WRITING SAMPLE

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Name: Joshua M. Nosal

Background: This is a brief portion of an arbitration brief written on the joinder of a parent (non-signatory) to an arbitration agreement between a subsidiary and a mining corporation. The brief originally included a merits section, but I have only included the portions that I wrote. I wrote this for the VIS International Moot Arbitration Competition in the Fall of 2014.

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ABBREVIATED TABLE OF AUTHORITIES

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STATEMENT OF FACTS

The Parties

1 **CLAIMANT: Vulcan Coltan Ltd** (hereinafter "CLAIMANT") operates in the country of Equatoriana. It is a subsidiary of the rare minerals broker, Global Minerals Ltd, and was established to sell conflict-free coltan in Equatoriana's highly developed electronics industry.

2 **RESPONDENT: Mediterraneo Mining SOE** (hereinafter "RESPONDENT") is Mediterraneo's state-owned monopoly of all of the country's coltan mines.

3 **Global Minerals Ltd** (hereinafter "GLOBAL") is CLAIMANT'S parent company. It is a broker of rare minerals worldwide and is based in Ruritania.

The Contract

4 On **23 March 2014**, CLAIMANT and RESPONDENT negotiated a contract for the sale of conflict-free coltan. Conflict-free coltan is obtained from politically stable areas, which makes it a sparse resource. The desirability of conflict-free coltan stems from market participants' hesitance to potentially fund political instability. CLAIMANT initially requested 100 tons of this coltan from RESPONDENT. However, given the desired timeframe for delivery and its existing contractual obligations, RESPONDENT only agreed to provide 30 tons.

5 On **28 March 2014**, CLAIMANT entered into a Coltan Purchase Contract ("CPC" or "contract") with RESPONDENT for 30 metric tons of conflict-free coltan, CIF transport to Oceanside, Equitoriana, INCOTERMS 2010, for the price of US $45 per kilogram. CLAIMANT was required to provide a letter of credit ("LOC") within fourteen days of receiving a notice of transport ("NOT") from RESPONDENT

The Facts

6 On **25 June 2014**, RESPONDENT notified CLAIMANT that a major customer had defaulted on a large purchase and that it was "keen" on disposing of 150 tons of conflict-free coltan due to RESPONDENT's limited storage capacity. Also, attached to the email was a NOT indicating that the shipment should be in accordance with CIP transport requirements to Oceanside, Equatoriana.

7 On **27 June 2014**, in response to RESPONDENT's email, CLAIMANT notified RESPONDENT that it would expand the order and accept RESPONDENT's offer of 100 tons of conflict-free coltan, CIP transport, Oceanside, Equatoriana, for the price of US $45 per kilogram. RESPONDENT did not reply. Later that day, developing tensions in Xanadu, a major provider of coltan, were revealed.

8 On **04 July 2014** at approximately 15:00 MST, RESPONDENT received the first LOC from CLAIMANT requiring that the delivery be not less than 30 metric tons per shipment, CIP transport, Oceanside, Equatoriana, for any sum of money not to exceed a total of US $4,500,000. Simultaneously, the market for coltan surged as news broke that the world's largest electronics producer had developed a new game console. An hour later RESPONDENT left a voicemail rejecting the LOC, arguing that it did not comply with the CPC, and unless corrected immediately, the CPC would be terminated.

9 On **05 July 2014**, CLAIMANT immediately contacted RESPONDENT to resolve any discrepancy once it learned of the threatened rejection. CLAIMANT wrote a letter indicating that RESPONDENT's silence was interpreted as acceptance of the terms of the amended CPC.

10 On **07 July 2014**, RESPONDENT mailed CLAIMANT a formal letter of avoidance of the CPC, alleging that CLAIMANT failed to perform its obligations because the LOC related to 100 tons of coltan and listed CIP as the transport method rather than the CPC's specified amount and price of coltan, as well as CIF transport. RESPONDENT declared these deviations to be a fundamental breach of the CPC.

11 On **08 July 2014** at 17:42 RST, CLAIMANT faxed a cover page to RESPONDENT and had the bank issue a second LOC conforming to the CPC's original terms. The fax arrived outside of RESPONDENT's ordinary business hours and was discovered at the start of business the next morning. On the same day at 19:05 RST, or on **09 July 2014** at 00:05 MST, a courier delivered the cover page and second LOC to RESPONDENT's office. The cover page explained that the second LOC was a precautionary measure, and that the first LOC remained open. The second LOC required that the delivery be 30 metric tons, CIF transport, Oceanside, Equatoriana, for any sum of money not to exceed a total of US $1,350,000, and a commercial invoice.

