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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

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WELLPOINT HEALTH	)	
NETWORKS INC., et al.,	)	
	)	Appeal from the United States District
Respondents-Appellees,	)	Court for the Northern District of
	)	Illinois, Eastern Division
v.	)	
	)	Case No. 07 cv 943
JOHN HANCOCK LIFE	)	
INSURANCE,	)	Judge Ruben Castillo
	)	
Petitioner-Appellant.	)	

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**BRIEF OF RESPONDENTS-APPELLEES**

---

John M. Nonna  
DEWEY & LEBOEUF LLP  
1301 Avenue of the Americas  
New York, NY 10019  
(212) 259-8000

Michael A. Knoerzer  
CLYDE & Co. US LLP  
405 Lexington Avenue  
New York, NY 10174  
(212) 710-3900

Jeffrey W. Sarles  
Sheila Finnegan  
Diana Swisher Andsager  
MAYER BROWN LLP  
71 South Wacker Drive  
Chicago, IL 60606  
(312) 782-0600

*Attorneys for Respondents-Appellees*

**CIRCUIT RULE 26.1 DISCLOSURE STATEMENT**

Appellate Court No: 08-2283

Short Caption: WellPoint Health Networks Inc. v. John Hancock Life Insurance

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement stating the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing the item #3):

WellPoint Health Networks, Inc.; Unicare Life & Health Company

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

<u>Mayer Brown LLP</u>	<u>Dewey &amp; LeBoeuf LLP</u>
<u>Clyde &amp; Co US LLP</u>	<u>White &amp; Case LLP</u>

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and  
Appellees WellPoint Health Networks, Inc. and Unicare Life & Health Co. are wholly owned subsidiaries of WellPoint, Inc.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:  
None

Attorney's Signature: /s Sheila Finnegan Date: June 4, 2007  
Attorney's Printed Name: Sheila Finnegan

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Cir. Rule 3(c). Yes \_\_\_  
No X

Address: 71 South Wacker Drive  
Chicago, Illinois 60606  
Phone Number: (312) 782-0600 Fax Number: (312) 701-7711  
E-Mail Address: sfinnegan@mayerbrown.com

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None

Attorney's Signature: /s Jeffrey W. Sarles Date: June 4, 2007  
Attorney's Printed Name: Jeffrey W. Sarles

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Cir. Rule 3(c). Yes X  
No    .

Address: 71 South Wacker Drive  
Chicago, Illinois 60606

Phone Number: (312) 782-0600 Fax Number: (312) 701-7711

E-Mail Address: jsarles@mayerbrown.com

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None

Attorney's Signature: /s Diana Swisher Andsager Date: June 4, 2007  
Attorney's Printed Name: Diana Swisher Andsager

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Cir. Rule 3(c). Yes \_\_\_  
No X.

Address: 71 South Wacker Drive  
Chicago, Illinois 60606  
Phone Number: (312) 782-0600 Fax Number: (312) 701-7711  
E-Mail Address: dandsager@mayerbrown.com

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None

Attorney's Signature: /s John M. Nonna Date: June 4, 2007  
Attorney's Printed Name: John M. Nonna

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Cir. Rule 3(c). Yes \_\_\_  
No X.

Address: 1301 Avenue of the Americas  
New York, New York 10019

Phone Number: (212) 259-8311 Fax Number: (212) 649-9461  
E-Mail Address: jnonna@dl.com

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None

Attorney's Signature: /s Michael A. Knoerzer Date: June 4, 2007  
Attorney's Printed Name: Michael A. Knoerzer

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Cir. Rule 3(c). Yes \_\_\_  
No X.

Address: 405 Lexington Avenue - 11<sup>th</sup> Floor  
New York, New York 10174

Phone Number: (212) 710-3940 Fax Number: (212) 710-3950  
E-Mail Address: michael.knoerzer@clydeco.us

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## **JURISDICTIONAL STATEMENT**

The Appellant's jurisdictional statement is not complete and correct.

The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1332. Appellant John Hancock Life Insurance Company ("Hancock") is a Massachusetts corporation with its principal place of business in Massachusetts. Appellee WellPoint Health Networks Inc. (now WellPoint, Inc.) is an Indiana corporation with its principal place of business in Indiana. Appellee UniCare Life & Health Insurance Company is an Indiana corporation with its principal place of business in Illinois. The amount in controversy exceeds \$800 million.

This Court has jurisdiction pursuant to Section 16 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 16(a)(3), because Hancock's appeal is from a final decision, entered on April 28, 2008, with respect to an arbitration that is subject to Title 9 of the U.S. Code. Hancock's Notice of Appeal was timely filed on May 21, 2008.

## **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

1. Whether a duly appointed panel of arbitrators exceeded its authority by accepting the resignation of one of its members.

2. Whether the remaining two arbitrators exceeded their authority by filling the ensuing vacancy through a process that was consistent with the parties' arbitration agreement and in which both parties had input and actively participated.

### Alternative Grounds for Affirmance

3. Whether Hancock waived any right to challenge the appointment of a replacement arbitrator on a petition to vacate where it failed to seek judicial resolution pursuant to 9 U.S.C. § 5 at the time of the appointment.

4. Whether Hancock's challenge to the arbitrators' liability ruling is time-barred where Hancock failed to file its petition to vacate within three months of that ruling as required by 9 U.S.C. § 12.

## STATEMENT OF FACTS

Appellees (collectively, “WellPoint”) submit the following Statement of Facts. Because the sole issue raised by Hancock is a challenge to the resignation and replacement of WellPoint’s party-appointed arbitrator, this Statement addresses the background to those events in considerable detail. It also quotes extensively from the documentary record because WellPoint believes that Hancock’s Statement of Facts is incomplete and, in places, misleading.

Hancock attempts to support many of its factual assertions by citing to a declaration from attorney Mark Leimkuhler, who represented Hancock in the arbitration and district court and now represents it on this appeal. AA.1-32. The Leimkuhler Declaration is replete with inadmissible hearsay and attorney argument. Because it is improper to supplement a well-documented arbitration record in this fashion, all references thereto should be stricken or disregarded.

### **1. The arbitration and appointment of the initial panel.**

In 1996, WellPoint agreed to purchase various “Group Business Operations” from Hancock (“GBO transaction”). The Purchase and Sale Agreement (“PSA”) contains a binding arbitration clause, which states in relevant part:

Any dispute or difference between the parties with respect to the operation or interpretation of this Agreement \* \* \* shall be decided by binding arbitration \* \* \*. The arbitrators may rely upon principles of fairness, equity, reason and custom in the insurance and reinsurance industry in reaching their decision.

\* \* \*

A panel of three (3) arbitrators will decide any dispute or difference between the parties. All arbitrators must be (a) disinterested officers or retired officers of life insurance or life reinsurance companies other than the parties to this Agreement or their Affiliates, or (b) disinterested persons of comparable experience. Each of the parties agrees to appoint one of the arbitrators. In the event that either party should fail to appoint its arbitrator within twenty (20) Business Days following receipt of the notice demanding arbitration \* \* \*, the party demanding such arbitration may appoint the second arbitrator before entering upon arbitration. The two party-appointed arbitrators shall select a third arbitrator. In the event that the two party-appointed arbitrators shall not be able to agree on the choice of the third arbitrator within twenty (20) Business Days following their appointment, the parties may agree on a third arbitrator within the next twenty (20) Business Days, and if they have not then so agreed, the Denver, Colorado office of the American Arbitration Association shall, at the request of either party, appoint as such third arbitrator a person who meets the qualifications specified in the second sentence of this Section 15.3.

\* \* \*

The decision in writing by any two arbitrators shall be final and binding on both of the parties. Judgment may be entered upon a final decision of the arbitrators in any court of competent jurisdiction. Arbitrat[ion] pursuant to this Article XV shall be governed by the Federal Arbitration Act, Title 9, United States Code.

A.42-A.43.

WellPoint filed a demand for arbitration against Hancock in October 2002, contending that Hancock had failed to disclose losses and expenses and other information regarding loss-producing insurance in connection with the GBO transaction. R.46-4. Hancock filed a counterdemand for \$42.4 million the next month, contending that WellPoint was responsible for the losses and administrative expenses. R.46-5.

Pursuant to the PSA's arbitration clause, each party appointed an arbitrator. WellPoint named David Nichols, Hancock named Donald DeCarlo, and the American Arbitration Association (AAA) selecting Richard Bakka as the Umpire. The parties then engaged in document discovery and discovery motion practice, which made clear that the principal issues to be decided were whether WellPoint had any obligation for three loss-producing books of insurance business — Fiduciary Administration Services Company (the "FASCO Business"); James E. Hackett Reinsurance Corporation (the "Hackett Business"); and JEH Re Underwriting Management (Bermuda) Ltd. (the "Bermuda Business") — and who bore responsibility for uncollected reinsurance.

**2. The panel accepts the resignation of WellPoint's party-appointed arbitrator.**

In July 2005, Hancock made an eleven-fold upward revision in its counterdemand to \$464.6 million. R.46-6 at 3. Three weeks later, the firm of LeBoeuf, Lamb, Greene & MacRae LLP replaced White & Case as WellPoint's counsel. AA.33.

On August 17, 2005, the Umpire notified the parties of this and subsequent developments as follows:

The Panel had a conference call yesterday in which David [Nichols] advised of a probable scenario. It appears that rather than LeBoeuf appearing as Co Counsel, there may be a substitution negating White and Case participation. Further, a request has been made for David to "stand down," with a yet to be named arbiter substitution.

Within the call, concern was evidenced that with the absence of White and Case, can LeBoeuf aver that the Hearing dates

continue to be “etched in stone”? Absent that affirmation, Hancock will have a voice as to the substitution.

The change in arbiters, absent health, disability or death problems, may not be a unilateral decision by Wellpoint and/or Counsel. The arbitration has a lengthy history with numerous exchanges, motions and rulings by this duly constituted Panel. It is recognized that most of those decisions dealt with hard fought discovery questions (neither side being happy with the resultants). While the main Case has yet to be formally addressed, certainly the exchange between the Panel members have identified the issues and tried to assure that the evidentiary materials will ultimately allow comprehensive and informed decision-making.

*Id.*

WellPoint’s counsel responded by letter the next day:

We write in response to your e-mail of August 17, 2005 in order to provide the formal letter that you have requested. As we did in our own e-mail of that same day, we confirm that LeBoeuf, Lamb, Greene & MacRae LLP, is substituted as counsel for White & Case.

