SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 48EFM

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HUNTSMAN INTERNATIONAL, LLC,

Plaintiff,

- v -

ALBEMARLE CORPORATION, ROCKWOOD SPECIALTIES GROUP, INC., ROCKWOOD HOLDINGS, INC., SEIFOLLAH GHASEMI, ANDREW ROSS, THOMAS RIORDAN, and MICHAEL VALENTE,

Defendants.

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INDEX NO. 650672/2017

MOTION DATE N/A

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 97, 98, 99, 101 were read on this motion to/for STAY.

Defendants Albemarle Corporation, Rockwood Specialties Group, Inc., and Rockwood Holdings, Inc. (collectively, Albemarle) move, pursuant to CPLR Article 63, to stay the ongoing American Arbitration Association (AAA) arbitration and disqualify the remaining two of three arbitrators, and pending a decision on this motion, to stay the present arbitration and all related processes, including, arbitrator selection, discovery deadlines, time to submit or exchange papers, and trial date, currently scheduled for May 3, 2021. After expedited briefing and argument on April 2, 2021, the motion is denied.

Hon. Dennis M. Cavanaugh is the former Chair of the arbitration panel. The remaining "wing" arbitrators are Hon. Wayne R. Andersen and Hon. Stanwood R. Duval, Jr.; all three are former federal district court judges (Panel).

The arbitration began after a lengthy and complex process to select arbitrators. (NYSCEF 73 Doc. No. [NYSCEF], March 14, 2019 email explaining selection process.) Over the course of 19 months, the arbitration progressed with more than 10 hearings resulting in 28 orders by the Panel. (NYSCEF 82, Williams Aff. ¶3; NYSCEF 72, March 25, 2021 Huntsman letter to AAA at 15, 16.) On March 10, 2021, Cavanaugh wrote to AAA:

> "[i]t has come to my attention that, through inadvertence, I did not advise that my daughter-in-law is an associate with Kirkland & Ellis' Houston office ... . Because my daughter-in-law was on maternity leave at the time I was appointed Chair, it didn't even occur to me to advise the parties of her relationship with Kirkland ... I've advised Judges Duval and Andersen of this relationship. Neither of them believes that this affects my neutrality or my ability to serve as Chair." [1]

(NYCEF 71, Cavanaugh letter.) Cavanaugh copied Duval and Anderson on the letter. (*Id.*) On March 11, 2021, AAA forwarded the letter to the parties. (NYSCEF 76, AAA letter.) On March 18, 2021, Albemarle objected to all three arbitrators' continued service; that objection was not provided to the court.

On March 26, 2021, the AAA Advisory Review Committee (ARC) sustained Albemarle's objection and removed Cavanaugh due to his previously undisclosed conflict of interest but denied its application to disqualify the other two arbitrators. (NYSCEF 76, AAA email letter at 3.) AAA also noted that its decision was final and that

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[1] According to Kirkland & Ellis LLP (K&E), which represents plaintiff Huntsman International LLC (Huntsman), Cavanaugh's daughter-in-law is one of almost 2,900 lawyers that work at Kirkland in 15 offices and over 70 practice groups across the world. (NYSCEF 72, Huntsman letter to AAA.) She works in a different office, in a different state, and in a different practice group from the Kirkland lawyers handling this arbitration. (*Id.*) She has never worked on this matter, she has never represented Huntsman in any capacity, and as a salaried employee, she does not share in the firm's profits. (*Id.*)

any future challenge to the wing arbitrators must be on other grounds. (*Id.*) On March 29, 2021, Albemarle filed this motion for a preliminary injunction.

Albemarle argues that

> "the neutrality of the remaining two 'wing' arbitrators has been unacceptably compromised by their improper participation in the disclosure of the former Chair's conflict to the parties, in a manner that could reasonably be seen as an attempt to improperly discourage Albemarle from asserting its meritorious challenge to the former Chair or to influence the ARC's decision on a challenge. Having successfully raised its proper objection, Albemarle is now faced with the prospect of proceeding before the wing arbitrators who improperly (and incorrectly) opined that the former Chair should not be disqualified, preemptively taking sides against Albemarle. The wing arbitrators' decision to opine on the disqualification issue was not just procedurally improper; it has created an untenable appearance of partiality.... Albemarle should never have been put in the position of having to choose between on the one hand enforcing its right to an impartial panel, and on the other hand incurring the potential prejudice of proceeding before wing arbitrators who reasonably could be seen to have discouraged it not to make the challenge and to have attempted to influence the outcome if the challenge were made. By improperly—and, as the ARC has now confirmed, incorrectly—supporting the continued service of a conflicted Chair, the wing arbitrators have irremediably compromised their own neutrality and appearance of impartiality."

(NYSCEF 69, Albemarle MOL at 2-3.)

