UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED MEXICAN STATES,

Petitioner,

v.

LION MEXICO CONSOLIDATED, L.P.,

Respondent.

Civil Action No. 1:21-cv-03185 (TFH)

DECLARATION OF HECTOR CARDENAS

I, Hector Cardenas, hereby declare and state as follows:

1. My name is Hector Cardenas, known in Mexico as Hector Cardenas Curiel. I am a resident and citizen of Mexico. I am an industrial engineer, businessman, and developer of real estate and other projects in Mexico. I have developed hundreds of construction projects throughout my career. I am currently administrator of more than 30 companies. Although my native and primary language is Spanish, I graduated from the American School in Guadalajara, and I can read and write in English.

2. I am the legal representative, sole administrator, and a shareholder of Inmobiliaria Bains, S.A. de C.V., C&C Capital, S.A. de C.V., and C&C Ingeniería y Proyectos, S.A.de C.V. ("Companies" and when one, "Company"). Together, several family members and I own a controlling majority of the shares in the Companies. These are the three Mexican companies that are at the heart of the legal disputes that arose between Lion Mexico Consolidated ("Lion") in the Mexican courts, that led to the international arbitral Award (the "Award) against Mexico that

is being challenged in this Court. A copy of the Award is attached as Exhibit 1.

I. My relationship with Lion

3. I became involved in negotiations and started a business relationship with Lion's parent company ING Clarion in early 2007. The initial contact was made by Mr. Robert Baer, president of DTZ Rockwood, who managed ING's investment portfolio in Mexico. Mr. Baer went on to broker and maintain my business relationship with ING Clarion on a day-to-day basis for the following five years.

4. The business relationship between the Companies and ING Clarion was envisioned as a partnership to develop two projects in Mexico with the Companies I represent. One project would take place on land that one of the Companies already owned and the other project would be on land that would be purchased after the contribution of funds from ING Clarion. The first project was a residential development anchored around a luxury hotel under an internationally recognized franchise name, to be located at the beach in the Mexican state of Nayarit. The second project was a mixed-use shopping center and two high-rise buildings in the city of Guadalajara.

5. From the beginning of the business relationship, the intention was for ING Clarion, through Lion, to become shareholder in Bains and C&C Capital. ING Clarion proposed that the way to do this operation was for Lion to provide short term loans to the Companies, that would be quickly converted into equity in Companies before the due date on the loans. The first loan was made in February 2007.

6. In preparation for the second loan, Mr. James Hendricks, Managing Director of ING Real Estate Investment Management/ING Clarion, prepared, signed, and sent to me by email a letter dated June 13, 2007, memorializing in writing our agreement of converting the loans into equity in the Companies and releasing the underlying mortgages. The document

signed by Mr. Hendricks reflects that our relationship was intended to be as business partners, not as lender and borrowers. Ms. Onay Payne, of ING Clarion, and Mr. Robert Baer, of DTZ Rockwood, were copied on this letter. *See* Ex. 2.

7. There were also numerous emails from Mr. Robert Baer that show that our original intention of being partners is very different from the lender-borrower story that Lion presented to the arbitral Tribunal and that the Tribunal accepted without question.

8. I accepted the modality of the short-term loans as an initial step in the long-term investment because at that time I had other investors willing to step in if ING Clarion had wanted out. But the 2008 subprime financial crisis changed everything. ING Clarion requested to place the projects on hold because of the serious financial difficulties at that time. The due dates for payment of the loans kept getting extended.

9. ING began preparations to divest its real estate investments to reduce its exposure as part of the bailout conditions from the Dutch government. *See* Ex. 3. ("In a separate deal, ING agreed to sell ING Clarion, its US-based private-market real-estate investment manager, to the manager of that operation in a deal valued at $100 million.") Clarion began to press for repayment of the loans, sending letters and even calling the loans in default.

10. Throughout this time, I kept Mr. Robert Baer, president of DTZ Rockwood, informed of the problems I was having with Clarion, and the letters they were sending to me regarding repayment of the loans, which was different from what our understanding was. He assured me that the letters from Clarion were a formality that Clarion was required to send to protect its interests, but that there was no reason to worry.

11. As the pressure from Clarion to repay the loans—with their exorbitant interest rate of 18% and the increased default rate of 25%, both compounded quarterly—increased, I had several meetings with Ms. Onay Payne, a Clarion Executive, to try to find a mutually agreeable

solution. At our first meeting in Guadalajara, Mexico, I reminded Ms. Payne of Clarion's commitment expressed in the document dated June 13, 2007, signed by Mr. Hendricks, summarizing the intention of converting the debt to equity in the Companies and removing the mortgages, and showed her the document. *See* Ex. 2. After reading the document—a document that Ms. Payne should have remembered because she was copied on the letter—she agreed to consider an alternative proposal for repayment of the loans.