We further confirm that, at the direction of WellPoint, we have asked Mr. Nichols to voluntarily withdraw as WellPoint’s party-appointed arbitrator. We have explained to Mr. Nichols WellPoint’s reasons for making this request. It has been stressed to Mr. Nichols that WellPoint acknowledges that it cannot at this time unilaterally terminate Mr. Nichols’ appointment.

We understand Mr. Nichols’ chief concern arising from WellPoint’s request relates to the impact of his withdrawal upon the arbitration schedule. This also appears to be the chief concern expressed in the Umpire’s August 17, 2005 e-mail.

AA.34. In the same letter, WellPoint confirmed that Nichols’ resignation would not require changing the hearing schedule, which provided for a merits hearing in March 2006. *Id.*

Hancock opposed WellPoint's request that Nichols withdraw, stating:

WellPoint's request is wholly improper. It is contrary to the controlling arbitration provisions, arbitration custom and practice, the ethical principles governing the conduct of arbitrators, and sound considerations of arbitration public policy. Moreover, it would unfairly prejudice John Hancock and inject serious legal error into this proceeding if permitted.

AA.36.

On August 29, 2005, the Umpire issued the following communication to the parties:

[T]he Panel asks respective Counsel if they agree that the Panel has the authority to decide the appropriateness of a withdrawal? Secondly, if the Panel were left to decide, would it not be proper for David [Nichols] to recuse himself? Should that be the case, does it seem proper for Don [DeCarlo] to participate in a decision? In short, should the substitution/withdrawal by default be a decision solely left to the Umpire? \* \* \* [P]erhaps a "meet and confer" (by phone) to advise the Panel if there is any agreed preferred manner for resolution – or the Panel is left to it's own devices?

R.46-8 at 2.

WellPoint submitted that the decision to withdraw "rest[ed] solely with Mr. Nichols." R.46-8 at 5. Hancock disagreed, stating that the Umpire and DeCarlo should decide whether Nichols could withdraw. R.46-8 at 8. The parties met as requested by the panel, but no agreement resulted. The full panel then took up the issue, as reflected in the Umpire's September 2, 2005 e-mail:

The Panel has met and acknowledge Michael's [WellPoint's counsel's] advisory of no erosion of the timeframes by reason of substitution of Counsel. In our exchange as to David's decision on withdrawal, we acknowledge the respective arguments offered by Counsel. Substitution without cause at this late stage is "new ground" on the arbitration trail. It would aid the Panel if

Michael gives an “offer of arbiter”, to assure that said arbiter has not served on any John Hancock matters or on assumption or cession of the two underlying books of business. We’d ask that Michael not view this as to whether it would be a prerequisite for an “initial” arbiter appointment. Rather the Panel’s interest is negating one of Mark’s [Hancock’s counsel’s] concerns and potentially not relegating us to court overview – thus eroding the timeframe. Your comments and/or affirmation Michael? Assuming they are given, the Panel will address on a “turnaround basis.”

R.46-3 at 9. WellPoint provided the requested confirmation:

We accept the Panel’s inquiry as not being a matter of condition precedent, but a reasonable inquiry at this stage. To set everyone’s mind at rest: We confirm that the individual we have in mind has not served as an arbitrator on any John Hancock matter or any matter involving the two underlying books of business. We further assure the Panel that [co-counsel] John Nonna and I have thoroughly vetted this individual for conflicts, scheduling and otherwise, and have found that there are none. We look forward to the Panel’s reply.

R.46-3 at 7.

Hancock conditioned its approval to Nichols’ withdrawal on knowing his replacement in advance. According to Hancock, WellPoint had to

name its candidate so that all legitimate concerns can be properly evaluated by the Panel and John Hancock before a decision is made regarding the proposed removal of Mr. Nichols. Once WellPoint names its candidate, we will promptly evaluate these issues and respond.

R.46-8 at 12. WellPoint then reiterated its view that neither WellPoint nor the panel could compel Nichols’ resignation, confirmed that its replacement arbitrator had no conflicts, and asked the panel to decide whether Nichols could resign. R.46-8 at 17.

On September 3, 2005, the Umpire issued the following on behalf of the panel regarding the arbitrator replacement issue:

Mark and Mike, thank you for the prompt responses. Mike, as you have noted, there was no condition precedent or prerequisite by the Panel. Rather, if that information would be provided it would aid in the Panel's assessments. The Panel would be less than candid if we did not admit that those inquiries were tailored to prospectively ease Mark's "furrowed brow." Mark will probably agree with you that even with answers, he and his Client will remain "troubled." \* \* \* We appreciate the "spirit" which has allowed you to negate the candidates service in "ANY" capacity as to Hancock matters, or on assumed or ceded on the two books of business. Further, your secondary clarification that "any" was inclusive of all manner of consulting and counsel. Finally, we acknowledge your initial affirmation that if there was a timely substitution, the substitution of Counsel and arbiter would not erode the agreed schedule or hearing date.

SA6.<sup>1</sup>

Thereafter, in the same e-mail, the Umpire communicated the panel's unanimous ruling:

Based on the foregoing, David Nichols has requested to withdraw as arbiter and *the Panel accepts his withdrawal*. The remanents [sic] of the Panel will await Wellpoint's advancing of a candidate for disclosure in accord with the affirmed "vetting."

*Id.* (emphasis added). That ruling was issued by the full three-member panel — Nichols, DeCarlo, and Bakka. DeCarlo (who twice dissented from other panel rulings) issued no dissent from the panel ruling accepting Nichols' withdrawal.

Hancock maintained a continuing objection to Nichols' resignation. R.46-3 at 12. But it did not seek judicial intervention to fill the resulting vacancy.

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<sup>1</sup> "SA\_\_" refers to WellPoint's Supplemental Appendix, which is attached hereto.

### **3. Selection of WellPoint's replacement party-appointed arbitrator.**

After the panel accepted Nichols' withdrawal, WellPoint appointed Timothy McCaffrey, a retired General Counsel of General Reinsurance Corporation, as its party-appointed arbitrator. R.46-9. Hancock objected, contending that Hancock should select Nichols' replacement, or "[a]lternatively, the two remaining Panel members should select a replacement and, absent their agreement, the matter should be submitted to the American Arbitration Association." R.46-3 at 12-13. In addition, Hancock objected to McCaffrey based on his experience with workers' compensation carve-outs, a type of business at issue in the arbitration, and because McCaffrey's former employer was a Hancock reinsurer. *Id.* at 13-15.

The Panel structured a vetting process to address Hancock's concerns and provided Hancock with an extensive role. Based on McCaffrey's disclosures about his experience and background during a teleconference, the Umpire and DeCarlo rejected WellPoint's selection of McCaffrey as its party-appointed arbitrator due to his prior experience with workers' compensation carve-outs and contact with Hancock. R.46-10 at 10.

Following that rejection, in September 2005 WellPoint designated George C. Pratt, a retired judge from the U.S. Court of Appeals for the Second Circuit, as its party-appointed arbitrator. R.46-11 at 2. Hancock again objected, contending that Judge Pratt did not satisfy the contractual qualifications and had once

reviewed Hancock documents for privilege while serving as special master in another matter. R.46-11 at 6-7.

In the face of Hancock's objections, DeCarlo, Hancock's appointed arbitrator, proposed that he and the Umpire pick three arbitrators associated with the AIDA Reinsurance and Insurance Arbitration Society (ARIAS) and have WellPoint choose one of them. R.46-11 at 13. When WellPoint did not immediately accept that proposal, Hancock's counsel, Mark Leimkuhler, observed that there is "case law that will support this." *Id.*

WellPoint then asked the arbitrators for assurances that DeCarlo would not have *ex parte* communications with Hancock's counsel while the arbitrators considered Judge Pratt's appointment. R.46-11 at 15. In response, the Umpire and DeCarlo requested the opportunity to speak *ex parte* with WellPoint's counsel:

Thanks for the email Mike—and appropriate concern. \* \* \* Don [DeCarlo] and I have spoken this morning and we elected to ask Mark [Leimkuhler], et al., for permission for the Panel to speak solely with "Team LeBoeuf". The topic solely confined to your current candidate (acknowledging reservations all around). \* \* \* [Y]our request [for no *ex parte* communications between Hancock's counsel and its party arbitrator] seems reasonable and I'll turn to Mark, et al., adding that provision to our request for his permission.

R.46-11 at 15. On October 6, 2005, the Umpire clarified the reasons for seeking an *ex parte* communication with WellPoint's counsel:

What Don and I are asking for, is for the opportunity to talk to "Team LeBoeuf" solely on the candidate they have advanced as a substitute for Tim. \* \* \* Without Panel opining, for the present, we would like the opportunity to speak solely with

Mike and John – just on the topic of their proffered candidate. What Mike is asking, is for a Maxwell Smart “cone of silence”, to exist on that limited exchange. Mark, within the exchange there will be no “argument” because it would be redundant of respective Counsel’s comprehensive written offerings on Judge Pratt.

R.46-11 at 18 .

WellPoint then agreed that DeCarlo, Hancock’s party-appointed arbitrator, could speak *ex parte* with Hancock’s counsel to explain why DeCarlo and the Umpire wanted to speak *ex parte* with WellPoint’s counsel. R.46-11 at 20. The Umpire thereafter reported that, based on Hancock’s *ex parte* communications with its own arbitrator, Hancock agreed that the Umpire and Hancock’s arbitrator could speak *ex parte* to WellPoint’s counsel: “Mike and John, Don [DeCarlo] advised late Friday, that Mark [Leimkuhler] had signed off on the potential *ex parte*.” SA7.

The Umpire and DeCarlo proceeded to contact WellPoint’s counsel by telephone. During this authorized *ex parte* communication, DeCarlo and the Umpire suggested several arbitrator candidates, including Norman Krivosha, a retired Chief Justice of the Nebraska Supreme Court, who had also served as officer of a life insurance company:

WellPoint did agree, upon request of Messrs. Bakka and DeCarlo, to consider additional candidates. Among the candidates suggested by Messrs. Bakka and DeCarlo was Judge Norman M. Krivosha (retired).

R.46-11 at 24. After WellPoint informed the arbitrators that it would appoint Krivosha as its party-appointed arbitrator (*id.*), the Umpire wrote to Hancock's counsel:

Don [DeCarlo] and I confirm that Judge Krivosha was one of several advanced as possibilities. Attention was drawn to him because of his "life" general counsel service and his years removed from the insurance industry (ie. no "carve out involvement").

