive of $528,736.35 paid by AMLQ counsel (and reimbursed to counsel by AMLQ) to the AAA/ICDR for fees and expenses of the Tribunal and AAA/ICDR administrative fees of which $286,987.28 was for Respondents' share of fees and expenses. (Declaration of Gregg L. Weiner, dated January 10, 2025 at 6 para. 19).[86]

IX. Interest

313. We understand Claimants to make claims for pre-Award and post-Award interest as detailed below. We further understand Claimants to claim that all interest awarded should be compound not simple interest (or in the alternative that "post-judgment" interest should be compounded as an incentive to compliance),[87] for two essential reasons (1) "Respondents' clear demonstration of bad faith and malice," and (ii) "the damages incurred by Peppertree/AMLQ (and

[85] The ICDR has confirmed to the Tribunal that as of the date of this Award all sums deposited by the Parties for fees and expenses of the Tribunal have been disbursed to the Tribunal in satisfaction of ICDR-approved invoices from members of the Tribunal.

While the advancement of Respondents' share of AAA/ICDR fees and expense would be more properly classified as damages for breach of the arbitration agreement, the Claimants' classification of these sums as recoverable costs does not prevent their allowance, and works to their detriment on a small scale in regard to interest, because pre-Award interest would accrue on damages from the date the claim of breach arose whereas the costs we award are only an interest-bearing obligation of the Respondents as of the date of this Award.

[86] *See* fn. 6, *supra*.

[87] We understand Claimants' claim for compound post-judgment interest to refer to the entire period from issuance of this Award to the date of compliance, including any period of noncompliance that follows entry of a judgment confirming, or recognizing and enforcing, this Award.

their investors) relate to invested funds regarding which the reasonable expectation is to earn compound interest or realize a substantial IRR [internal rate of return]." (Claimants' Pre-Hearing Memorial at 21 n.18).

314. The following are the categories of damages and costs that we have sustained in this Award, as to which Claimants have made claims for pre- and post-award, and post-judgment, interest. Where Claimants have identified a rate of interest that they contend is applicable, and/or an accrual date for the interest computation, this is also noted:

(1) Company Sale Breach damages of $185,752,900 at an interest rate of at least 8.5% per annum but more appropriately, say Claimants, at 16% percent per annum, in all events compounded. Claimants contend that the accrual date should be in February 2021 for $148,602,320 and August 2022 for $37,150,580. This is based on the anticipated release date for a portion of Company Sale proceeds to be held in escrow and released 18 months from closing date. [88]

(2) Payments of Independent Company Counsel Fees of $2,479,236.35, Treble Damages on Payments of Independent Company Counsel Fees of $4,958,472.70, Management Salaries of $1,496,788.88, Management Legal Fees of $1,390,126.88, Collateral Litigation Legal Costs of $1,512,024.63, and FCPA-Related Legal and Consulting Costs of $320,556.22.

[88] As to compounding, *see* Claimants' Pre-Hearing Memorial at 21 n.18. As to rates and accrual dates, *see* Claimants' Opening Post-Hearing Memorial at 15-16.

(3) Claimants awarded legal costs, including advances of Respondents' Share of Deposits for Tribunal Fees, as calculated by the Tribunal in paras. 311-312 above, amounting to $7,869,961.62 for Peppertree and $6,501,306.14 for AMLQ.[89]

A. Interest Rate Issue No. 1: – Pre-Award Rate

315. We decline to apply the 16% rate, proposed by Claimants based on the testimony of Mr. Rainieri about Peppertree's rate of return on its investment portfolio. No data was submitted in support of this figure. We do not know what period it covers, or the individual rates of return on the investments counted toward this average. Also, it cannot be assumed that capital is seamlessly transferred from one investment to another, closing to closing without intervals when capital awaiting deployment in high-return, long-term investments is invested in shorter-term, lower risk, higher liquidity investments. We also do not know how Peppertree counts overhead costs and transaction costs. And we have no testimony about AMLQ's or its affiliates' internal rates of return. Finally, we have no information about costs of funds for either Claimant, and we do not know the composition of debt and equity in the capital structure of either Claimant. Although interest is intended to be compensatory, it need not purport to mimic the successful Claimant's record of returns in high-risk ventures.