12. During my next two meetings with Ms. Payne, also in Guadalajara, we discussed my proposal to repay the loans by transferring to Lion an office building that one of the Companies was constructing in Guadalajara. Our discussions in those two meetings were centered on obtaining acceptable guarantees from a solid bank that there would be enough funds to complete the building. A solution was found when the local banker that was providing the loan was able to confirm that one of his corresponding larger banks in the United States would provide the guarantee of sufficient financing to complete the building.

13. A few days after my last meeting with Ms. Payne in Guadalajara, I decided to travel to Ms. Payne's office in Dallas, Texas, to put in writing our oral agreement. I brought a companion to assist me in making the final presentation. Ms. Payne did not even allow my companion to join us at the meeting. Once Mr. Payne and I were behind closed doors, Ms. Payne said that the Fund (Lion) was not in a financial condition to continue with the investment, and that she herself was not interested in investing in our projects. Ms. Payne said that she had to look after what was best for the Fund's investors and for her bonus.

14. When I reminded Ms. Payne of the document dated June 13, 2007, signed by Mr. Hendricks, Ms. Payne responded that Clarion's lawyers had already reviewed the document and had determined that the document would be worthless in court. She added that the only thing that the document could be useful for was for me to frame it and hang it on my wall.

15. Ms. Payne said that she wanted the three loans repaid immediately, with interest. She added that if we could not pay the loans immediately, time was on Lion's side because of the high interest rate that the three loans were accruing (25% compounded every three months), and that Lion would eventually foreclosure on the mortgages and take the entire properties from the Companies.

16. Throughout this time, I kept Mr. Robert Baer, president of DTZ Rockwood, informed of the problems I was having Clarion and specifically with Ms. Payne.

17. As I found out later, I was not the only Mexican developer having similar problems with Lion. Other developers in other regions of Mexico like Acapulco and Quintana Roo, were having similar problems with Lion. These Mexican developers have been ruined by Lion's pattern of walking in as joint investors that would start the relationship with short term loans, only to later switch the original stated intention of being business partners to becoming enforcers of what were essentially predatory loans.

18. Litigation between Lion and the Companies began in Mexico in 2012. It is crucial to note that Lion and the Companies I represent never agreed to international arbitration to settle our disputes. As a result, all disputes between Lion and the Companies I represent were submitted to the courts of Mexico. However, after only three years into Mexican court proceedings, Lion unilaterally decided to discontinue two—but not all—of the legal proceedings from the courts of Mexico and artificially transform its dispute with the Companies I represent, into an investor-State international arbitration against Mexico alleging denial of justice by the Mexican court system, but still seeking to recover its investment with a very large profit.

19. When Lion initiated the international arbitration case against Mexico in 2015, the Companies had been successful in one Mexican court case. Lion had filed a constitutional relief process ("*amparo*") against that case. The court review process was still pending when Lion

decided to withdraw it and initiate the international arbitration against Mexico. Had Lion continued to pursue the challenge and been successful, the legal situation would have returned to the point that existed before the Companies' success in that case. We will never know what would have happened because Lion did not allow the Mexican courts enough time to decide its case.

20. Lion had also initiated several criminal cases against me and even initiated a new criminal case against me after the international arbitration case against Mexico had already started. I won the earlier criminal cases. The last case, which Lion filed fraudulently by using an earlier filing date, remains open. Significantly, Lion requested and obtained a court order freezing a significant part of two of the Companies' assets to satisfy a potential order for damages if the criminal proceedings are successful.

II. My exclusion from the Arbitration

21. With this background, it is not surprising that the main subject of the international arbitration initiated by Lion against Mexico concerned my relationship with Lion and the disputes between the Companies and Lion in the Mexican courts.

22. My name was at the center stage of the arbitration. In fact, my name was the most referred name in the Award, mentioned a total of one hundred and eleven times.

23. Despite the central role that my name played in the Award and in the events that led the Tribunal to find that the Mexican court system had denied justice to Lion, neither I nor the Companies were allowed to participate in the arbitration in any way.

24. Despite making significant and serious findings about me, as I will explain in the next section, the arbitral Tribunal did not invite or request my participation as a witness or in any other capacity during the arbitration.