R.46-11 at 25. The Umpire asked the parties to work together to vet Krivosha so that a full panel could proceed with the arbitration. *Id.*

On October 20, 2005, the panel, the parties, and Krivosha held a teleconference. Hancock extensively questioned Krivosha about his background, any relationships with the other panel members, the parties, or their counsel, and any knowledge of or experience with the subject matter of the arbitration. R.46-12 at 11-15, 20-23, 25. Krivosha disclosed that he was a former Chief Justice of the Nebraska Supreme Court and former general counsel of a life insurance company; he was once a party-appointed arbitrator in a case where Bakka was umpire (which settled prior to hearing); and he had no prior relationship with WellPoint or its counsel. *Id.* at 11-15, 20-23, 25-26.

The next day, Hancock renewed its objection to Nichols' resignation and to WellPoint's role in the replacement process, but it agreed that Krivosha met the panel's prerequisites for service as WellPoint's party-appointed arbitrator:

At the outset, John Hancock renews its earlier-stated objections and positions regarding WellPoint's proposed removal of Mr. Nichols and selection of a replacement arbitrator, and the following comments regarding Judge Krivosha's qualifications

and experience are made without waiving and in full reservation of those objections and positions. \* \* \* Judge Krivosha appears to have the requisite experience under the governing arbitration clause, and we have no knowledge of any prior experience Judge Krivosha has had that would violate the other “prerequisites” the Panel has identified.

SA8. The Umpire then advised the parties that Krivosha had joined the panel, stating:

“Don [DeCarlo, Hancock’s arbitrator] and I confirm that Judge Krivosha is now ‘gainfully employed’ and the Panel is ‘duly constituted.’”

SA11. With a full panel again in place, the arbitration proceeded as scheduled.

#### **4. The Phase I and Phase II hearings and awards.**

At the panel’s suggestion, the arbitration hearing was conducted in two phases.

At the Phase I hearing in March 2006, the panel made clear that Phase I would address only liability issues and categories of potential damages, not the amount of damages. R.46-13 at 46-47. The Panel repeated that understanding when Hancock sought to introduce damages evidence, stressing that evidence regarding the amount of damages would be reserved for “Part 2.” *Id.* at 48.

The panel’s Phase I liability award fully disposed of all disputed liability issues. The panel concluded that WellPoint had not purchased the Bermuda Business in the GBO Transaction and therefore had no liability arising out of that business. DeCarlo, Hancock’s party-appointed arbitrator, dissented with respect to that ruling. The panel further ruled that WellPoint had assumed 100% of the Hackett Business and 100% of the FASCO Business (with certain limitations).

A.34. The panel's ruling that WellPoint bore no liability for the Bermuda Business made damages-related evidence submitted by Hancock irrelevant because Hancock had assumed WellPoint's responsibility for the Bermuda Business. Thus, Hancock had to develop entirely new damages calculations, which became the subject of Phase II.

The Phase II hearing in February 2007 addressed only the quantification of the damages to which Hancock was entitled. The panel's Phase II award directed WellPoint to pay Hancock \$26,093,162.45, plus \$2,950,000 in "offsetting balances and interest assessments." A.38. Shortly thereafter the Panel increased the award to \$26,482,917.20. A.41.

### **5. The district court proceedings.**

WellPoint filed a petition to confirm the Phase I award on February 20, 2007. R.1. After the panel issued its Phase II award, WellPoint filed an amended petition to confirm both the Phase I and Phase II awards. R.32. On May 21, 2007, after the panel revised the damages calculations, WellPoint filed a second amended petition. R.35. On May 24, 2007, Hancock filed a cross-petition to vacate the panel's award, claiming only that the arbitrators were not selected in accordance with the PSA. R.37.

The district court confirmed the award. It articulated the issue as "whether the panel has authority to render an award when an arbitrator has been duly selected by a party but subsequently withdraws, and the arbitration agreement does not expressly provide for this contingency." A.25. Looking to the "intent of

the parties, as evidenced by their agreement,” the court found that the PSA requires only that “the arbitration proceed before a panel comprised of one arbitrator chosen by each party and a neutral umpire,” and concluded that this “is what occurred here.” A.28.

The court rejected Hancock’s contention that WellPoint’s request that Nichols resign constituted “wrongdoing.” The court noted that it is “an arbitrator’s prerogative to resign his post if he determines it is in the best interests of the parties”; WellPoint told the panel that it had “no right to remove Nichols, and that whether to remain on the panel was entirely Nichols’ decision”; the Panel determined, after discussions with the parties, that Nichols’ withdrawal would not affect the arbitration schedule; and the Panel therefore “accepted his resignation.” A.29-30.

The court also found that the selection of Krivosha to fill the resulting vacancy “was made through a lengthy process in which John Hancock had significant input,” and that Hancock “agreed that Krivosha met the prerequisites for service as WellPoint’s party-appointed arbitrator.” A.28. Further, the court explained, Hancock had not argued to the arbitrators, as it did to the court, that “the entire panel should be disbanded and reconstituted,” instead proposing that Hancock select WellPoint’s replacement party arbitrator. *Id.*

In addition, the court rejected Hancock’s contention that the recommendation of Krivosha by the Umpire and DeCarlo in an *ex parte* communication with WellPoint made the replacement process “unfair.” A.30.

The court explained that “Hancock agreed to the *ex parte* communication” and did not object to its scope during the arbitration. *Id.* Moreover, the court found, “the *ex parte* discussion did not involve any decisions made in John Hancock’s absence.” *Id.*

The district court also rejected Hancock’s contention that the timing of Krivosha’s appointment affected the legitimacy of the reconstituted Panel. The court explained that Krivosha was appointed “*prior* to the arbitration hearing, heard all of the evidence, and fully participated in the deliberations and rendering of the panel’s decision.” A.32.

Finally, the district court rejected two alternative arguments raised by WellPoint: (i) that Hancock waived its challenge to the composition of the panel by failing to contest Krivosha’s appointment immediately pursuant to Section 5 of the FAA; and (ii) that Hancock’s challenge to the panel’s Phase I liability ruling was untimely.

Hancock’s appeal followed. As its brief states, Hancock appeals because the arbitrators awarded it “a smaller amount than it had sought.” Aplt. Br. 4.

## **SUMMARY OF ARGUMENT**

### **I.**

The panel acted within its contractual authority by accepting Nichols’ resignation and providing for a fair and reasonable replacement process. The PSA does not address how to proceed in those circumstances, requiring only that each party appoint one qualified arbitrator, which is precisely what occurred.

When Nichols proposed to resign, the panel solicited both parties' views before deliberating and issuing a ruling accepting that resignation. Before permitting WellPoint to appoint a replacement, the remaining arbitrators ensured that the scheduled hearing would not be delayed and that Hancock would not otherwise be prejudiced. They placed conditions on WellPoint's appointment, rejected WellPoint's first two nominees, and then adopted the suggestion of Hancock's appointed arbitrator that he and the Umpire propose three qualified arbitrators from which WellPoint would select one. They approved WellPoint's selection, Judge Krivosha, only after a full hearing in which Hancock participated and after Hancock affirmatively stated that it deemed Krivosha qualified. Hancock had full opportunity to help tailor and participate in this process, which implemented contract interpretations and procedural determinations of arbitrators specifically engaged to interpret the contract and establish arbitral procedures. Hancock's characterization of that process as unauthorized is simply a stratagem to undo a merits award that disappointed it. The district court's rejection of that stratagem should be affirmed.

## II

WellPoint raises two alternative grounds for affirmance. The first is that Hancock waived any right to seek to vacate the award by failing to seek immediate judicial relief under Section 5 of the FAA at the time of Krivosha's appointment. Parties objecting to the filling of a panel vacancy must do so immediately and not wait to see how they fare on the merits, as the Eighth Circuit

held in *Dow Corning v. Safety National Casualty*, 335 F.3d 742 (8th Cir. 2003). Hancock's gamesmanship should not be condoned.

### III

WellPoint's second alternative ground is that Hancock's challenge to the panel's Phase I liability ruling is time-barred. Section 12 of the FAA requires that a petition to vacate be filed within three months of an award. This Court's precedents and rulings of other Courts of Appeals make clear that whether an arbitral ruling is ripe for judicial review does not depend on whether it is labeled a "ruling" or an "award" but rather on whether the arbitrators have completed their assignment. Where an arbitration hearing is bifurcated into liability and damages phases, as here, the arbitrators complete their liability assignment upon the issuance of a liability award. Hancock therefore had to file its petition to vacate the Phase I award within three months. Instead, it waited a full year, making its petition untimely.

### **ARGUMENT**

In a recent petition for certiorari, Hancock, represented by some of the same attorneys representing it on this appeal, rightly cautioned that courts are beset with unwarranted attempts to overturn arbitration awards, "resulting in substantial cost and delay and often wiping out any efficiencies that resulted from the parties' agreement to arbitrate rather than litigate." R.46-14 at 17. That is precisely what Hancock's appeal amounts to here. As Hancock states (Aplt. Br. 4), it obtained "a smaller amount than it had sought" from the arbitrators, and it

now seeks to obtain a larger amount by having this Court cast aside the multi-year arbitration and have it begin again from scratch. It has no basis in fact or law for that request.

The grounds for vacatur in Section 10(a) of the FAA are construed narrowly “to prevent arbitration from becoming merely an added preliminary step to judicial resolution rather than a true resolution.” *Flender v. Techna-Quip*, 953 F.2d 273, 278 (7th Cir. 1992). A court’s review is “extremely limited” even where the petitioner contends that the arbitrator “exceeded his powers” pursuant to Section 10(a)(4). *Prostyakov v. Masco*, 513 F.3d 716, 723 (7th Cir. 2008); see *Major League Baseball Players Ass’n v. Garvey*, 532 U.S. 504, 509 (2001). Hancock may be disappointed with the panel’s findings and conclusions, in particular with its ruling that WellPoint did not purchase the Billyard Bermuda business as part of the GBO Transaction. But parties who “have chosen arbitration and been disappointed in their choice” cannot resort to courts “to undo the results of their preferred method of dispute resolution.” *Merit Ins. v. Leatherby Ins.*, 714 F.2d 673, 683 (7th Cir. 1983).

#### **I. The Panel Did Not Exceed Its Authority.**

According to Hancock, the awards should be vacated because the withdrawal and replacement of WellPoint’s party-appointed arbitrator did not comply with the terms of the PSA’s arbitration clause. Aplt. Br. 21. Therefore, according to Hancock, the panel that rendered the awards lacked authority to do so. Hancock is wrong, both on the facts and the law.