316. In each of PFAs 1, 2 and 4 we awarded post-Award interest at the Wall Street Journal Current Prime Rate that was prevailing on the date of the Award. The principal sums

[89] Each of these sums save for Advances for Respondents' Share of Deposits is drawn from Appendix 1 to Claimants' Responsive Pre-Hearing Memorial, which is a summary of the analysis of documentation made in the First and Second Reports of Claimants' Damages Expert James Feltman. These amounts are understood to cover the period through June 15, 2024. The Tribunal ruled in September 2024 that the Second Supplemental Report of Mr. Feltman dated August 30, 2024 would be excluded from the Phase 2 record without prejudice to its submission, in support of updated damages calculations, in a further Phase. That exclusion was based substantially on the fact that the hearing was closed and Respondents had not been able to cross-examine Mr. Feltman concerning his updated damages computations. In October 2024, we permitted Claimants to provide a modified report of the amount of their Advances of Respondents' Share of Deposits for Tribunal Fees, based on Claimants having learned from the ICDR that deposit payments in this amount had in fact been applied from Claimants' deposit payments to cover Respondents' unpaid deposits obligation.

involved were attorney fees and arbitration costs for particular stages of this arbitration.[90] Arguably, pre-Award interest covering all or some of a four-year period from February 2021 calls for a relatively greater consideration of the investment returns that could have been earned by Claimants on proceeds of a Company Sale. We elect to adhere to our past practice as to reference rate, and pre-Award interest on damages will accrue, compounded[91] annually, at 150 basis points above the Wall Street Journal Current Prime Rate of 7.50 percent, thus 9.00 percent. The selection of this rate gives some recognition to Claimants' contentions concerning rates of return on invested funds, as the prime rate in 2021 and most of 2022 was below the rate we adopt here. The selection of this rate for pre-Award interest also takes into account that, as discussed in para. 321 below, the rate applicable to post-Award, pre-judgment interest accruals as a matter of obligation under substantive New York law is nine percent. Of course, the nine percent rate is also the statutory rate provided under New York's CPLR Article 50, which is in our discretion to apply in a New York-seated case governed by New York law. Finally, selection of this rate gives some consideration to the finance-based justification for compound interest (as opposed to conduct-based arguments for compound interest as a form of punishment). One reference point for interest rate selection is the Respondents' borrowing costs, because the compensatory damages awarded may reasonably be analogized to an involuntary loan by Claimants to Respondents, and Respondents are likely not a prime-rate borrower due to country risk and currency risk factors in Central America. (*See* para. 319 below). Having no submissions from Claimants supporting a particular frequency of

[90] This turns out to have been in derogation of the mandate of New York law, at least as perceived in certain decisions of federal judges in the Southern District of New York. *See* para. 321, *infra*. The Parties did not bring that mandate to our attention in connection with those Awards.

[91] www.bankrate.com/rates/interest/interest-rates/wall-street-prime-rate (last visited March 23, 2025).

compounding, adjusting the rate to an above-prime rate with compounding limited to annual is a pragmatic compromise.

317. Respondents argue that we are bound by principles of finality to apply the same rates of interest that we applied in our prior Awards. (Respondents' Post-Hearing Brief at 37-38). This argument has no merit.[92] We are not making any change to the interest awarded in our prior Awards. The claims and damages on which we award interest in this Award are different. We have not awarded pre-Award interest in any of our prior Awards; the only sums on which interest was awarded in our prior Awards were legal costs and arbitration costs associated with obtaining the equitable relief and sanctions awarded in PFAs 1-3, and the accrual dates for interest in those awards were the dates of issuance of the Awards granting certain legal costs and arbitration costs to the Claimants. The only position we adopted with a finality that extends beyond those particular interest awards was that we were not required to apply the New York statutory rate of nine percent. (Section 5001 *et seq.* of the New York Civil Practice Law and Rules ("CPLR")). We do not alter that decision here, although we will apply the CPLR rate (i) to pre-Award interest for the reasons discussed above, and (ii) to post-Award, pre-judgment interest in conformity with relevant case law, as discussed in para. 321 below. We also made no decision in our prior Awards that all interest awards in this case, on all principal sums awarded, would be simple interest rather than compound