25. The Companies attempted to participate in the arbitration through their

representative, Mr. Ivan Mercado, as *amicus curiae*, but he was refused and denied access. Specifically, after consulting Mexico and Lion, the arbitral Tribunal rejected Mr. Mercado's request to participate in the arbitration as a non-disputing party (*amicus curiae*). *See* Ex. 4.

26. Mr. Mercado sent five letters to the Tribunal over the course of one year in pursuit of this request. The letters informed the Tribunal about the ongoing Mexican court proceedings because of their impact on the jurisdictional issues that would be considered by the arbitral Tribunal first. Specifically, Mr. Mercado informed the Tribunal about Mexican court proceedings that were still pending in Mexico and that seemed to violate the waiver requirement in NAFTA. *See* Exs. 5-9. The Tribunal did not even respond to Mr. Mercado's request until after one year had passed from when Mr. Mercado first wrote to the Tribunal. After a year of ignoring Mr. Mercado's letters, the Tribunal rejected Mr. Mercado's request. *See* Ex. 4. In addition, this issue seems to have been ignored by the Tribunal because it is not mentioned anywhere in the Award, including the Decision on Jurisdiction that is part of the Award and appended at the end of the Award.

27. I also offered full cooperation to the Mexican government from the beginning of the case in early 2016, but I was never called as a witness by Mexico. Nor was I consulted on any aspect of the proceeding or kept informed as to its progress by Mexico. As a result, Mexico's lawyers in the arbitration did not know the background of my business relationship with Lion or important facts regarding the Mexican court proceedings. Thus, they could not respond to Lion's allegations against me even if they had wanted to.

28. Because neither I nor the Companies were allowed to appear before the arbitral Tribunal to respond or to present any evidence, the Tribunal's Award was based on an incomplete record that only reflected Lion's side of the story.

III. The Tribunal's Award made serious findings against my interests without affording me any opportunity to defend myself or my interests

29. The arbitral Tribunal effectively assumed the role and functions of the Mexican courts in my disputes with Lion by making findings of fact that substantially affected my interests, without my presence or participation before the Tribunal.

30. As discussed in more detail below, the arbitral Tribunal made a finding that I supposedly organized and carried out an extensive fraudulent scheme against Lion. For example, in paragraph 94 of the Award, the Tribunal asserted that "[t]he Cancellation Lawsuit was the first step in a complex judicial fraud schemed by Mr. Cardenas to avoid the imminent foreclosure of the Mortgages. It is clear that Sr. Cárdenas organized this fraudulent scheme . . . ." In the following paragraph of the Award (paragraph 95), the arbitral Tribunal refers to the "Sr. Cardenas's fraudulent scheme" three times. *See* Award, Ex. 1.

31. In another example, in paragraph 103 of the Award, discussing the settlement agreement, which is a very important document that completely changed the nature of the dispute and the outcome of the Award, the arbitral Tribunal categorically stated that: "[t]he Tribunal is convinced that the *Términos* are in fact a forgery [and will refer to the document frequently as the "**Forged Settlement Agreement**" of "**Forged Agreement**"]." (Emphasis in original.) The Settlement Agreement was at the core of the various court proceedings in Mexico. A copy of the Settlement Agreement is attached as Ex. 10.

32. Among the "compelling" evidence cited by the Tribunal for this finding that the Settlement Agreement was forged, is the supposed lack of "contemporary evidence proving that in the negotiations between Lion and Sr. Cárdenas such solution was ever discussed . . . ." Award, paragraph 103. The solution that the Tribunal was referring to was converting the loans into equity in the Companies.

33. Had I been allowed to be heard by the Tribunal and present evidence directly or

indirectly through the Companies' designated representative, Mr. Mercado, I would have been able to provide documentary evidence to the contrary. I would have been able to give to the Tribunal, directly or through Mr. Mercado, a copy of the June 13, 2007 letter signed by Mr. Hendricks, ING Real Estate Investment Management's Managing Director, with Ms. Payne and Mr. Baer being copied. *See* Ex. 2. Both Mr. Hendricks, the author of the letter, and Ms. Payne were witnesses in the arbitration before the Tribunal. Award, ¶ 40. According to this letter signed by Mr. Hendricks on June 13, 2007, "[w]ithin 90 days – following the closing of the loan – it is anticipated that the $12 million US dollars will be converted into an equity interest and the underlying mortgage will be released." Ex. 2. That was the true and original intention behind the short-term loans. Neither Lion, Mr. Hendricks, nor Ms. Payne provided this document to the Tribunal or even acknowledged its existence during the arbitration, as far as I know from reading the assertion by the arbitral Tribunal that there had not been any documents submitted in the arbitration to contradict Lion's allegation that the relationship was anything other than a lender-borrower relationship.