**A. The arbitrators acted within their contractual authority by accepting Nichols' resignation.**

Hancock asserts that a party has “no right to remove an arbitrator” unless it is “expressly given that authority by the arbitration agreement.” Aplt. Br. 30. But WellPoint did not “remove” Nichols, and Hancock has no basis for suggesting that his withdrawal was tied to WellPoint’s responsibility for paying his fees. *Id.* at 31. In fact, WellPoint acknowledged, and the panel agreed, that it did not have the power to remove Nichols or demand his resignation. AA.33; AA.34. The record shows that WellPoint requested that Nichols voluntarily withdraw, he agreed, and the full panel, which was well aware of the circumstances leading to Nichols’ request, unanimously approved his withdrawal. See *supra* pp.5-9. This sequence of events did not violate the PSA’s arbitration provision which, as the district court explained, does not contain “any provisions addressing what should occur if a duly appointed arbitrator resigns.” A.25.

“Arbitrators may resign for any reason.” 3 Ian R. Macneil et al., *FEDERAL ARBITRATION LAW* § 30.4.2, at 30:6 (1999); accord 1 Larry E. Edmonson, *DOMKE ON COMMERCIAL ARBITRATION* § 24.3, at 24-2, 24-3 (3d ed. 2008) (“Arbitrators have an unqualified right to resign”). The potential reasons for such a resignation are innumerable, including illness, family issues, a late-arising conflict, lack of interest in the case, and a belief that it would best serve the parties’ interests. “[T]he recognized prerogative of an arbitrator to resign his post if it is in the best interests of the parties” is well settled. *Evanston Ins. v. Kansa Gen. Int’l Ins.*, 1995 WL 23063, at \*4 (N.D. Ill. Jan. 13, 1995); accord *Florasynt v. Pickholz*, 750

F.2d 171, 174 (2d Cir. 1984) (where the arbitrators “believed that their resignation under the circumstances would best serve the interests of the parties, it was both their right and their responsibility to resign”).

When a panel member proposes to resign, and the arbitration agreement does not address such a development, the panel must determine what is to be done. Here, the panel did just what an adjudicative body should do. It did not permit WellPoint, or even WellPoint and Nichols together, to authorize Nichols to resign, but rather insisted that any such authorization come from the panel. The panel then reviewed the PSA, outlined its concerns about the arbitration schedule, solicited input, received submissions, heard argument from the parties, and engaged in deliberations. See *supra* pp.5-9. Hancock argued then, as it does now, that WellPoint forced Nichols’ resignation and that he therefore should not have been permitted to resign. R.46-7 at 2. The panel rejected that argument and rendered a ruling accepting Nichols’ resignation, stating: “Based on the foregoing, David Nichols has requested to withdraw as arbiter and the Panel accepts his withdrawal.” SA6.

That ruling was issued by the full panel of Bakka, DeCarlo, and Nichols, which, as Hancock acknowledges, was properly constituted pursuant to the PSA’s arbitrator appointment provisions. Hancock is poorly placed to challenge that ruling because, by entering into the PSA, it agreed to be bound by all such rulings. See *George Watts & Son v. Tiffany & Co.*, 248 F.3d 577, 580-81 (7th Cir. 2001) (an arbitrator’s decision represents “an agreement between the parties

themselves”; “[p]eople who want their arbitrators to have fewer powers need only provide this by contract”). Indeed, Hancock, who proposed that the Umpire and DeCarlo decide whether Nichols could withdraw, actually received more process than it originally sought given Nichols’ participation in the decision. R.46-8 at 3. Yet, Hancock now attempts to repudiate its delegation of authority to the panel by challenging its decision to accept Nichols’ resignation.

First, Hancock asserts that “there was no arbitration ruling” on this issue (Aplt. Br. 60), as if the panel never said in writing that “the Panel accepts his [Nichols’] withdrawal.” SA6. Hancock even omits that ruling from its Separate Appendix, despite its centrality to this appeal and Hancock’s inclusion of other arbitral communications in its Separate Appendix.

Second, when Hancock does reference that ruling, it blatantly misrepresents it by stating: “In a September 3, 2005 email, the Umpire stated that Mr. Nichols had asked to withdraw and that *the remaining members of the Panel* had accepted his decision to do so.” Aplt. Br. 9-10 (emphasis added). In fact, the Umpire’s e-mail plainly states that “the Panel accepts his withdrawal,” not that the “remaining members” do.<sup>2</sup>

Finally, Hancock incorrectly asserts that the district court “disregarded” WellPoint’s role in Nichols’ resignation. Aplt. Br. 43. In fact, the district court

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<sup>2</sup> The district court mistakenly deemed it “not at all clear from the record” whether a duly constituted panel allowed Nichols’ withdrawal. A.30 n.8. As explained above, the Umpire’s email makes clear that the full panel of Nichols, DeCarlo and Bakka accepted Nichols’ withdrawal. The fact that their decision was issued by email makes it no less valid; virtually all of the arbitrators’ decisions were disseminated in that manner.

addressed WellPoint’s role at length. The court explained that “WellPoint made clear to the panel that it was fully aware it had no right to remove Nichols, and that whether to remain on the panel was entirely Nichols’ decision”; after authorized *ex parte* discussions, “Nichols decided to withdraw, and the panel accepted his resignation”; and WellPoint “fully cooperated” in the panel’s effort to fill the vacancy. A29-A30.

In sum, the panel properly addressed Nichols’ resignation. The full panel considered each of Hancock’s arguments, duly deliberated, and issued a ruling accepting the resignation. Hancock has no valid ground for contending that the panel lacked authority to deal with this development in such considered fashion.

**B. The arbitrators acted within their authority by accepting Krivosha’s appointment.**

Hancock’s challenge to Krivosha’s appointment is equally misplaced. As demonstrated below, Krivosha’s appointment complied with the relevant PSA terms; Hancock relies on cases that do not address the filling of a panel vacancy; Hancock’s proposal that a panel vacancy requires the arbitration to start over from scratch does not reflect the law and is untenable; and Krivosha was appointed through a fair and reasonable process.

**1. Krivosha’s appointment was not inconsistent with the PSA.**

As with Nichols’ resignation, the appointment of Judge Krivosha to fill the resulting vacancy did not violate the PSA, which is silent on how to appoint a replacement arbitrator.

Although the PSA does not expressly address that issue, it provides sufficient direction to conclude that the replacement process here did not violate it. In particular, the PSA provides that each party is to select one arbitrator, with the umpire to be selected by the two party arbitrators or the AAA, and that each arbitrator must have certain qualifications. A.42 § 15.3. It is undisputed that WellPoint appointed Judge Krivosha as its arbitrator, that Hancock has consistently acknowledged that Krivosha possessed the specified qualifications, and that the Umpire was duly appointed by the AAA. See *supra* pp.13-14.

Hancock suggests that the parties “chose not to include a provision for the appointment of replacements” and that they thereby agreed not to allow the appointment of a replacement. Aplt. Br. 28. To be sure, as the district court noted, “[t]he parties could have specified what should occur in the event of a resignation or inability to serve by one of the arbitrators.” A.27. But the reality is that procedures to fill panel vacancies are rarely referenced in reinsurance contracts or other ad hoc arbitration agreements, reflecting the parties’ intent that the resolution of such issues be left to the arbitrators. See Paul M. Hummer, *The Law of Arbitrator Selection*, ARIAS U.S. Quarterly, Vol. 14, No. 1, at 2 (2007) (“Many arbitration clauses do not address what happens if an arbitrator withdraws for some reason before an award is rendered by the panel”).

The PSA certainly does not contain any provision requiring, as Hancock asserts, that each party may select an arbitrator only “at the outset of an arbitration.” Aplt. Br. 30. In Hancock’s view, Krivosha’s appointment violated

the PSA because the latter requires that a party appoint its initial arbitrator within 20 days after the arbitration demand. *Id.* at 32, 46. The district court properly found that contention “untenable,” explaining that Hancock’s position “would prohibit either party from ever choosing an arbitrator after the expiration of the initial 20-day period.” A.27. Indeed, under Hancock’s theory, if an arbitrator resigned, became disabled, or died more than 20 days after the initial demand, no replacement could be made that would comply with the parties’ agreement. In practice, that would mean a panel vacancy could *never* be filled, because panels are never in place by 20 days after the initial demand.

Hancock’s only response is that a court must adhere to the inapposite time limit even if it would be “ill-advised” to do so. *Aplt. Br.* 46-47. That position cannot be reconciled with the practical realities of conducting an arbitration. As this Court has recognized, arbitrators have “wide latitude” to fill “contractual voids” and thereby ensure that the lack of “explicit provisions” does not lead to “an illogical and inappropriate result.” *Chameleon Dental Prods. v. Jackson*, 925 F.2d 223, 225-26 (7th Cir. 1991).

Applying that principle, where an arbitration agreement does not specify the process for filling a panel vacancy, the remaining arbitrators must be allowed to fill the vacancy through any reasonable means that does not conflict with the parties’ agreement. The Eighth Circuit so ruled in *Dow Corning*. There the court found it “reasonable,” after Safety’s party-appointed arbitrator resigned, for the remaining arbitrators “to allow Safety to choose its substitute party-arbitrator.”

335 F.3d at 749. If that procedure was reasonable, even more so was the procedure here, where WellPoint was permitted to select its substitute party arbitrator only after a careful vetting process in which its first two selections were rejected and its final selection came from a list proposed by Hancock’s party-appointed arbitrator and the Umpire. As in *Dow Corning*, Krivosha was appointed consistent with “the method of selecting party-arbitrators prescribed in the agreement to arbitrate.” *Id.*

*Dow Corning* does not stand alone. Courts in this circuit agree that an arbitral party may replace its party-appointed arbitrator if a vacancy develops. In *Evanston*, 1995 WL 23063, at \*3, the court found that where, as here, the parties’ agreement did not directly address how to proceed if an arbitrator resigned, it did express the parties’ “overriding intent” to submit their disputes to binding arbitration before a three arbitrator panel, with each party nominating one arbitrator. The court concluded that it could best “effectuate that intent” by upholding the party’s designation of its own replacement party arbitrator. *Id.*; accord *Argonaut Midwest Ins. v. General Reins.*, 1998 WL 474142, at \*3 (N.D. Ill. Aug. 6, 1998).

Hancock contends that *Evanston* and *Argonaut* are “irrelevant” because they did not involve an attempt to vacate an award based on the arbitrators’ lack of “contractual authority.” Aplt. Br. 39-40. But those cases address the very issue presented by this case — what to do when one member of a three-arbitrator panel resigns and the parties’ agreement does not address such an occurrence. In

each case, the court reviewed the contract's arbitral appointment provisions (which were almost identical to those here) and devised a practical solution that remained faithful to those provisions by permitting each party to appoint one arbitrator.