12 On **09 July 2014**, CLAIMANT received a letter from RESPONDENT, which returned the second LOC and again purported to terminate the contract. RESPONDENT stated that it is "no longer willing to tolerate the continued efforts of the companies belonging to the GLOBAL to outwit their business partners." Consequently, CLAIMANT was deprived of the ability to fulfill its pre-existing contractual commitments to other customers into which it had entered in reliance on its agreement in the CPC with RESPONDENT for 30 tons of coltan.

13 On **11 July 2014**, CLAIMANT initiated arbitration proceedings against RESPONDENT and filed an Application for Emergency Measures to preserve the status quo pending the Arbitral Tribunal's

award. CLAIMANT initially requested the preservation of 100 metric tons of coltan, and alternatively the preservation of 30 metric tons of coltan.

14 On **26 July 2014**, the Emergency Arbitrator found that she properly had jurisdiction to order interim measures. The Emergency Arbitrator also found that CLAIMANT had fulfilled the substantive legal requirements of demonstrating a good arguable case and the risk of imminent harm, and ordered RESPONDENT to preserve the full 100 metric tons of coltan originally requested by CLAIMANT.

15 On **8 September 2014**, CLAIMANT reduced its claim against RESPONDENT from 100 metric tons to 30 metric tons of coltan as a sign of goodwill, which RESPONDENT subsequently accepted.

SUMMARY OF ARGUMENTS

Does the Arbitral Tribunal have jurisdiction over Additional Party, i.e. GLOBAL?

16 No. Pursuant to the fundamental international arbitration principle of intent, this Tribunal does not have jurisdiction over GLOBAL because GLOBAL did not intend to arbitrate disputes arising from the CPC and is not a party to the CPC. Furthermore the Tribunal should not look to the "good faith" and "group of companies" doctrines to assert jurisdiction; doing so would conflict with international arbitration norms and compromise the enforceability of the resulting award.

ARGUMENTS ON PROCEDURE

ISSUE 3: GLOBAL IS NOT BOUND BY THE ARBITRATION AGREEMENT BECAUSE IT HAS NOT CONSENTED AS A PARTY TO THESE PROCEEDINGS.

17 GLOBAL requests that this Tribunal refrain from asserting jurisdiction over GLOBAL because it is not a consenting party to the CPC or its arbitration clause. "[C]onsent of the parties remains the essential basis of a voluntary system of international commercial arbitration." [*Redfern, p. 85*]. GLOBAL only participates in these proceedings because this Tribunal has the authority to render an award against a party that refuses to take part in the proceedings under the ICC Rules of Arbitration, incorporated by the contract. [*ICC Rules, Art. 6(8); Cl. Ex. 1, p. 7*].

18 This Tribunal should not assert jurisdiction over GLOBAL for the following reasons. GLOBAL is not a consenting party to the arbitration arising from the contract and never intended to arbitrate any claim brought by RESPONDENT (**I**). As no intent to arbitrate can be found, it is equally inappropriate to turn to the hotly-debated "group of companies" doctrine, which deviates from the traditional consent and performance approach [*Rodler, p. 21*], to bind an autonomous entity based on its corporate relation to CLAIMANT (**II**). Nor do good-faith principles join GLOBAL to the arbitration, as good faith must still rely on intent of the parties to arbitrate (**III**).

I. GLOBAL is not a consenting party to these arbitral proceedings, and its provision of the LOC securing CLAIMANT's payment is not sufficient grounds to bind GLOBAL to the arbitration agreement.

19 The Tribunal should refuse to assert jurisdiction over GLOBAL because GLOBAL has not agreed to arbitrate under the CPC and is not even a contracting party to the CPC. If the Tribunal wishes to bind GLOBAL to this arbitration, it must find authority to do so under the law of the seat, Danubia, which is the governing law of the dispute. [*NYC, Art. V(1)(a)*]. That law, as promulgated by the Supreme Court of Danubia, provides no such authority; instead, it "emphasizes that arbitration is based on consent." [*Proc. Ord. 2, p 69*]. Specifically, "[t]he essence of arbitration is voluntary mutual agreement between the parties to submit their disputes to [arbitration]." [*Eldin, p. xiii*]. Such an agreement was not made between GLOBAL and RESPONDENT.