34. In addition to providing a copy of this document, if I had been allowed to appear before the arbitral Tribunal, I would have been able to provide multiple emails from Mr. Baer that corroborate the authenticity of this document and the intention of the would-be business partners.

35. Finally, if I had been allowed to be present before the arbitral Tribunal, I would have been able to respond to questions from the members of the arbitral Tribunal regarding the Settlement Agreement that the Tribunal deemed fraudulent in my absence, and I would have been able to respond to any other question about the so-called fraudulent scheme allegedly (but according to the Award, conclusively) orchestrated by me.

36. In addition to the personal affectation of my rights and interests that will be

explained in the next section, the arbitral Tribunal's findings about this Settlement Agreement have created conflicts with proceedings before the Mexican courts regarding the validity of the Settlement Agreement and have contradicted the opinion of a court-appointed panel of experts regarding the authenticity of the signature challenged by Lion. *See* Mexico's Petition to Vacate the Award, paragraph 21, quoting Mexico's Counter-Memorial, paragraphs 119, 121-123. (A copy of Mexico's Counter-Memorial is attached as Exhibit 3 to the Declaration of Stephan E. Becker in Support of Mexico's Petition to Vacate the Award.)

37. The arbitral Tribunal also created a problem of double recovery by Lion. As Mexico argued during the arbitration "[t]o this date, under Mexican Law, the forgery of the Settlement Agreement has not been established and it remains legally effective. Pursuant to the Settlement Agreement, share certificates were issued in Lion's name. Thus, Lion is the owner of these shares, and therefore their value must be subtracted from any compensation awarded by the Tribunal." Award, paragraph 777. The arbitral Tribunal disregarded what the Mexican courts might have determined, putting itself above the Mexican courts, when it rejected Mexico's argument by declaring that "[t]he Tribunal has already established that the Settlement Agreement . . . was a forgery." Thus, according to the Tribunal, the Settlement Agreement could not have any legal effect in Mexico. Award, paragraph 784.

IV. My interests that are at stake in this Court proceeding

38. The arbitral Tribunal's findings about me in the Award endorsed Lion's allegations without giving me the opportunity to defend myself. Now, that Award is being used against my interests and the interests of the Companies I represent, causing harm to me and the Companies.

39. Lion was the first one to use the Award against me and the Companies in court. Only four days after the Award was issued, Lion filed a petition introducing a copy of the Award before the Mexican court that was deciding Lion's challenge to a lower court's finding that Lion

had to reimburse the Companies I represent, as provided by Mexican law, as a result of Lion's decision to withdraw from the constitutional relief (*amparo*) proceedings immediately before starting the arbitration. (The issue of the assessment of this penalty is mentioned in paragraphs 832-833 of the Award.).

40. Lion petitioned the court to accept the arbitral Tribunal's findings in the Award as proof that the settlement document was fraudulent, that the courts of Mexico acted illegally denying justice to Lion, and that Lion's withdrawal from the *amparo* proceedings was justified. Included in the portion of the Award transcribed in Lion's petition is paragraph 838 of the Award, where the arbitral Tribunal orders Mexico to reimburse Lion for any amount that Lion is ordered to pay to the Companies. *See* Ex. 11. Several months after this filing, the court ruled in favor of Lion and remanded the proceedings to another court to calculate the damages using criteria that would result in a much lower amount. The amount claimed by the Companies I represent is $14 million, as provided by Mexican law. *See* Award, paragraph 833.

41. In another example of the Award being used against my interests and the interests of the Companies in Mexican courts, an attorney used the Award to predispose against me an intermediate court in a case that the Companies I administer filed against HSBC Mexico for fraudulent sale of derivative swaps to the Companies, that the companies have already won at the first level and the appeal level. The attorney representing HSBC Mexico filed a copy of the Award with a pleading, using quotes from the Award in support of a gratuitous assertion, unrelated to that case, that I supposedly engage in fraud as a business practice. This was a shameless attempt to predispose the court against my interests and the interests of the Companies. *See* Ex. 12. That court's decision has been delayed and is still pending.

42. I have also received credible information that several Mexican government officials have suggested that Mexico should make me reimburse the country for the payments Mexico

must make as a result of the Award. This is not speculation or a remote possibility. The arbitral Tribunal practically guaranteed that Mexico will sue the Companies for at least part of the Award, by including in the Award the provision ordering Mexico to reimburse Lion for any penalties that by law a Mexican court must order Lion to pay the Companies for withdrawing Lion's constitutional relief proceedings in Mexico. *See* Award, paragraphs 832- 838.