Hancock also contends that the Umpire “attempt[ed] to avoid” deciding whether WellPoint had a right to appoint a substitute. Aplt. Br. 61, n.18. But what Hancock asked the panel to address was whether WellPoint could “*unilaterally* select a replacement” for Nichols. AA.44. There was no need to address that question because WellPoint agreed that it had no “unilateral” right to replace Nichols, instead withdrawing its first two candidates at the behest of the panel and selecting a third from a list proposed and vetted by the Umpire and Hancock’s arbitrator.

Hancock further argues that the district court improperly applied a “‘general intent’ test” to reject Hancock’s challenge to Krivosha’s appointment. Aplt. Br. 36. But the full sentence from which Hancock plucks that phrase shows that the court had its eyes fixed squarely on the PSA: “In the absence of an express term in the agreement governing the contingency involved in this case, the Court looks to the general intent of the parties, as evidenced by their agreement.” A.28. Noting that the PSA “evidences the parties’ intent that the arbitration proceed before a panel comprised of one arbitrator chosen by each party and a neutral umpire,” the court explained that “[t]hat is what occurred here.” *Id.*

The district court's approach was consistent with this Court's arbitration decisions, which hold that courts interpret arbitration provisions to ascertain the parties' intent, for which the written agreement provides "the best evidence." *Universal Reinsurance v. Allstate Ins.*, 16 F.3d 125, 129 (7th Cir. 1994). Thus, a court "must enforce the arbitral award so long as the arbitrator's interpretation can in some rational manner be derived from the agreement, viewed in the light of its language, its context, and other indicia of the parties' intention." *Butler Mfg. v. United Steelworkers of Am.*, 336 F.3d 629, 636 (7th Cir. 2003).

That principle applies with extra force here because the PSA confers authority over the "operation or interpretation of this Agreement" to the arbitrators. A.42. That assignment necessarily includes the authority to determine, in light of provisions that do not expressly address panel vacancies, how the parties would have intended to fill them. Even if this were a close question, "[c]lose questions concerning the interpretation of the scope of the powers authorized to the arbitrator are resolved in favor of those powers." *Baravati v. Josephthal, Lyon & Ross*, 28 F.3d 704, 710 (7th Cir. 1994).

Furthermore, the PSA provides that the arbitrators may make such decisions based on "principles of fairness, equity, reason and custom in the insurance and reinsurance industry in reaching their decision." A.42. That broad delegation of authority fully empowered Hancock's party arbitrator and the Umpire to decide how best to fill the vacancy left by Nichols' resignation.

A recent decision by this Court is instructive. In *Prostyakov*, 513 F.3d at 721, Masco sought to vacate an unfavorable arbitration award on the ground that the arbitrator's appointment was inconsistent with the parties' agreement. The agreement stated that the arbitration would be conducted "privately," which Masco argued precluded the appointment of an arbitrator with an AAA affiliation. Masco conditionally agreed to such an appointment and moved to dismiss the arbitration claim based on the arbitrator's purported lack of authority. The arbitrator denied that motion based on his interpretation of the parties' agreement. *Id.* This Court rejected Masco's Section 10(a)(4) argument for vacatur, explaining that "nothing in the Agreement expressly or implicitly defines a 'privately' conducted arbitration as one that excludes the participation of the AAA," and concluding that "we will not interpolate that meaning here." *Id.* at 723-24. Hancock's Section 10(a)(4) challenge should get similarly short shrift. Just as the agreement in *Prostyakov* was silent on the meaning of "privately," here the PSA is silent on the process to be followed in the event of a panel vacancy. In those circumstances, the Court in *Prostyakov* refused to override the arbitrator's contract interpretation, and the Court should refuse to do so here as well.

## **2. Hancock relies on inapposite cases.**

Hancock relies on cases that address only the initial appointment of arbitrators. For example, in *R.J. O'Brien & Assocs. v. Pipkin*, 64 F.3d 257 (7th Cir. 1995), the defendant sought to vacate an award because one of the arbitrators

was not a National Futures Association member, as required by the applicable arbitration rules. The Court refused to vacate the award because the departure from the rules was “trivial.” *Id.* at 263. More important, the case did not involve any panel vacancy, and thus the Court’s recognition that contractual appointment requirements must be followed has no bearing on this case, where it is undisputed that the initial panel was selected pursuant to the PSA’s terms and the PSA authorized WellPoint to appoint one of the arbitrators. The same is true of the other cases cited by Hancock, including *Tamari v. Conrad*, 552 F.2d 778 (7th Cir. 1977), *Universal Reinsurance*, 16 F.3d at 125, and *Bulko v. Morgan Stanley DW*, 450 F.3d 622 (5th Cir. 2006), none of which involved the filling of a panel vacancy.

In relying on cases involving a purported failure to follow the contract when appointing initial arbitrators, Hancock fails to grasp the fundamental difference between that context and the replacement context. In the initial appointment cases, the courts are not reviewing arbitral decisionmaking; the issue is whether the parties or an arbitral institution complied with the parties’ agreement. In contrast, the withdrawal and replacement context involves decisions by arbitrators who were incontestably selected in accordance with the parties’ agreement.

Hancock cites only a single case where an arbitration award was vacated due in part to the appointment of a replacement arbitrator, *Association of Flight Attendants v. Aloha Airlines*, 158 F. Supp. 2d 1200 (D. Haw. 2001). That case,

which the district court found to be “not on point” (A.32), involved unusual facts that have no relation to those underlying this appeal.

*Flight Attendants* involved a challenge to a collective bargaining arbitration award under the Railway Labor Act. After the company’s party arbitrator resigned following the hearing and only the arbitrators’ decision remained pending, the other two arbitrators each issued conflicting awards. 158 F. Supp. 2d at 1202-03. The company appointed a substitute arbitrator, who then issued a third opinion concurring in the denial of the union’s grievance. *Id.* The company contended that the arbitration concluded in its favor, while the union contended otherwise. It was that dispute that prompted the court’s ruling. *Id.* at 1206-08. Significantly, the court distinguished situations where, as here, a party arbitrator resigns before the evidentiary hearing occurs, recognizing that in such cases the replacement has an opportunity to hear the evidence before the award is rendered. *Id.* at 1207-08. Thus, *Flight Attendants* provides no support for Hancock’s view that appointing replacement arbitrators is impermissible where the contract does not address that issue.

**3. Hancock’s proposal that a panel vacancy requires the arbitration to begin anew is unviable.**

Hancock posits a “general rule” that if an arbitration panel vacancy arises during the arbitration, and the arbitration agreement is silent on replacement procedures, the arbitration “must commence anew with a full panel.” Aplt. Br. 29. No such “general rule” applies here.

As an initial matter, Hancock waived reliance on any such rule by failing to contend in the arbitration that the proceeding should start anew. *Central States, S.E. & S.W. Areas Pension Fund v. Midwest Motor Express*, 181 F.3d 799, 805 (7th Cir. 1999) (an objection “not raised [in] the arbitration is waived”); *Baltimore & Ohio Chicago Terminal R.R. v. Wis. Cent. Ltd.*, 154 F.3d 404, 409-10 (7th Cir. 1998) (same); *Health Servs. Mgmt. v. Hughes*, 975 F.2d 1253, 1261-64 (7th Cir. 1992) (denying petition to vacate award where party waived challenge to propriety of arbitrators by failing to raise it in arbitration). As the district court noted, “[a]t no time did John Hancock argue that the entire panel should be disbanded and reconstituted.” A.28.

In fact, Hancock insisted on assurances that the arbitration would proceed according to the current schedule. R.46-6 at 5. And Hancock itself proposed — as an acceptable method of filling the vacancy — that Hancock choose the replacement for WellPoint’s party arbitrator or that “the two remaining Panel members should select a replacement.” R.46-3 at 13. The latter proposal was largely implemented, with the two remaining Panel members proposing several possible replacements of which WellPoint selected one. Having obtained less in damages than it sought, Hancock now demands a different solution. Principles of waiver and estoppel bar that demand.

In any event, this circuit recognizes no “general rule” that arbitration must commence anew once a vacancy arises. In the fourth of the *Tamari* appeals, this Court held that an arbitrator’s withdrawal from a panel during arbitration

proceedings did *not* require the remaining arbitrators to recuse themselves, as the Tamaris requested. *Tamari v. Bache Halsey Stuart*, 619 F.2d 1196, 1198-99, 1202 (7th Cir. 1980); see also *Argonaut*, 1998 WL 474142; *Evanston*, 1995 WL 23063.

The Eighth Circuit, too, has rejected what it called the “so-called” general rule espoused by Hancock in circumstances analogous to those here. *Dow Corning*, 335 F.3d at 749. In fact, what Hancock calls the “general rule” is expressed only in some Second Circuit cases, and even there its applicability depends on the “circumstances.” *Marine Prods. Export v. M.T. Globe Galaxy*, 977 F.2d 66, 68 (2d Cir. 1992). In one case, for example, the Second Circuit upheld the appointment of a new party arbitrator by the party whose initial party arbitrator had died. The court explained that “the reference in [FAA] § 5 to ‘filling a vacancy’ would make no sense if the Act were construed to require that whenever one arbitrator died the entire panel must be removed.” *Trade & Transp. v. Natural Petrol. Charterers*, 931 F.2d 191, 196 (2d Cir. 1991); see also *Sec. Ins. of Hartford v. Commercial Risk Reins.*, 2007 WL 4917787, at \*1 (S.D.N.Y. May 8, 2007) (panel “reconstitution [is] unnecessary, as the resignation of the arbitrator \* \* \* occurred prior to any evidentiary or substantive proceedings”).

In fact, the latest case from the Second Circuit on this issue, which Hancock does not address, appears to overthrow the so-called “general rule.” In *Zeiler v. Deitsch*, 500 F.3d 157, 163 (2d Cir. 2007), after a party-appointed

arbitrator resigned, one party argued that the panel must be reconstituted. The two remaining arbitrators rejected that view, continued with the arbitration, and issued awards. The district court granted the objecting party's motion to vacate the awards, and the Second Circuit reversed. It explained that "[t]he authority of the two remaining arbitrators after the resignation of the third one is essentially an issue of contract interpretation, grounded in the language of the agreements between the parties," and concluded that the contract did not limit the arbitrators' authority "to continue in the unexpected event that one of the members might resign." *Id.* at 166-67. Instead, a "sensible reading" of the contract "makes continuation of the remaining members of the panel (with an opportunity for appointment of a replacement) the default position." *Id.* at 167.