[92] The law of the case doctrine, invoked by Respondents and mentioned in the case principally cited by Respondents, *North River Ins. Co. v. Philadelphia Reins. Corp.*, 63 F.3d 160 (2d Cir. 1995), has no application here. First, "law of the case" is not a principle of arbitration law, "It is generally accepted that the law of the case doctrine does not limit the power of a court, but merely expresses *the practice of courts* generally to refuse to reopen what has been decided." *North River*, 63 F.3d at 164 (emphasis supplied) (quoted by Respondents at para. 86 of their Post-Hearing Memorial). Under the Federal Arbitration Act and Article 75 of the CPLR, we are bound not to modify what has been decided in an award. We do not consider that, with respect to interest, we modify in this Award anything decided in our prior Partial Final Awards. If Respondents wish to invoke the law of the case doctrine before the SDNY Court to argue that the Court's judgments confirming our prior Awards are "law of the case" as to interest-related issues, they may do so and the Court will decide the question presented.

interest, and so there is no "law of the case" or finality barrier to the annual compounding we adopt.

318. In PFA-1, we cited to the New York City Bar Association's 2017 Report, *Awards of Interest in International Commercial Arbitration: New York Law and Practice,* prepared by the Bar Association's Committee on International Commercial Disputes (hereinafter, the "Interest Report").[93] The Parties having since that time been on notice of the Report and its contents, we consider the Tribunal to be acting within its discretion to rely upon the Report and its contents, including the authorities therein cited, in support of our conclusions on interest.

319. One conclusion the Interest Report supports is to derive the applicable interest rate based in part on the concept that pre-Award interest represents the cost of funds to the Respondent that would have been negotiated if the money damages awarded had been loaned to the Respondent on market terms. On this basis, we think the current Wall Street Journal Prime Rate of 7.50 percent plus 150 basis points reasonably estimates the interest rate that Respondents would have been required to pay for long-term borrowing of sums of money comparable to the damages awarded herein over the period from early 2021 until now, given risk factors associated with markets in which Respondents conduct business. In this regard, we are mindful that the WSJ Prime Rate was considerably below 7.50 percent in 2021 and most of 2022 but exceeded this rate in 2023 and most of 2024. This makes our choice of the nine percent rate a reasonable one.

B. Interest Rate Issue No. 2 – Post-Judgment Interest

320. Case law cited in the Interest Report supports the conclusion that the rate of post-judgment interest – that is to say, interest accrual after entry of a judgment enforcing this Award

[93] https://www.nycbar.org/reports/awards-of-interest-in-international-commercial-arbitration-new-york-law-and-practice/ (last visited Feb. 20, 2025), *republished in* 28(1) *Am. Rev. Int'l Arb.* (Aug. 2017).

– is determined in a U.S. federal district court by the federal statute concerning interest on judgments, 28 U.S.C. § 1961, unless the parties by contract have specifically agreed upon a rate of post-judgment interest other than the federal statutory rate. *See Westinghouse Credit Corp. v. D'Urso*, 371 F.3d 96, 102 (2d Cir. 2004), *cited with approval recently in Kenmar Securities, LLC v. Negocio Y Telefonia Nedetel*, 2024 WL 5165960 at *5 (S.D.N.Y. Dec. 19, 2024). Thus, if this Award is confirmed as a judgment of the SDNY Court or another federal court in the United States, then in the entry of judgment and in proceedings in the United States to enforce that judgment the federal statutory rate can be expected to apply to further accruals of interest after the entry of judgment. However, the Claimants may seek to have this Award recognized and enforced outside the United States, and we do not find in the Interest Report, or in any authority directed to our attention by the Parties, a contention that the law of a relevant foreign jurisdiction where such recognition and enforcement may be sought would decline to enforce a post-judgment rate of interest chosen by the Tribunal in the exercise of discretion conferred by the arbitration rules chosen by the Parties. Accordingly, subject to the application, in any jurisdiction where recognition and enforcement of this Award may be sought, of law concerning interest on judgments that would affect the rate of post-judgment interest, the rate of post-judgment interest shall be as stated in para. 319 above – *i.e.*, the post-Award rate will be nine percent and upon entry of judgment enforcing the Award in a court outside the United States, interest will continue to accrue if permitted by law in that jurisdiction at the post-Award rate until the date of full compliance with this Award. In a United States judgment enforcing this Award, however, the post-judgment rate will be set by the Court's application of 28 U.S.C. § 1961.