43. Withdrawing from the constitutional relief proceedings and the foreclosure civil lawsuit in Mexico should have meant that Lion was forfeiting the possibility of making a valid claim of denial of justice against Mexico. Instead, in addition to giving Lion a windfall of $47 million, plus interest and costs, with the arbitral Tribunal's unprecedented finding of denial of justice, the Tribunal rewarded Lion for withdrawing the constitutional relief proceedings by making Mexico reimburse Lion for what should have been an ill-advised decision to withdraw from these proceedings.

44. If the Mexican government sues the Companies in the courts of Mexico for that part of the Award, the government might also attempt to sue the Companies for the entire amount of the Award. This would lead to a double loss for the Companies. In accordance with the Mexican court proceedings enacting the Settlement Agreement between Lion and the Companies, Lion already owns a significant percentage of shares in Bains and C&C Capital, with which their loans with Lion were fully repaid. *See* Award, paragraphs 783-786. Shares certificates of the two Companies have already been issued, assigned to Lion, and are deposited in a Mexican court, waiting for Lion to claim them. So far Lion has not claimed the shares from the court. But the shares belong to Lion already. Only Lion can dispose of them, for example by transferring the shares to someone else. The Companies already issued those shares to Lion in compliance with the Settlement Agreement. If I or the companies are forced to repay Mexico for any payment that Mexico needs to make as a result of the Award, this would amount to a double

deprivation of the Companies' property as a direct result of the arbitral Tribunal's findings against me in the Award, without giving me the opportunity to defend myself.

45. It is clear from the above paragraphs that the decision that this court is called to make on whether to vacate the Award will have a significant impact on my interests and the interests of the Companies I represent.

V. The existing parties in this proceeding do not represent my interests

46. The parties before this Court are not willing or able to represent my interests before this Court. On the contrary, both parties have taken positions in the underlying arbitration and before this Court that are adverse to my interests.

47. Lion made grave accusations of fraud against me in the arbitration, which the Tribunal believed because no one was present before the Tribunal to refute the accusations.

48. Mexico was before the arbitral Tribunal, but Mexico decided not to dispute Lion's allegations during the arbitration that I had committed fraud, perhaps believing that this would be the best way to defend the actions of the Mexican courts. According to the Award, Mexico conceded Lion's allegation that I had committed fraud. For example, according to paragraph 94 of the Award, Mexico told the arbitral Tribunal that "the alleged multi-level fraud was so complex and sophisticated that its judicial system could not withstand it." In paragraph 365 of the Award, the arbitral Tribunal states that Mexico argued in paragraph 66 of its Post-Hearing Brief that the Mexican courts, like Lion, "also fell victim to Sr. Cardenas's fraudulent scheme." And in the following paragraph of the Award (paragraph 366), the Tribunal states that it "concurs with Mexico that the evidence marshalled in this case supports the conclusion that Sr. Cardenas and the debtors engaged in a sophisticated fraud . . . ."

49. Mexico and Lion have maintained those positions in the current proceeding to vacate the Award. For example, Mexico told this Court on paragraph 61 of its Petition to Vacate

the Award, that "the fact that Lion was defrauded by Mr. Cardenas is reprehensible."

50. In its Petition to Vacate the Award, Mexico chose to challenge the arbitral Tribunal's excess of powers based on one annullable defect in the Award. Even if Mexico's sole argument for vacating the Award proves successful, the annullable defect argued by Mexico does not relate in any way to the Tribunal's gross excess of powers against my interests, which would remain undisturbed.

51. Intervening in this proceeding is my only opportunity to defend my interests by contesting the Award. The two existing parties do not represent my interests and have not presented my arguments and evidence to the Court, including the fact of my complete exclusion from the underlying arbitration, where my rights and property were severely affected without being afforded the opportunity to be heard.

VI. The timing of when I learned about this Court proceeding

52. I first learned that Mexico had started a proceeding to try to vacate the Award by reading the news in an article published on July 12, 2022. *See* Ex. 13. At first, I thought that the article was referring to an annulment proceeding at ICSID, where I knew I would not be allowed to participate. On July 25, 2022, however, I learned that it was a United States federal court proceeding in the District of Columbia. I immediately retained international counsel in Washington, D.C. to assist me with this intervention.

Dated: August 22, 2022,

Guadalajara, Jalisco, Mexico.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Hector Cardenas