Commentators agree that arbitration need not commence anew in the event of a vacancy, as Hancock maintains. One treatise states that an arbitrator's resignation "does not normally signal the end of arbitration" unless the arbitration agreement shows that the parties "clearly intended" that result, and that otherwise "a replacement may be appointed in accordance with the terms of the parties' agreement or applicable statute." 3 Macneil et al., *supra* p.21, § 30.4.2, at 30:7. Another treatise recognizes the holdings of recent decisions that "where one of the arbitrators resigns or withdraws," even "after the arbitrators have heard the evidence and have had the chance to discuss the issues," the remaining arbitrators "maintain their authority to make an award." DOMKE ON COMMERCIAL ARBITRATION, *supra* p.21, § 26.4, at 26-13. Here, of

course, the remaining arbitrators did not go so far, instead ensuring that the vacancy was filled before proceeding further.<sup>3</sup>

Hancock deviates from its own proposed general rule by suggesting that filling a vacancy can be appropriate if it happens early in the arbitral process. Aplt. Br. 44-46. But timing is not the only consideration. Vacancies can occur at any time. The question in each case, where the rules or agreement do not specify how to proceed, is what is appropriate in the circumstances in light of the contract and status of the case. The arbitrators devised a reasonable solution here. As the district court noted, “Krivosha was appointed *prior* to the arbitration hearing, heard all of the evidence, and fully participated in the deliberations and rendering of the panel’s decision.” A.32.

The bottom line is this: There is no “general rule” requiring an arbitration to start from scratch upon the occurrence of a panel vacancy. Where the parties’ agreement does not address such a development, the remaining arbitrators must do what makes sense in light of the agreement’s appointment provisions and the status of the arbitration. Here, where the parties’ contract authorized WellPoint to appoint one arbitrator and was silent on filling vacancies, and where all the substantive rulings lay in the future, the remaining arbitrators reasonably devised

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<sup>3</sup> The treatises cited by Hancock do not support its position. One notes that, where an arbitration is pending for more than a year, “appointing a replacement is the appropriate course.” 2 Thomas H. Oehmke, *COMMERCIAL ARBITRATION* § 71:14, at 71-21 (3d ed. 2007). Another explains that if a replacement arbitrator is needed, “the same procedure should be used as for an original appointment.” Richard A. Lord, 21 *WILLISTON ON CONTRACTS* § 57:70 (4th ed. 2006).

a fair method with input from both parties that allowed the arbitration to continue with a panel consisting of an arbitrator appointed by each party and the Umpire. Such a reasonable response to Nichols' resignation offers no ground for vacatur.

**4. Krivosha was appointed through a fair process.**

Hancock complains that there was something unfair about the appointment of WellPoint's replacement party arbitrator. Aplt. Br. 32-34. In fact, the remaining arbitrators bent over backwards to ensure a fair process with comprehensive input and participation by Hancock. As the district court concluded, "the selection of the replacement arbitrator was made through a lengthy process in which John Hancock had significant input." A.28.

Under *Dow Corning*, *Evanston*, and *Argonaut*, the remaining arbitrators reasonably could have authorized WellPoint simply to appoint Nichols' successor. Instead, they placed conditions on that appointment and conducted hearings to ensure that Hancock would not be prejudiced by the replacement and that the scheduled hearing would not be delayed. Indeed, Hancock successfully blocked WellPoint's first proposed successor and, after Hancock objected to WellPoint's second nominee as well, WellPoint agreed to select an arbitrator from a list proposed by the two remaining arbitrators, including Hancock's own party arbitrator. Hancock then acknowledged that the selected appointee, Krivosha, fulfilled the qualifications imposed by requirements of the arbitration clause. See *supra* p.13-14. Significantly, the "vetting" process that led to Krivosha's

appointment was far more extensive than the disclosure process employed for the parties' initial appointments.

Hancock complains about the *ex parte* communications that led to Krivosha's selection. Aplt. Br. 34. But Hancock expressly agreed to the *ex parte* discussions after objecting to WellPoint's first two choices. As described in an e-mail sent by the Umpire to both parties' counsel, "Don [DeCarlo] advised late Friday, that Mark [Leimkuhler, Hancock's counsel] had signed off on the potential *ex parte*." SA7. Neither DeCarlo nor Leimkuhler responded that the Umpire was wrong about Hancock's sign-off, and it is far too late for Hancock to repudiate its own agreement on that score now.

Hancock contends that it merely "agreed that Judge Krivosha met the contractual qualifications to serve as an arbitrator," not that it acceded to the *ex parte* process. Aplt. Br. 35 n.11. But Hancock did not object in the arbitration, as it does now, to the *ex parte* communications or the manner in which Krivosha was suggested. It failed to raise any objection either when it conducted its thorough voir dire of Krivosha or when he was appointed. Instead, Hancock simply renewed its prior general objection to Nichols' withdrawal and replacement and affirmatively stated that Krivosha had "the requisite experience under the governing arbitration clause" and satisfied the Panel's "prerequisites." SA8. Thus, notwithstanding Hancock's general objection to Nichols' withdrawal and replacement, it expressed satisfaction with the outcome of the *ex parte* discussion that it now seeks to impugn. As the district court concluded, "there is

nothing in the record to indicate that [Hancock] raised an objection during the arbitration process that the communication went beyond what counsel had agreed to and was thus improper.” A.30.

Furthermore, it was DeCarlo, Hancock’s own arbitrator, who initially proposed that he and the Umpire suggest three arbitrators and have WellPoint choose one of the three, which is precisely what occurred. R.46-11 at 13. That documented proposal at a minimum undermines Leimkuhler’s hearsay assertion in his Declaration (AA.15 ¶ 44) that DeCarlo told him that he (DeCarlo) did not expect specific replacement candidates to be offered to WellPoint during the *ex parte*. Hancock’s assertions (Aplt. Br. 12, 34) that it was the Umpire who suggested the candidates for WellPoint to consider is also misleading. DeCarlo participated with the Umpire in the *ex parte* discussions, and they together suggested several names to WellPoint that they believed would be qualified and acceptable to both parties. As the Umpire put it, “Don and I confirm that Judge Krivosha was one of several advanced as possibilities.” R.46-11 at 25. And WellPoint agreed, “upon request of Messrs. Bakka and DeCarlo, to consider additional candidates,” including Krivosha, who were “*suggested by Messrs. Bakka and DeCarlo.*” *Id.* at 24 (emphasis added).

In short, this was a process to which Hancock and its party arbitrator agreed, in which Hancock and its party arbitrator fully participated, and to which Hancock raised no objection in the arbitration. Its judicial challenge to that process simply represents post-award remorse about the outcome.

Hancock also argues that the process by which Krivosha was appointed “materially altered the parties’ bargained-for balance of rights” and provided WellPoint with an unauthorized “advantage.” Aplt. Br. 26. In fact, the PSA expressly authorizes WellPoint to name one of the three arbitrators, and WellPoint’s selection of Nichols’ replacement thereby maintained the “balance” reflected in the PSA. Further, its right to select that replacement was not unfettered, as demonstrated by the fact that Hancock successfully challenged its first two choices and its third choice was proposed and vetted by the two remaining arbitrators. What *would* have upset the contractual balance was the implementation of Hancock’s initial suggestion — that Hancock select Nichols’ replacement (R.46-3 at 13) — which would have given Hancock two appointed arbitrators and thus a panel majority.

Hancock further argues (Aplt. Br. 32-34, 47), as it did unsuccessfully to the panel (R.46-7 at 5-6), that allowing WellPoint to select its replacement party arbitrator after the selection of the Umpire gave it an unfair advantage. But the record shows that WellPoint did not tailor its selection based on the identity of the Umpire and that Hancock did not object based on any connection between Umpire and Krivosha. R.46-11 at 24; R.46-13 at 2. WellPoint appointed one arbitrator, just as the PSA authorized, but it did so under more restrictive conditions than set forth in the PSA. Its choices were limited to three suggestions from the Umpire and DeCarlo, and its selection became effective only after Hancock questioned Krivosha at length and agreed that he was qualified.

Hancock did not reserve a challenge to Krivosha *qua* Krivosha but only to the withdrawal and replacement of Nichols.

Hancock also contends that failure to vacate the award would create “a potential for gamesmanship” and “could undermine the integrity of other arbitration proceedings.” Aplt. Br. 31, 47. But as explained above, the circumstances that lead an arbitrator to resign vary from case to case. The best protection against gamesmanship is to require the panel to approve such a resignation and ensure a fair process to fill the vacancy, which is precisely what occurred here.

Moreover, the record contains no indication that WellPoint asked Nichols to resign to reverse any trend of unfavorable decisionmaking. Hancock notes (Aplt. Br. 8) that the panel had issued “eight written decisions” prior to WellPoint’s request. But none of those rulings was substantive (other than one rejecting Hancock’s request for an immediate interim award), being addressed solely to discovery; some of those rulings favored WellPoint and some favored Hancock; and a particularly important discovery ruling in Hancock’s favor by a majority of the Umpire and Nichols provoked a dissent from DeCarlo (Hancock’s arbitrator). R.46-13 at 50. What the record does show is that WellPoint changed law firms and requested a change in party arbitrator immediately after its potential liability in the arbitration jumped from \$42 million to almost \$500 million. See *supra* p.5. The panel was well aware of that circumstance when it accepted Nichols’ resignation.

Nor can Hancock plausibly suggest that replacing Nichols with Krivosha made any material difference to the outcome. This Court refused to vacate an arbitration award, in a case where an arbitrator had a substantial relationship with the umpire, where “rerunning the arbitration before a different panel is unlikely to change the outcome.” *Merit Ins.*, 714 F.2d at 683. Here, the two party arbitrators divided on the key Bermuda Business issue, and the Umpire cast the decisive vote. There is no reason to think that the Umpire would have voted differently if Nichols rather than Krivosha had been WellPoint’s party arbitrator.

Moreover, the risk of gamesmanship is insignificant where the party requesting the withdrawal is the party who appointed the arbitrator. In *Sphere Drake Insurance Ltd. v. All American Life Insurance*, 307 F.3d 617, 620 (7th Cir. 2002), this Court reversed what it noted was the first decision since the FAA was enacted to vacate an award because of evident partiality by “a party-appointed arbitrator on a tripartite panel.” The Court rejected the notion that “party-appointed arbitrators are governed by the norms under which neutrals operate.” *Id.* at 623. Applying that insight, the resignation and replacement of one party’s arbitrator is not inherently unfair to the other party. As Hancock acknowledges, in this proceeding “the party-appointed arbitrators were not required to be strictly neutral.” Aplt. Br. 33.