C. Interest Rate Issue No. 3 – Post-Award/Pre-Judgment Interest

321. Case law cited in the Interest Report supports the conclusion that post-Award interest – that is to say interest covering the period between issuance of the Award and

confirmation of the Award as a judgment in the SDNY Court – is treated in the SDNY Court (i) as a matter within the discretion of the Court, not the Tribunal, and (ii) by applying the New York CPLR rate of nine percent *per annum* where the parties have selected New York law as controlling the rights and liabilities arising from their contract. *See Maersk Line v. National Air Cargo Group, Inc.*, 2017 WL 4444941 at *5 (S.D.N.Y. Oct. 4, 2017), *cited with approval recently in Kenmar Securities, LLC*, *supra*, at *4, where the Court also cited *Loans on Fine Art LLC v. Peck*, 2024 WL 4601955 at *6 (S.D.N.Y. Oct. 29, 2024) for the proposition that "Post-Award pre-judgment interest … is mandatory under New York law… at a rate of 9 percent per annum upon entry of an arbitration award until entry of final judgment." (internal citations and quotation marks omitted). Our appreciation of this case law is that the SDNY Court in an award enforcement case treats post-Award interest as pre-judgment interest in the award enforcement action and applies the New York CPLR Article 50 rate where the Parties by contract have established that New York law governs. In the matter of post-Award but pre-judgment interest, therefore, we exercise our discretion under AAA Rule R-47(d) in conformity with this case law.

D. Interest Accrual Date Issues

322. The Interest Report supports the selection of accrual dates for pre-Award interest calculations in two ways (i) from the earliest date on which an award creditor was aware that it had sustained harm, or (ii) where harm was sustained on multiple occasions over a period of time through actions that were a continuing breach, by the selection of a reasonable intermediate date. As noted in para. 314 above, Claimants propose a February 2021 accrual date for $148,602,320 of Company Sale damages, and August 2022 for $37,150,580. This is based on the anticipated release date for a portion of Company Sale proceeds to be held in escrow and released 18 months from closing date. We will make a slight adjustment, because the Company Sale damages we award are

not based on Respondents' failure to close a deal with Torrecom, but on Respondents' failure to proceed with a Company Sale upon their decision to reject the Torrecom offer as inadequate. Such a Company Sale process, had it been initiated by the selection of an Investment Bank in November 2020, could not reasonably have been expected to culminate in a Company Sale by the end of February 2021. We will therefore identify September 1, 2021 as the accrual date for $148,602,320 of Company Sale damages, and March 1, 2023 as the accrual date for $37,150,580 of Company Sale damages. The other categories of damages we award mainly involve multiple payments over time to attorneys and individuals, including payments that are continuing and may be the subject of additional awards in a further phase of this arbitration. Given the relatively smaller sums involved as compared to the Company Sale damages, we decline to attempt to identify the best intermediate date with precision based on the invoices for payments that are in the record. We believe a reasonable intermediate date is the mid-point from the commencement of the arbitration to the date of issuance of this Award, *i.e.*, February 15, 2023.

323. There is no pre-Award interest on legal costs and arbitration costs awarded in this Award. Technically, the portion of legal costs awarded today that quantifies the attorneys' fees sanction imposed in Procedural Order No. 2024-10 for Respondents' misconduct in the 2024 information exchange process became an obligation of Respondents on the date of that Order, May 3, 2024. Although interest accrual from that date would be appropriate, the calculation would be burdensome and the interest amount at issue relatively immaterial. All legal costs incurred by Claimants for this arbitration and arbitration costs incurred by Claimants for the Tribunal's fees and expenses that are awarded today will bear only post-Award and post-Judgment interest, accruing beginning on the date of issuance of this Award

324. Punitive damages and treble damages (awarded on the advanced sums for Independent Counsel fees) are not compensatory, and so pre-Award interest on punitive damages and treble damages is not appropriate. Interest on those sums will accrue from the date of issuance of this Award. Post-Award and post-judgment interest will accrue on punitive damages and treble damages as they do on other damages awarded in this Award.

E. Compound v. Simple Interest

325. This issue was not sufficiently briefed by the Parties. The Respondents' misconduct and wrongful motives are not a persuasive basis for compound interest in a case where other relief addressed to those elements has been granted. Also, frequency of compounding and the interest rate itself are in some respects different ways of addressing the same risk element, when the interest rate is addressed, as we address it, as pertaining to an involuntary loan to the Respondent. Having selected a rate 150 basis points above prime rate for these reasons, we are reluctant to award compounding on any basis other than annual. As Claimants have not articulated a rationale for any particular frequency of compounding, compounding will be annual.