20 GLOBAL's endorsement of the contract should not be construed as an agreement to arbitrate under the CPC. The party claiming a non-signatory's agreement to be bound by an arbitration clause

bears the burden of proof. Such a burden is higher when a willfully contracting party seeks to bind a non-signatory than when a non-signatory seeks to enter an arbitration already initiated with a willfully contracting party. [*Craig, p. 177*]. The key difference is that a willfully contracting party, such as RESPONDENT, has already conceded to arbitration, whereas a non-signatory, such as GLOBAL, has not.

21 To meet the heightened burden of proof, the party attempting to bind the non-signatory must show positive acts of the non-signatory that "clearly establish the non-signatory's intent to acceded to the contract, and also the original parties' acceptance of that accession." [*Mayer, p. 832*]. RESPONDENT cannot meet this burden of proof because GLOBAL's issuance of the LOC is not a positive act that would show accession to the contract (**A**), and because RESPONDENT did not consider GLOBAL's endorsement an accession to the contract (**B**).

A. Neither the LOC nor GLOBAL's endorsement indicate GLOBAL's accession to the contract.

22 GLOBAL did not accede to the contract through either its endorsement or its issuance of the LOC to secure CLAIMANT's payment obligation. Normally, only the signing parties to a contract are bound by it, but circumstances surrounding an arbitration agreement can indicate such intent to accede. [*Whitesell, pp. 8-9*]. Such an indication cannot be found here, however, because neither the Parties' negotiations nor the language in the contract indicate GLOBAL's intent to accede to the contract. Art. 1 of the contract sets forth the "Contracting Parties," which includes "Seller" and "Buyer," not endorser. [*Cl. Ex. 1, p. 7*]. As expected, the contract continues to make no reference to GLOBAL as an obligated party.

23 Additionally, GLOBAL's endorsement signature on the signature page does not indicate that GLOBAL is a party to the contract as a surety; instead, it merely imposes secondary liability on the surety. [*Badia, pp. 93-94*]. RESPONDENT admits that acting as a surety to secure a payment obligation is not equivalent to becoming "a direct party to the deal." [*R. Ans. to Arb., p 34*]. "In the end the exact legal status of [GLOBAL] was of limited concern to [RESPONDENT]." [*Resp. Ex. 1*]. Indeed, any obligation or right GLOBAL possessed as a surety was created as a precautionary measure for RESPONDENT in an independent agreement. [*Id*]. Thus, GLOBAL's endorsement of the CPC and subsequent LOC only serve to acknowledge their separate security agreement without binding GLOBAL to the contract or its arbitration clause.

B. RESPONDENT did not accept GLOBAL's LOC or endorsement of the contract as accession to the contract.

24 RESPONDENT recognized that GLOBAL would not be a party to the contract, nor would it accede to the contract. If RESPONDENT intended to include GLOBAL in the contract, it could have so requested prior to signing the contract. [*ICC 4402*]. Consequently, the Tribunal should look to the obvious indication of party status---the signature page--- to see which entities are designated there. [*Born, Int. Comm. Arb., p. 1411, see U.S., Chevron Case*]. As stated in ¶¶ 88-89 supra, the CPC does not designate GLOBAL as one of the "contracting parties." [*Cl. Ex. 1, p. 7*].

25 Furthermore, the Parties' recognized GLOBAL's intent to remove itself as a party to the CPC and subsequently negotiated for the security of CLAIMANT's payment obligation. RESPONDENT's General Sales Manager, Mr. Winter, also admits that it was not concerned with GLOBAL's legal status under the contract, but only payment security. [*Resp. Ex. 1, p 41*]. There is no doubt that Mr. Winter, as a businessman experienced in the large-scale sale of coltan [*Resp. Ex. 1, p. 40*], was aware that securing a sizable payment obligation would be costly. Mr. Winter's business experience would also have made him aware of CLAIMANT's desire to limit transaction costs. [*Cl. Ans. to Resp., p. 50*]. As a result, the payment security obtained from GLOBAL was merely CLAIMANT's effort to reduce transaction costs.