At bottom, what are the practical alternatives to allowing a party to appoint (or as in this case select) a replacement party arbitrator? Hancock’s initial proposal to the arbitrators, that the other party make that selection and thereby

give it two party arbitrators to none for its adversary (R.46-3 at 12-13), cannot be deemed fair in the absence of a contractual provision mandating it. Hancock's current position, that a resignation requires the arbitration to be scrapped and begun anew, no matter how much discovery and motion practice has transpired, can hardly be deemed efficient or otherwise reasonable. With such unpalatable alternatives, it is not surprising that the courts have approved reasonable determinations by the remaining arbitrators as to how to fill the vacancy where the agreement is silent on the subject, including allowing a party to fill the vacancy left by the withdrawal of its party arbitrator. *E.g.*, *Dow Corning*, 335 F.3d at 749; *Evanston*, 1995 WL 23063, at \*3; *Argonaut*, 1998 WL 474142, at \*3; *Zeiler*, 500 F.3d at 163; *Trade & Transp.*, 931 F.2d at 196.

**C. The arbitrators' rulings are entitled to deference.**

The district court upheld the arbitrators' decisions to accept Nichols' resignation and WellPoint's appointment of Krivosha without deferring to the arbitrators. A.30 n.8. We agree with its analysis, as explained above, and add in this section that the arbitrators' rulings were entitled to deference.

Hancock argues against deference on the ground that "[c]ourts, not arbitrators, determine the scope of arbitrators' legal power." *Aplt. Br.* 58-59. But the cases on which it relies, including *AT&T Technologies v. Communications Workers of America*, 475 U.S. 643 (1986), and *First Options of Chicago v. Kaplan*, 514 U.S. 938 (1995), address a very different question, namely, whether the parties agreed to arbitrate at all (and who decides that question). Where the

parties unquestionably agreed to arbitrate, courts defer to the arbitrator's resolution of the meaning of the parties' contract. *E.g.*, *Prima Paint v. Flood & Conklin Mfg.*, 388 U.S. 395 (1967); *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440 (2006); *Colfax Envelope v. Local No. 458-3M, Chicago Graphic Commc'ns Int'l Union*, 20 F.3d 750, 753-54 (7th Cir. 1994) (where parties have agreed to arbitration, arbitrators rather than courts resolve meaning of contract terms).

That principle applies as well where the parties' contract is silent on aspects of the arbitrators' authority. That is the teaching of *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 62-63 (1995), which upheld the right of arbitrators to award punitive damages even though the parties' contract was silent on the subject, and of *Bazzle v. Green Tree Financial*, 539 U.S. 444, 454 (2003), which upheld the right of arbitrators to decide whether a class-action arbitration is maintainable where the parties' contract is silent on that issue.

Here, the parties unquestionably agreed to arbitrate, and the PSA unquestionably provides that "the interpretation of this Agreement" is to be performed by arbitrators, not courts. A.42. Hancock contends that the arbitrators misinterpreted the PSA in authorizing the withdrawal and replacement of Nichols, but a court "is forbidden to substitute its own interpretation even if convinced that the arbitrator's interpretation was not only wrong, but plainly wrong." *Chicago Typo. Union No. 16 v. Chicago Sun-Times*, 935 F.2d 1501, 1505 (7th Cir. 1991).

The rulings challenged by Hancock were not only contract interpretations to which the parties delegated authority to the arbitrators, but also procedural rulings to which courts properly defer. “[P]rocedural’ questions which grow out of the dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator, to decide.” *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 84 (2002); accord *John Wiley & Sons v. Livingston*, 376 U.S. 543, 557 (1964); *Int’l Ass’n of Machinists & Aerospace Workers, Progressive Lodge No. 1000 v. Gen. Elec.*, 865 F.2d 902, 904 (7th Cir. 1989). On that basis, the Eighth Circuit rejected a Section 10(a)(4) challenge in *Dow Corning*, deferring to the decision of the remaining arbitrators as to how to fill a panel vacancy left by the resignation of a party arbitrator. As the court explained, reviewing courts generally “leave procedural issues for the arbitrators to decide.” 335 F.3d at 749. As in *Dow Corning*, the arbitrators’ rulings on Nichols’ withdrawal and Krivosha’s appointment were procedural determinations that are entitled to the utmost deference. See also *Dockser v. Schwartzberg*, 433 F.3d 421, 426 (4th Cir. 2006) (dispute over proper number of arbitrators on panel was a “procedural question” for arbitral, not judicial, determination); 2 Oehmke, COMMERCIAL ARBITRATION, *supra* p.35, n.3, § 71:14, at 17-21 (3d ed. 2007) (“The resolution of a vacancy issue is a procedural matter (which is an issue for the remaining arbitrators to resolve)”).

Hancock’s disagreement is with the procedures established by the arbitrators to fill the panel vacancy. They insisted on conditions to ensure a

smooth transition; allowed Hancock to *voir dire* WellPoint's nominees; obtained Hancock's permission to speak with WellPoint *ex parte* to suggest potential replacements who would be acceptable to both sides; and made sure that Hancock had no objections to the qualifications of the replacement selected by WellPoint. It is that deliberative process, with its multiple procedural determinations, that warrants deference from this Court.

In arguing against deference, Hancock (Aplt. Br. 59-60) again improperly relies on cases addressing appointments of initial arbitrators. In those cases, there were no arbitral rulings to which a court could defer because there were no arbitrators in place when the challenged appointments were made. Hancock also relies on *Szuts v. Dean Witter Reynolds*, 931 F.2d 830 (11th Cir. 1991), to contend that a decision reached by fewer than three arbitrators is not entitled to deference. Aplt. Br. 61. But here, unlike *Szuts*, the award was rendered by three arbitrators. Moreover, the decision to accept Nichols' withdrawal was rendered by all three initially appointed arbitrators. And while his replacement was approved by only two arbitrators, the PSA provides that a "decision in writing by any two arbitrators shall be final and binding on both of the parties" (A.43, § 15.4), nothing in the PSA requires that a party's appointed arbitrator be approved by *any* of the other arbitrators, and in any event Hancock's party arbitrator did not express any disagreement with the replacement selection process. In fact, Hancock expressly urged the two remaining arbitrators to decide

whether Nichols could withdraw (R.46-8 at 8), contravening its current argument that they lacked the power to act.

In sum, the scope of judicial review applicable to the decisions below should be as deferential as in other cases involving arbitral contract constructions and procedural rulings. But even without such deference, the district court properly held that there is no viable basis for vacating the award.

## **II. Hancock Waived Any Right To Seek Vacatur Based On The Composition Of The Arbitral Panel.**

The district court rejected WellPoint's alternative argument that Hancock's failure to seek judicial relief under Section 5 of the FAA when Krivosha was appointed waived its right to seek vacatur of the panel's award. WellPoint raises that argument here as an alternative ground for affirmance.

Section 5 authorizes an arbitral party to obtain immediate judicial relief if it believes the contractual method for appointing an arbitrator has not been followed "or if for any other reason there shall be a lapse in the naming of an arbitrator \* \* \* or in filling a vacancy." 9 U.S.C. § 5. By failing to invoke Section 5 to challenge Krivosha's appointment, Hancock waived any right to challenge that appointment under Section 10.

The district court opined that actions under Section 5 and Section 10 are not "mutually exclusive." A.23. The problem with that view is that it allows a party objecting to an arbitral appointment to continue to participate in the arbitration, wait to see if it prevails, and, if not, seek to vacate the unfavorable award after the arbitration — just what Hancock did here. In support of that

dubious course of conduct, Hancock (Aplt. Br. 49-50) relies on dictum from *Tamari v. Conrad*, 552 F.2d 778 (7th Cir. 1977), a decision addressing arbitral immunity which does not even mention Section 5 of the FAA.

More to the point is the Eighth Circuit's rejection of Hancock's "wait and see" approach in *Dow Corning*. The arbitration provision there, as here, provided for a panel of two party-appointed arbitrators and an umpire. After one of the party arbitrators resigned, the two remaining arbitrators authorized that party, over Dow Corning's objection, to appoint a replacement. Instead of challenging that decision in court under Section 5, Dow Corning proceeded with the arbitration, just as Hancock did here, under "a 'reservation of right' to challenge the panel's authority." 335 F.3d at 748. After receiving an unfavorable award, Dow Corning sought to vacate the award, contending that the arbitrators had exceeded their authority by allowing the appointment of a replacement party arbitrator. *Id.*

The Eighth Circuit rejected that contention, holding that Dow Corning had waived its challenge by "fail[ing] to file a section 5 motion challenging the panel's ruling on the substitution issue." *Id.* at 749. The court deemed Dow Corning's conduct "a transparent attempt to preserve a threshold procedural issue in case Dow Corning eventually lost the arbitration on the merits." *Id.* at 748-49. Hancock rejects the applicability of *Dow Corning* because that opinion cites to a Fifth Circuit decision, *Brook v. Peak*, which addressed a different type of waiver.

Aplt. Br. 51-52. But that is no reason to disregard the Eighth Circuit's persuasive reasoning in such an analogous case.

Moreover, Hancock offers no viable reason why it did not seek judicial intervention pursuant to Section 5. That provision was designed for just this type of situation, and the reported cases show that it works well. For example, in *National American Insurance v. Transamerica Occidental Life Insurance*, 328 F.3d 462 (8th Cir. 2003), one of the party arbitrators on a three-member panel resigned after the arbitration had been pending for over a year. In the ensuing Section 5 action, the court authorized the party whose arbitrator had resigned to appoint a replacement, a decision affirmed on appeal. *Id.* at 463-64. Similarly, in *Trade & Transport*, a dispute arose over the proper composition of the panel after one party's nominated arbitrator died. That party filed a Section 5 action, and the court appointed the party's nominee as the replacement party arbitrator and referred all related procedural questions to the reconstituted panel, a ruling affirmed on appeal. 931 F.2d at 194-96.

Hancock relies on *Avis Rent A Car System v. Garage Employees Union, Local 272*, 791 F.2d 22 (2d Cir. 1986), to support its "wait till we see if we win" approach. But in that inapposite case, the parties disputed which of two collective bargaining agreements, containing different arbitrator appointment provisions, applied. The arbitrator, who was appointed under the agreement favored by the union, issued an award stating that the agreement favored by the employer was controlling. It was the inherent conflict between that ruling and

the arbitrator's appointment that led to the award being vacated. *Id.* at 23-26. No such considerations apply here.