F. Interest on Escrow Account Deposit Obligations

326. In Sections II.F. and III. we have granted mandatory injunctive relief on certain of Claimants' derivative claims, requiring certain sums to be deposited by Respondents with an escrow agent as security for satisfaction of the money damages obligations imposed by this Award, and as a fund for use in paying DTH for authorized new Tower development. Whereas the damages awards for which these sums will stand as security are interest-bearing, it is appropriate that the security deposits should also bear interest. For periods of time during which non-compliance with this Award prevents the escrow agent from investing the funds to be deposited, as a matter of fairness and equity the interest-earning obligation should fall on the Respondents. As these sums

are tantamount to damages for breach of obligations owed to the Company, the accrual dates for interest calculations should correspond to the dates of breach:

(1) As to the unauthorized Tower expenditures, there has been a continuing breach from the time the arbitration commenced until the present. Pre-award interest is appropriate, and the accrual date shall be a reasonable intermediate date, *i.e.*, February 15, 2023.

(2) As to the Offset Right, the derivative claim of $6.58 million was fully matured based on unrecognized credits prior to the date of commencement of the arbitration. We recognize that the Offset Right had accrued over a period of years prior to its assertion in the February 2, 2021 Request for Arbitration. But in the absence of a proposal from Claimants, we have no efficient way to select a reasonable intermediate date. Pre-award interest is appropriate, however, and the accrual date for interest on this portion of the escrow deposits obligation shall be February 2, 2021, the date Claimants asserted the Offset Right claim in the original Request for Arbitration.

(3) As to the transfer we mandate to the escrow agent of the monthly SG&A payment of $480,000, we are ordering the transfer for periods following issuance of this Award, and post-award and post-judgment interest will apply in the manner provided herein.

(4) As to the obligation arising in the contingency of a Company Sale to deposit the proceeds of the sale with the Escrow Agent, post-award and post-judgment interest will apply as provided above from the dates of receipt of Company Sale proceeds to the date of compliance.

AWARD

For the foregoing reasons the Tribunal awards as follows:

1. The objections to arbitral jurisdiction of Respondents Alberto Arzu, William Mendez and Alejandro Sagastume are SUSTAINED, and all claims against them are DISMISSED without prejudice to the claims being asserted in another forum having jurisdiction.

2. The objection to arbitral jurisdiction of Respondent Jorge Hernandez is DISMISSED.

3. Claimants' claims for tortious interference with contract against Respondents Jorge Hernandez and DTH are SUSTAINED, with relief awarded as follows:

a. For money damages and costs, in the aggregate of the sums awarded in paras. 4 through 7 and 10 through 13 below, as joint and several obligations to the Peppertree Claimants and AMLQ corresponding in amounts to the awards made to those Claimants in those paragraphs,

b. For the equitable relief granted in decretal paras. 3c., 8 and 9 below.

c. The restrictions and obligations imposed on the Shareholder Respondents in PFAs 2-4 (Appendices 2, 3 and 4 annexed), are imposed upon Respondents Jorge Hernandez and DTH (to the extent not already imposed on DTH) by this Award. The obligations of specific performance imposed upon the Shareholder Respondents in PFA-1 are imposed by this Award upon Respondents Hernandez and DTH in the form of a mandatory injunction to cause the Shareholder Respondents to comply with their specific performance obligations in PFA-1. The monetary obligations for legal costs imposed on the Shareholder Respondents in PFA-1 are imposed upon Respondents Hernandez and DTH by this Award. The restrictions herein mentioned include the stay of counterclaims

sanction imposed in PFA-2, which now restrains Mr. Hernandez from asserting such counterclaims.

4. Each of Claimants' Company Sale breach claims seeking money damages, as against the Shareholder Respondents jointly and severally, is SUSTAINED, and is awarded in the principal sums of (i) $131,311,600 to the Peppertree Claimants and (ii) $54,441,300 to AMLQ, for a total of $185,752,900, without prejudice to any claim Claimants may make at a future date as a consequence of a Company Sale or the impossibility of a Company Sale.