Under AAA rules, ARC decides conflict issues. (AAA Construction Industry Arbitration Rule 19[b].) Here, Albemarle fails to identify any AAA rule that barred Cavanaugh from speaking to the wing arbitrators about the conflict. (NYSCEF 89, Rutherglen Decl. ¶9.) In fact, AAA Rule 19(b), gives AAA discretion whether to share such information.[2] Also, relevant here is AAA Construction Industry Arbitration Rule

[2] "Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others"; "such information" includes "any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives." (AAA Construction Industry Arbitration Rule 19[b], [a].)

22(c), which provides that, where one arbitrator has been replaced, the decision whether to rehear any prior rulings lies within the discretion of the new panel.

"A preliminary injunction may be granted under CPLR article 63 when the party seeking such relief demonstrates: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor." (*Doe v Axelrod*, 73 NY2d 748, 750 [1988] [citation omitted].)

Albemarle has not established likelihood of success. While this court has jurisdiction to hear Albemarle's request for the extraordinary relief to intervene in an ongoing arbitration prior to a final award, Albemarle has not satisfied its burden under CPLR 6301. New York "courts have inherent power to disqualify an arbitrator before an award has been rendered." (*Astoria Med. Group v Health Ins. Plan*, 11 NY2d 128, 132 [1962] [reversing pre-award order disqualifying arbitrator].) Indeed, "[w]here a party to an arbitration proceeding becomes aware of the . . . probable partiality of an arbitrator, there would appear to be no reason why the court should not exercise its equitable jurisdiction on the application of the party at any time during the proceeding, rather than require the party to wait for the award, and then move to vacate . . . ." (*Grendi v LNL Constr. Mgt. Corp.*, 175 AD2d 775, 776 [1st Dept 1991] [internal quotation marks omitted].) The grounds for disqualification pursuant to the court's inherent power include the "appearance of bias." (*Bronx-Lebanon Hosp. Ctr. v. Signature Med. Mgt. Group*, 6 AD3d 261, 261 [1st Dept 2004] [denying motion to disqualify arbitrator].) "[T]hat bias must be clearly apparent based upon established facts, not merely supported by unproved and disputed assertions." (*Id.*) However, this court can find

neither the appearance of bias nor "probable partiality" on this record. (*See Belanger v State Farm Mut. Auto Ins. Co.*, 74 AD2d 938, 939 [3d Dept 1980].)

New York courts disfavor collateral attacks on ongoing arbitrations "[w]here, as here, the parties have agreed to arbitrate their disputes and to be bound by [ ] [AAA] rules." (*Nespola v Mgt. Network Grp.*, 101 AD3d 437, 438 [1st Dept 2012] [citations omitted].) "[J]udicial review of interim determinations ... is generally unavailable." (*Id.*) Here, the parties chose arbitration, including application of AAA rules regarding conflicts. AAA's disqualification decisions are binding because the "AAA [r]ules clearly outline" that the AAA's determination of any partiality challenge "shall be conclusive." (*York Hannover Holding A.G. v Am. Arbitration Assn.*, 1993 WL 159961, *5 [SDNY 1993]; *NGC Network Asia, LLC v Pac Pac. Group Intl., Inc.*, 2012 WL 377995 [SDNY 2012], cert denied 134 S Ct 265 [2013].)

The fundamental premise of the parties' agreement to arbitrate here is that the parties are bound by the AAA's rules and procedures and cannot use the courts as some sort of interlocutory appellate court to challenge adverse rulings. (*See York Hannover Holding A.G.,* 1993 WL 159961 at *5 [concluding that a party to arbitration "is not free to disregard the Rules it agreed to operate under and expect this court to relieve it of the consequences of doing so"].) Such a challenge undermines the inherent benefits of arbitration, speed and lower cost, and invites interference with the arbitration process. (See *Matter of 797 Broadway Group LLC v BCI Constr. Inc.*, 57 Misc 3d 391, 399 n. 6 [Sup Ct, Albany County 2017] [there are "powerful incentive[s] for disaffected parties to seize on even the most attenuated of connections to support an evident-partiality challenge"].)

Albemarle's reliance on *Grendi* for the proposition that the arbitrators placed Albemarle in an untenable situation by not following these rules, compelling pre-award disqualification, is misplaced. In *Grendi*, the petitioner refused to pay the respondents' share of required arbitrator fees, after respondents disclosed that they could no longer afford to do so. (*Grendi v LNL Constr. Mgt. Corp.*, 175 AD2d at 776.) AAA informed the arbitrators of the petitioner's refusal, which the court believed created a potential for bias given that the petitioner's decision directly affected how much money went into the arbitrators' pockets. (*Id.* at 777.) This court rejects Albemarle's conjecture that, via Cavanaugh's letter, Anderson and Duval were sending Albemarle a secret message to stand down—do not challenge Cavanaugh. The court will not speculate as to why Cavanaugh sought input from his co-panelists and will not assign the malevolent motive that Albemarle invites without any factual basis. Nevertheless, there is a clear difference between the cases relied upon by Albemarle involving arbitrator compensation and this case where Albemarle disagrees with the wing arbitrators' opinion. (*Bronx-Lebanon Hosp. Ctr.*, 6 AD3d at 261 [since disqualification could not be based on adverse ruling, movant unsuccessfully raised circumstances surrounding ruling]).