26 None of the facts conflict with GLOBAL's original intent to create a liability shield when it established CLAIMANT. [*Cl. Ans. to Resp., p. 50*]. The circumstances do not indicate that the security provided by GLOBAL was GLOBAL's effort to lower its liability shield, nor could RESPONDENT interpret them as such. In fact, CLAIMANT has signed multiple contracts in which GLOBAL has provided the necessary securities. [*Proc. Ord. 2, p. 63*]. In each of those situations, however, GLOBAL refused to be a party to the agreement. [*Id.*]. Because of RESPONDENT's historic business relationship with GLOBAL, it is not reasonable to believe that RESPONDENT perceived GLOBAL's endorsement of the contract and security of CLAIMANT's payment obligation as GLOBAL's accession to the contract.

II. This Tribunal does not have a good-faith basis upon which it may assert jurisdiction over GLOBAL.

27 Although good-faith principles may apply to a limited extent, the Tribunal should not assert jurisdiction over GLOBAL because it has not consented to arbitrate nor does its conduct justify binding it to the contract. Danubian law, the governing law of the seat, does not contain a codified

provision regulating the good-faith actions of the Parties. [*Proc. Ord. 2, p 69*]. Thus, if the Tribunal seeks to conduct a good-faith analysis, it must look to international law for guidance. Such law provides bases for determining whether GLOBAL in good faith intended to arbitrate under the contract, but not the conclusion. [*Born, Int. Comm. Arb., p. 1413*]. The most circumstantially relevant bases for analyzing GLOBAL's intent to arbitrate are estoppel (**A**), third party beneficiary (**B**), and guarantor (**C**). However, none of these good-faith bases grant the Tribunal jurisdiction over GLOBAL.

A. The estoppel basis.

28 GLOBAL has taken no action under the CPC that would warrant estopping it from resisting arbitration. The premise of estoppel is that a non-signatory cannot seek and receive benefit from a contractual relationship while ignoring other contractual obligations. [*MacHarg, p. 19*]. Under estoppel, an arbitration right may be extended based on a party's conduct resembling an undertaking of contractual obligations. [*Hosking*]. Specifically, a non-signatory may be bound if its role in the contract negotiations or the performance of the contract shows clear intent to be bound or if the other party could have reasonably understood the non-signatory could have been bound. [*Swiss, Trading Case, r. 2; ICC 4131*]. In the Swiss, Trading Case, a third party entered a preexisting contractual relationship as a joint obligor next to the original obligor. [*Swiss, Trading Case*]. The Court found that the third party intended to be bound by the arbitration agreement in the preexisting contract when it assumed responsibility, not as a surety securing the obligation, but as a joint obligee. [*Id.*].

29 Here, however, the parties' negotiations evidence no intent to bind GLOBAL to the arbitration provision as an endorser of the contract. [¶¶ *88-89 supra*]. Because RESPONDENT specifically recognizes GLOBAL's status as an endorser and not a contracting party with contractual obligations [*Resp. Ex. 1, p 41*], there is no evidence that the parties, in good faith, reasonably believed that GLOBAL was bound to the contract.

30 Furthermore, RESPONDENT has not been injured by GLOBAL's actions. According to one commentator, "[t]he doctrine of … estoppel exists to prevent fraud or injustice." [*Lord, § 8.3*]. In line with this statement, "the proper application of the estoppel doctrine is as a 'shield,' and not as a 'sword.'" [*Born, Int. Comm. Arb,. p 1474*]. In the present case, RESPONDENT has not been denied its contractual right to payment. Instead of a breach by CLAIMANT, which RESPONDENT asserts was its reason for including GLOBAL's endorsement [*R. Ans. to Arb., p 37*], RESPONDENT breached the

contract. Thus, RESPONDENT cannot now turn to the contract in an effort to collect damages from GLOBAL, which RESPONDENT incurred on its own accord.

B. The third party beneficiary basis.

31 Without direct benefit, GLOBAL should not be joined in the arbitration. "It is generally accepted that if a third party is bound by [and benefits from] the same obligations stipulated by a party to a contract and [the] contract contains an arbitration clause or, in relation to it, an arbitration agreement exists, such a third party is also bound by the arbitration agreement, even if it did not sign it." [*ICC 9762, p. 39*]. For example, a Swiss Court refused to grant third party beneficiary status when the beneficiary was not granted direct rights under the contract. [*Swiss, Beneficiary Case*].