5. Claimants' non-derivative claims for breach of contract against the Shareholder Respondents are SUSTAINED as follows:

a. For advances by Claimants of Independent Company Counsel Fees, damages are awarded in the principal sums of (i) $1,754,971.89 to Peppertree, and (ii) $724,264.46 to AMLQ, for a total of $2,482,236.35, without prejudice to additional claims for additional advances in conformity with the Tribunal's ruling of September 14, 2024.

b. For advances by the Peppertree Claimants of Management Salaries, damages are awarded in the principal sum $1,496,788.88 to the Peppertree Claimants, without prejudice to additional claims for additional advances in conformity with the Tribunal's ruling of September 14, 2024.

c. For advances by Claimants of Management Legal Fees, damages are awarded in the principal sums of (i) $970,893.82 to the Peppertree Claimants, and (ii) $419,233.06 to AMLQ, for a total of $1,390,126.88, without prejudice to additional claims for additional advances in conformity with the Tribunal's ruling of September 14, 2024.

6. Claimants' claim for the contingent sanction arising from the establishment of their breach of contract claim for advances of Independent Company Counsel Fees is SUSTAINED, in the principal sums of (i) $3,509,943.78 to the Peppertree Claimants, and (ii) $1,448,529.92 to AMLQ, for a total of $4,958,473.70, without prejudice to additional claims for additional sanction amounts relating to further advances potentially to be awarded in conformity with the Tribunal's ruling of September 14, 2024. The obligors of the contingent sanction are the Shareholder Respondents, DTH and Mr. Hernandez, jointly and severally.

7. Claimants' claims, as against the Shareholder Respondents jointly and severally, for defense costs for the Foreign Arbitrations, the BVI Action[94] and the Florida Action, and expenses incurred for FCPA-Related Investigations are SUSTAINED in the principal sums of (i) $1,293,488.01 to the Peppertree Claimants, and (ii) $540,092.37 to AMLQ, for a total of $1,833,580.38, without prejudice to additional claims for additional amounts relating to further costs incurred that were not reported upon in Mr. Feltman's Supplemental Report of June 28, 2024. The obligors of these awarded damages are the Shareholder Respondents, DTH and Mr. Hernandez, jointly and severally.

8. Claimants' derivative claims for money damages are DISMISSED but Claimants' claims for equitable/declaratory relief on their derivative claims are SUSTAINED to the following extent: An escrow account shall be established within 21 days of the issuance of this Award by an escrow agent designated by Company Counsel Adam Schachter, Esq., who shall immediately upon establishment notify the Parties of the relevant details of the escrow agent's appointment and the opening of the escrow account.

[94] The portion of this Award attributable to the BVI action is awarded upon the condition that Claimants shall deliver to the Tribunal proof of the dismissal of the parallel costs claim made in the BVI court within 20 calendar days of the date of this Award.

a. Paragraphs 67, 85 and 93 of this Award are applicable to the establishment, funding and operation of the escrow account.

b. Upon application to the Tribunal by the escrow agent, the Company, or any Party, the Tribunal will consider, so long as the applicant is in compliance with the escrow terms of this Award, whether to adopt additional provisions supplementing and/or clarifying but not modifying the existing escrow provisions of this Award.

c. The Shareholder Respondents, DTH and Mr. Hernandez are jointly and severally obligated to deposit $44,443,256.70[95] in the escrow account within 10 business days after they have been notified of the opening of the account, as an equitable remedy for the Unauthorized Towers derivative claim. Such sums shall be treated by the escrow agent as security for satisfaction of the monetary damages, sanctions, costs and interest that have been awarded, are awarded in this Award, or may be awarded to Claimants in the future as provided in para. 67 above.

d. The Shareholder Respondents, DTH and Mr. Hernandez, jointly and severally, shall deposit a further sum of $6,580,000 principal plus $2,804,859.45 of pre-Award interest, for a total of $9,418,898[96] in the escrow account within 10 business days after they have been notified of the opening of the account, as an equitable remedy for the Offset Right derivative claim. The escrow agent shall hold such funds in a designated separate Tower Development Account. The escrow agent, upon being notified in writing by

[95] Interest is accrued, and compounded annually, on the original principal sum of $37 million, at the pre-Award rate of 9.00 percent per annum, from February 15, 2023 to March 24, 2024.