Finally, Hancock argues that WellPoint's waiver argument is barred by judicial estoppel. Aplt. Br. 52-53. Hancock points to an offhand remark by one of WellPoint's lawyers as to whether Hancock could challenge Krivosha's appointment after the arbitration, which is not the type of "intentional self-contradiction" to obtain "an unfair advantage" that may result in judicial estoppel. *Lampi v. Am. Power Prods.*, 228 F. 3d 1365, 1377 (Fed. Cir. 2000) (applying 7th Circuit law and rejecting applicability of judicial estoppel). Moreover, estoppel requires "reasonable reliance." *Lewis v. Washington*, 300 F.3d 829, 834 (7th Cir. 2002). No party as sophisticated and well-represented as Hancock would reasonably rely on such a remark by the other party's attorney to determine its obligations under a federal statute. Hancock made a tactical decision not to invoke Section 5 — both to await the outcome on the merits and to avoid a judicial proceeding that would delay that outcome. Hancock must accept the consequences of its own decision.

### **III. Any Attempt By Hancock To Vacate The Panel's Phase I Award Would Be Untimely.**

The district court also rejected WellPoint's alternative argument that Hancock's petition to vacate the panel's Phase I liability ruling was time-barred. WellPoint raises that argument here as a second alternative ground for affirmance.

An arbitral party has three months in which to seek vacatur of an award. 9 U.S.C. § 12. The Phase I liability award was issued on May 24, 2006, yet Hancock did not file its petition to vacate until May 24, 2007. R.37. “The plain language of § 12 does not provide for any exceptions to the three-month window and says nothing about tolling.” *Olson v. Wexford Clearing Servs.*, 397 F.3d 488, 490 (7th Cir. 2005). Hancock’s challenge to the Phase I award is therefore untimely.

Hancock is wrong to suggest that, because the Phase I award was labeled “Interim Rulings on Phase I,” it could not be confirmed until after the Phase II award was rendered. Aplt. Br. 55. The arbitral ruling in *Olson* was not labeled a “final award” or even an “award,” and this Court has made clear that the label is not dispositive. See *Publicis Commc’n v. True North Commc’ns*, 206 F.3d 725 (7th Cir. 2000).

In *Publicis*, the arbitrators issued an “order” that Publicis produce tax information to True North at a time when “unrelated issues” remained to be resolved. 206 F.3d at 729. When Publicis failed to produce the information, True North filed a petition to confirm, which the district court granted. This Court affirmed, rejecting Publicis’s distinction “between an award and an order” as “extreme and untenable formalism.” *Id.* at 728. Instead, “[t]he content of a decision — not its nomenclature — determines finality.” *Id.* at 728-29. The Court concluded that the tax document order constituted a confirmable award because it “wasn’t just some procedural matter — it was the very issue True North wanted arbitrated.” *Id.* at 729.

Here, too, the panel’s Phase I ruling on liability was not “just some procedural matter” but rather fully resolved the very issue — liability — that the parties wanted the Panel to address in Phase I. See also *Yasuda Fire & Marine Ins. v. Cont’l Cas.*, 37 F.3d 345, 348 (7th Cir. 1994) (an arbitral order that a party must post an “interim letter of credit constitutes an ‘award’ under section 10” of the FAA). As this Court has explained, an award need not be final in the § 1291 sense to be confirmable “even if all it did was determine liability, leaving thorny remedial issues for future determination.” *Smart v. IBEW Local 702*, 315 F.3d 721, 726 (7th Cir. 2002).

This Court relied on *Smart* in *McKinney Restoration v. Illinois District Council No. 1*, 392 F.3d 867 (7th Cir. 2004), in which an employer sought to vacate two related arbitration awards. Because one of those awards was issued more than three months prior to the petition to vacate, the Court held that the petition was untimely. *Id.* at 869. The Court explained that in *Smart* “the award was enforceable even though it determined only liability, not damages, because it was clear that the arbitrators ‘had finished their assignment and clear as well what their award required.’” *Id.* at 872.

The district court opined that the arbitrators in this case “did not consider their work completed with the entry of the Phase I Ruling” and that it therefore was not subject to judicial review. A.14-15. But applying the *Smart* standard, the Phase I award was immediately subject to judicial review because the panel had finished its liability assignment and made clear “what [the] award required,”

namely that particular parties would bear responsibility for particular books of business. The panel then turned to the only remaining issue, the amount of damages, in Phase II. Thus, the Phase I award satisfied the conditions for a judicially reviewable ruling, and Hancock had to seek vacatur within three months or lose any right to do so.

The district court deemed *Publicis* and *Yasuda* to be “limited exceptions to the general rule” precluding judicial review until the arbitration is terminated. A.16. But that categorization is inconsistent with the Court’s flexible approach in those decisions. Hancock seeks to distinguish *Publicis* and *Yasuda* on the ground that there “particular circumstances created a need for immediate confirmation of a non-final arbitration ruling.” Aplt. Br. 55. But it accurately describes *Publicis* as involving a discovery order. *Id.* at 56 n.16. It is far from clear why that order would be more subject to immediate review than an award resolving liability.

Like the awards in *Publicis* and *Yasuda*, the Panel’s Phase I ruling, which fully resolved all liability issues before it, was in substance a confirmable award when issued. And like the confirmable interim rulings in *Yasuda* and *Crawford Group*, the Phase I ruling fully and finally resolved discrete issues, in particular liability for the “Billyard Bermuda business,” for uncollected third-party

reinsurance, and for administrative expenses. A.34. Accordingly, the Phase I ruling was immediately subject to judicial review.<sup>4</sup>

Hancock says it “know[s] of no instance in which a party has been denied judicial review of an award when, having waited until the end of the arbitration to seek review, it sought to vacate within three months of the award.” Aplt. Br. 56. But the petition to vacate in *Olson* was deemed untimely even though the petitioner sought to vacate *before* the end of the arbitration. *Olson* involved an arbitral order dismissing one but not all respondents from the arbitration. Noting that the dismissal arguments had been fully presented, this Court held that the dismissal order was “final” and that the petition to vacate, filed three months after the dismissal, was untimely. 397 F.3d at 491-93. The Court added this warning to arbitral parties: “A party who is uncertain about the finality or appealability of an arbitration award should err on the side of compliance with the FAA § 12, which is not onerous.” *Id.* at 492. Hancock failed to heed that warning, choosing not to file a petition to vacate within the statutory deadline, and the result should be the same as in *Olson*: “*Olson*’s failure to act within the limitations period bars his action.” *Id.* at 493.

Recognizing that liability rulings in bifurcated arbitrations may be immediately subject to judicial review will often promote efficient adjudication.

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<sup>4</sup> Hancock says the district court erred by stating that “Phase II involved only ‘an exact accounting of damages.’” Aplt. Br. 16 n.6. According to Hancock, Phase II also involved three liability issues. *Id.* In fact, those three issues each involved the amount of damages resulting from the Phase I liability rulings. See A.35 ¶ 2(a),(b),(c).

In this case, for example, where the arbitrators divided the proceeding into a liability phase and a damages phase, the Phase II decision was issued almost a full year after the Phase I award. If Hancock had sought vacatur immediately after the Phase I award and won, the Phase II proceeding would have been unnecessary. Indeed, the Phase II proceeding may have been unnecessary even if Hancock had sought vacatur and lost, because that outcome would have heightened the potential for settlement.

With such practical considerations in mind, the First and Second Circuits, too, have moved away from former rigid finality rules and now hold that an arbitrator's liability ruling is ripe for judicial review even though damages remain to be quantified, in particular where the arbitration is divided into a liability phase and a damages phase. As the First Circuit held in *Hart Surgical v. UltraCision*, 244 F.3d 231, 232, 235 (1st Cir. 2001), "in an arbitration case that is bifurcated into liability and damages phases," the "liability determination is final and subject to district court review." Such a liability ruling is ripe for judicial review so long as the arbitration was effectively divided into two phases, "[a]ll evidence related to the issue of liability [was] presented to the arbitrator" in the first phase, and the arbitrator then "issued his decision on liability." *Providence Journal v. Providence Newspaper Guild*, 271 F.3d 16, 19 (1st Cir. 2001). In the Second Circuit, too, a liability ruling issued after the first phase of a bifurcated proceeding is ripe for judicial review so long as that ruling "decide[d] every point

required by and included in” the parties’ liability submissions. *Trade & Transp.*, 931 F.2d at 195.

Finally, Hancock contends that it could not have sought to vacate the Phase I ruling because the PSA requires court actions to be brought in Delaware. *Aplt. Br.* 56 n.17. But actions to vacate arbitration awards may be brought in the district where the award was made. *Cortez Byrd Chips v. Bill Harbert Constr.*, 529 U.S. 193, 204 (2000). The Phase I hearing took place in Chicago, making the Northern District of Illinois the convenient venue, as both parties recognized by stipulating to that venue in this judicial review proceeding. WellPoint presumably would have stipulated to the same venue if Hancock had filed a petition to vacate immediately after Phase I.

## CONCLUSION

The district court's judgment should be affirmed.

Dated: October 20, 2008

Respectfully submitted,

John M. Nonna  
DEWEY & LEBOEUF LLP  
1301 Avenue of the Americas  
New York, NY 10019  
(212) 259-8000

Michael A. Knoerzer  
CLYDE & Co. US LLP  
405 Lexington Avenue  
New York NY 10174  
(212) 710-3900

---

Jeffrey W. Sarles  
Sheila Finnegan  
Diana Swisher Andsager  
MAYER BROWN LLP  
71 South Wacker Drive  
Chicago, IL 60606  
(312) 782-0600

*Attorneys for Respondents-Appellees*

## **CERTIFICATE OF COMPLIANCE**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,982 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface and type style requirements of Fed. R. App. 32(a)(5) & (6) and Circuit Rule 32(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2000 in 13-point Georgia for the main text and 12-point Georgia for the footnotes.

Dated: October 20, 2008

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Diana Swisher Andsager  
One of Appellees' attorneys

**CIRCUIT RULE 31(e) CERTIFICATION**

The undersigned attorney certifies that she has filed electronically, pursuant to Circuit Rule 31(e), a virus-free version of the brief and all of the Supplemental Appendix items that are available in non-scanned PDF format.

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Diana Swisher Andsager

## **CERTIFICATE OF SERVICE**

The undersigned attorney hereby certifies that on October 20, 2008 she caused two copies of the foregoing Brief of Respondents-Appellees to be served by hand delivery, and a digital version of that brief to be served by e-mail, on the following:

Jonathan C. Bunge  
Kirkland & Ellis LLP  
200 East Randolph  
Chicago, IL 60601

Edwin G. Schallert  
Debevoise & Plimpton LLP  
919 Third Avenue  
New York, NY 10022

Mark I. Leimkuhler  
Baach Robinson & Lewis PLLC  
1201 F Street, N.W.  
Washington, D.C. 20004

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Diana Swisher Andsager

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