32 Because the third party beneficiary basis is an exception to the general rule excluding non-signatories from the effects of a contract, the basis requires a particularly clear showing of third-party beneficiary status. [*U.S., McCarthy Case, p. 362*]. Such a clear showing has not been made here because GLOBAL did not have a right to compel RESPONDENT's contract performance, nor did it receive direct benefit from the contract. Focusing on GLOBAL's equity in CLAIMANT as a source of benefit would allow the enforcement of arbitration agreements—entered into by a corporation—against any of that corporation's shareholders. Because GLOBAL does not receive a direct benefit from the contract, the Tribunal cannot deem it a contracting party under the good-faith principle of third party beneficiary.

C. The guarantor basis.

33 GLOBAL's status as endorser or guarantor of CLAIMANT's contractual payment obligation does not bind GLOBAL to the CPC's arbitration clause. However, the subjectivity of the guarantor relationship requires consideration of the relationship between the parties and the contractual language adopted. [*Born, Int. Comm. Arb., p. 1461*]. Some courts have found that a "determination of whether a guarantor is bound by an arbitration clause contained in the original contract necessarily turns on the language chosen by the parties in the guaranty." [*U.S., Shipping Case, p. 973*].

34 In the present case, however, there is no written guaranty made by GLOBAL making reference to the contract. Tribunals have argued that the guaranty only attaches to the obligation and not the contract arbitration clause unless specific reference is made to the clause. [*Swiss, Guarantee Case; U.S., Mitsubishi Case, p. 265*]. The LOC does not, in connection with GLOBAL's credit obligation, sufficiently reference the contract and more specifically its underlying arbitration agreement. [*See Swiss, Government Guaranty Case*]. In fact, in the LOC's brief reference to the contract,

it specifically recognized that it was "between [RESPONDENT] and [CLAIMANT]," not GLOBAL. [*Cl. Ex. 5, p. 11*].

35 Additionally, GLOBAL has not performed any requisite contractual obligations. A non-signatory that performs a contract may be bound by the contract's arbitration clause through implicit consent. [*Born, Int. Comm. Arb., p. 1460; UNIDROIT Prin., Art. 2.1.1 c. 2*]. Case law recognizes the extension of an arbitration agreement to a third party who has intervened or reserves the right to intervene in a particularly intense manner in the execution of a contract containing an arbitration clause. [*Ad Hoc, Holding Award*]. Here, the LOC issued by GLOBAL was merely a security of the payment obligation not an intervention or performance of that obligation. Furthermore, GLOBAL's passivity in the Parties' negotiations evidences that it has not intervened in a particularly intense manner that would bind it to the underlying arbitration agreement.

III. The Tribunal does not have jurisdiction over GLOBAL under the "group of companies" doctrine.

36 The Tribunal should not use the group of companies doctrine to assert jurisdiction over GLOBAL for two reasons: GLOBAL has continued to remain a separate entity from CLAIMANT, which precludes application of the doctrine in this case (**A**); and applying the doctrine threatens the enforceability of the Tribunal's ultimate decision (**B**).

A. The group of companies doctrine does not apply to these circumstances.

37 The group of companies doctrine does not apply to GLOBAL as parent to its subsidiary, CLAIMANT, because GLOBAL never intended to arbitrate under the contract. [¶¶ *88-89 supra*]. "[I]t is not so much the existence of a group that results in the various companies of the group being bound by the agreement signed by one of them, but rather the fact that such was the true intention of the parties." [*Savage, ¶ 501*]. As a result, courts and arbitral tribunals impose additional requirements on the doctrine besides the presence of a group. [*Ferrario*].