[96] Interest is accrued, and compounded annually, on the original principal sum of $6,580,000, at the pre-Award rate of 9.00 percent per annum, from February 2, 2021 to March 24, 2024.

Company Counsel Adam Schachter, Esq. (or his duly appointed successor) that a payment obligation of the Company with respect to new Tower development has arisen under the EPC Contracts, will disburse the required payments from the Tower Development Account. The Shareholder Respondents, DTH and Mr. Hernandez, jointly and severally, shall ensure that no other Company funds are disbursed to pay the Company's obligations relating to new Tower development under the EPC Contracts until the funds so deposited are exhausted by their proper application in accordance with this Award. The escrow agent shall render an accounting report to the Shareholders of disbursements from and balances remaining in the Tower Development Account monthly on the first business day of the month. At the end of one year from the date of deposit of the required funds for establishment of the Tower Development Account, if there has not been a Company Sale that disposes of the remaining deposited funds, such funds shall be transferred by the escrow agent to the account established as security for satisfaction of the damages awarded in this Award, as provided in para. 67.

e. The Shareholder Respondents, DTH and Mr. Hernandez, jointly and severally, shall cause the Company to transfer $480,000 per month to the escrow account, and shall be jointly and severally obligated to make such payments if they are not made by the Company, and those Respondents and their agents are restrained and enjoined from causing the direct or indirect transfer from the Company to DTH (or to any person other than the escrow agent) of the $480,000 per month SG&A payment. The escrow agent upon instruction from the Company CEO Mr. Gaitán shall make disbursement of SG&A payments that are requested in writing by DTH and that Mr. Gaitán determines to be

reasonable and appropriate. (*See* fn. 31). Post-award and post-judgment interest shall apply in conformity with paragraph 326 (3) above.

9. The Claimants' claim for a provisional measure of security with respect to proceeds of a Company Sale when and if a Company Sale occurs is GRANTED in the following terms: the escrow account established pursuant to decretal paragraph 8 above shall receive, hold, and disburse Company Sale proceeds in conformity to paragraph 67 of this Award.

10. The Peppertree Claimants' claim for legal and arbitration costs is SUSTAINED in the amount of $8,316,587.72, without prejudice to a future application for costs incurred with regard to periods of time after those covered in Claimants' January 2025 Fee Submissions. The obligors of these awarded costs are the Shareholder Respondents, DTH and Mr. Hernandez, jointly and severally. This sum is inclusive of the Peppertree Claimants' advances of Respondents' share of deposits for the fees and expenses of the Tribunal.

11. Claimant AMLQ's claim for legal and arbitration costs is SUSTAINED in the amount of $6,814,210.49, without prejudice to a future application for costs incurred with regard to period of times after those covered in Claimants' January 2025 Fee Submissions. The obligors of these awarded costs are the Shareholder Respondents, DTH and Mr. Hernandez, jointly and severally. This sum is inclusive of AMLQ's advances of Respondents' share of deposits for the fees and expenses of the Tribunal.

12. Claimants' claim for punitive damages is SUSTAINED, in favor of Claimants jointly and severally, as against the Shareholder Respondents, Mr. Hernandez and DTH, jointly and severally, in the amount of $25,166,643.

13. Claimants' claims for interest are SUSTAINED upon the following terms:

a. Interest on the Company Sale damages awarded in decretal paragraph 4 above shall accrue from September 1, 2021 for $148,602,320 of such damages, and from March 1,

2023 for $37,150,580 of such damages, such accruals to be attributed *pro rata* to the Company Sale damages awarded to Peppertree and AMLQ, respectively. Pre-Award interest on the damages awarded in decretal paragraph 4 is awarded to Peppertree in the sum of $43,413,725 and to AMLQ in the sum of $17,687,719.[97]

b. Interest on the damages awarded in decretal paragraphs 5 and 7 shall accrue from February 15, 2023. Pre-Award interest on the damages awarded in decretal paragraphs 5 and 7 is awarded to Peppertree in the sum of $1,103,084 and to AMLQ in the sum of $336,686. (The contingent sanction sums awarded in decretal paragraph 6 and the costs awarded in decretal paragraph 11 bear interest only from the date of issuance of this Award).

c. Interest on the sanction, costs and punitive damages awarded in decretal paragraphs 6, 10, 11 and 12, respectively, shall accrue from the date of this Award.

14. Insofar as Respondents shall fail to comply timely with the escrow account deposit obligations imposed in decretal paragraph 8, interest shall accrue from the date when compliance shall have become due until the date of compliance.[98]

15. Except as otherwise provided by applicable law in a jurisdiction where judgment upon this Award may be entered, all interest accruals will be at the rate of 9.00 per cent per annum, compounded annually, running from the accrual date to the date of payment, including any post-judgment period of non-payment.[99]

[97] Each tranche of Company Sale damages is allocated in accordance with the Claimants' respective percentages of their aggregate percentage interest in the Company (45.55 percent). Thus the Peppertree Claimants, owning 32.2 percent, are allocated 71 percent of the Claimants' interest, and AMLQ, owning 13.35 percent, is allocated 29 percent. *See* footnote 5 at p. 6. Therefore, interest is computed on the September 1, 2021 tranche of Company Sale damages on $105,507,647 for the Peppertree Claimants and $43,094,673 for AMLQ. Interest is computed on the March 1, 2023 tranche of Company sale damages on $26,376,912 for the Peppertree Claimants and $10,773,668 for AMLQ.

[98] *See* paragraph 320 concerning the effect of the law of the Award-enforcement jurisdiction on post-Judgment interest.

[99] *See* fn. 98.

16. Claimants' claim for Declaratory Relief in regard to the meaning of the last sentence of Section 5.04(b)(ii) of the Shareholders Agreement is SUSTAINED to the extent of the interpretation made in Section VII., paras. 285 *et seq.* of this Award.

17. Claimants' claims for breach of fiduciary duty are DISMISSED without prejudice to the assertion of such claims against Respondents Arzu, Sagastume, and Mendez in another forum.

18. The total of compensatory money damages, sanctions (exclusive of punitive damages) and pre-Award interest awarded as of the date of issuance of this award is $193,171,083 to the Peppertree Claimants, $82,012,435 to Claimant AMLQ, and in addition $25,166,643 is awarded to Claimants jointly and severally as punitive damages, for a total monetary award of $300,749,761. Post-Award and post-Judgment interest will accrue on all components of this sum, with annual compounding, from the date of issuance of this Award. This does not include sums that Respondents are required, by the equitable relief granted herein, to deposit in escrow. Those sums shall also bear post-Award and post-Judgment interest (except as otherwise provided by applicable law in a jurisdiction where judgment on this Award may be entered) from the date on which compliance is due until the date of compliance.

We, THE UNDERSIGNED ARBITRATORS, do hereby certify, for purposes of Article III of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards concluded June 10, 1958, and Article 4 of the Inter-American Convention on Commercial Arbitration concluded January 30, 1975, that this Fifth Partial Final Award is made in New York, New York, USA.

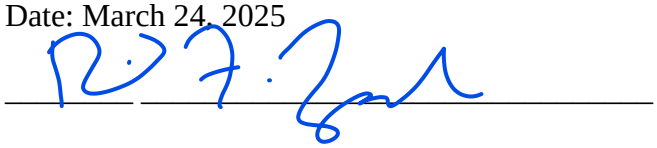
Date: March 24, 2025

Marc J. Goldstein, Chair

Date: March 24, 2025

Mélida N. Hodgson, Arbitrator

Date: March 24, 2025



Richard F. Ziegler, Arbitrator

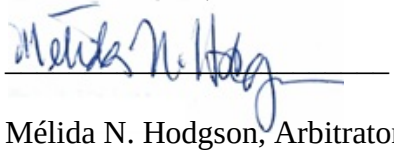
I, Marc J. Goldstein, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed the foregoing instrument, which is the Fifth Partial Final Award.

Date: March 24, 2025

Marc J. Goldstein, Chair

I, Mélida N. Hodgson, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed the foregoing instrument, which is the Fifth Partial Final Award.

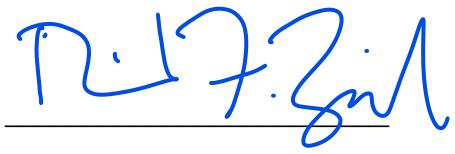
Date: March 24, 2025



Mélida N. Hodgson, Arbitrator

I, Richard F. Ziegler, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed the foregoing instrument, which is the Fifth Partial Final Award.

Date: March 21, 2025



Richard F. Ziegler, Arbitrator