38 The present circumstances do not meet the requirements of the doctrine and therefore do not facilitate joining GLOBAL to the arbitration. The doctrine first requires "a tight corporate structure and strong organizational and financial link . . . between the members of the group." [*Badia, p. 71*]. Here, however, CLAIMANT maintains its books and personnel separate from GLOBAL, preserving their financial independence. [*Proc. Ord. 2, p. 63*]. Although Mr. Storm, at GLOBAL, is responsible for CLAIMANT, "he has no authority to act for CLAIMANT Vulcan," preserving their organizational independence. [*Proc. Ord. 2, p. 63*]. The doctrine also requires "an active role of the

non-signatory member in the negotiation [and] performance . . . of the contract." [*Badia, p. 71*]. Although GLOBAL participated in the Parties' negotiations and communications [*Cl. Ex. 2, 4*], GLOBAL made it clear that it would not be a party to the contract [*Proc. Ord. 2, p. 63*], precluding any reasonable inference that GLOBAL intended to arbitrate under the contract. Thus, the doctrine's final requirement is not met, which is that "the group structure and the active involvement [of the non-signatory] must be such as to infer that the non-signatory . . . intended to arbitrate." [*Badia, p. 71*]. Because the doctrinal requirements have not been met, it would be improper for the Tribunal to assert jurisdiction over GLOBAL under the group of companies doctrine.

B. Applying the group of companies doctrine threatens the enforceability of the Tribunal's decision.

39 Even if the Tribunal finds that the doctrinal requirements have been met, application of the doctrine in this case would conflict with Danubian national law governing the contract. [*Proc Ord. 2, p. 69*]. Despite the lack of Danubian court decisions accepting or rejecting the doctrine, several Danubian scholars have relied on the Danubian Supreme Court's emphasis of consent-based arbitration to suggest that the Court will not adopt the doctrine. [*Proc. Ord. 2, p. 69*]. This is in line with English and Swiss jurisdictions that have excluded the doctrine from their national law [*English, Bank Case, p. 64; Swiss, GC Case*], as well as the U.S., which relies on the alter ego theory when piercing the corporate veil. [*U.S., Bridas Case*].

40 Not only does the doctrine conflict with the contract's governing law, it also runs against the legal principles of Ruritania, GLOBAL's headquarters. [*Cl. Req. for Arb., p. 2*]. Ruritanian law "respects the separate legal nature of [a] subsidiary," except in a case of fraud. [*Proc. Ord. 2, p. 64*]. This equates to the alter ego theory, which requires fraudulent behavior on the part of the subsidiary to the benefit of the parent. [*Rodler, p. 46*]. Although RESPONDENT alleges that GLOBAL fraudulently forced one of its subsidiaries into bankruptcy to avoid payment obligations, no fraud has been committed in the present case. [*R. Ans. to Arb., p. 34*]. In fact, the LOC make fraudulent behavior on the part of GLOBAL impossible. As such, Ruritianian courts, in support of the separate legal nature of CLAIMANT, would not uphold an arbitral award against GLOBAL.

41 If the Tribunal ignores these enforceability issues and nevertheless seeks to apply the group of companies doctrine, it must recognize that even France, a former proponent of the doctrine, would not bind a non-signatory to arbitrate under the present facts. French courts applying the doctrine have bound non-signatories to an arbitration agreement under two primary circumstances.

First, when a non-signatory (parent) is attempting to join an arbitration between its subsidiaries and a seller, where the parent is found to be at the center of the contractual relationship. [*ICC 4131*]. And second, when a contracting party attempts to bind a non-signatory (parent to the opposing subsidiary) to an arbitration agreement, where the subsidiary was created for the sole purpose of facilitating the disputed transaction and the parent was the mastermind of the subsidiary. [French, *Lestrade Case*]. Because GLOBAL is not seeking to enter the arbitration, proving that it was the center of the contractual relationship under the Dow Chemical analysis is insufficient. Furthermore, CLAIMANT was not created for the sole purpose of purchasing coltan from RESPONDENT, nor is it possible that GLOBAL was the mastermind behind CLAIMANT's business decisions. [*Proc. Ord. 2, p. 63*].

CONCLUSION: Because GLOBAL did not intend to arbitrate under the CPC and is not a party to the CPC, and because it would be improper to join GLOBAL to this Arbitration under the doctrines of "good faith" and "group of companies," CLAIMANT respectfully requests that the Tribunal refrain from asserting jurisdiction over GLOBAL.

REQUEST FOR RELIEF

For the reasons described above, Counsel for CLAIMANT respectfully requests this Distinguished Tribunal to find that:

(1) There is a valid contract between CLAIMANT and RESPONDENT;

(2) The interim measures were appropriate and enforceable; and

(3) GLOBAL should not be joined in this arbitration.