Moreover, it was not the arbitrators, but rather Albemarle which created this "untenable" situation. When AAA disqualified Cavanaugh but denied disqualification of Anderson and Duval, the wing arbitrators were not copied on the email. But for filing this extraordinary motion, publicly without requesting a seal, Anderson and Duval would never have known about Albemarle's request to disqualify them and Albemarle could

not assert their bias now. Albemarle cannot create the situation and complain about the resulting presumed bias.

Nevertheless, this court rejects Albemarle's premise that the arbitrators are now conflicted and predisposed to favor Huntsman. Implicit in Albemarle's argument, that prior rulings are tainted because Cavanaugh's conflict existed prior to his selection in 2019, is that (1) Cavanaugh knew about the conflict when he made decisions unfavorable to Albemarle; (2) Cavanaugh succeeded in convincing the other two arbitrators to join him in favoring K&E; and (3) facts and law were not the underpinning of the 28 arbitration decisions. This court has no reason to believe that these former federal judges cannot be impartial after declining a motion to recuse; this situation is no different. (See *Catalyst Waste-to-Energy Corp. v Long Beach*, 164 AD2d 817, 820 [1st Dept], *appeal dismissed* 76 NY2d 1017 [1990].)

Moreover, the parties here fashioned the complex arbitrator selection process. Presumably, the parties appreciate the expertise of federal judges developed over many years making decisions based on the law and the facts, including neutrality after recusal decisions.

This court also rejects Albemarle's argument that the remaining arbitrators have "pre-judged" whether prior rulings must be revisited. Under Albemarle's theory, any adverse decision in litigation or arbitration predetermines subsequent decisions. Arbitrators take an oath to be fair and just (CPLR 7506), and Albemarle fails to present any factual allegations that the remaining arbitrators here have somehow betrayed this oath. "[T]he fact that one party loses at arbitration does not, without more, tend to prove that an arbitrator's failure to disclose some perhaps disclosable information should be

interpreted as showing bias against the losing party. We have repeatedly said that adverse rulings alone rarely evidence partiality, whether those adverse rulings are made by arbitrators or by judges." (*Scandinavian Reins. Co. v St. Paul Fire & Mar. Ins. Co.*, 668 F3d 60, 75 [2d Cir 2012] [citations omitted]; *see also Flintrock Const. Servs., LLC v Weiss*, 2013 WL 1332783, *4 [Sup Ct, NY County 2013] [denying pre-hearing order disqualifying arbitrator and stating "[a] petitioner's subject[ive] belief that an arbitrator's rulings favored respondent does not create an actual or perceived conflict of interest between an arbitrator and respondent that prejudiced petitioner's right"].)

Albemarle contends that it will suffer irreparable harm if it is forced to litigate this dispute before wing arbitrators who ought to be removed under New York law and before a new Chair is nominated by them. Albemarle is not without a remedy, and thus, it cannot establish irreparable harm at this juncture. It may make a post-award request to vacate the award. (*See Santana v Country-Wide Ins. Co.*, 177 Misc 2d 1 [Civ Ct, Queens County 1998] [vacating award because arbitrator decided disqualification issue "instead of referring the final determination of the disqualification issue to the AAA"], *affd* 184 Misc 2d 294 [App Term, 2d Dept 2000].)

Albemarle contends that it is "precisely because arbitration awards are subject to such judicial deference, it is imperative that the integrity of the process, as opposed to the correctness of the individual decision, be zealously safeguarded." (*Goldfinger v Lisker*, 68 NY2d 225, 231 [1986].) When, in a post-award challenge, one of the arbitrators who participated in the award is found to be conflicted, the conflict infects the award and requires it to be vacated. (*Kern v 303 E. 57th St. Corp.*, 204 AD2d 152 [1st Dept], denying leave to appeal, 84 NY2d 810 [1994].) Again, such a significant decision

is not to be made based on conjecture, and the court declines Albemarle's invitation to make unsubstantiated assumptions.

Finally, equities favor denial of the motion. The parties selected arbitration because it is supposed to be cheaper and faster. "Arbitration serves the laudable objective of 'conserving the time and resources of the courts and the contracting parties.' Arbitrators routinely use their expertise to orchestrate expeditious resolutions to complex legal problems in commercial disputes." (*American International Specialty Lines Ins. Co v Allied Capital Corp.*, 35 NY3d 64, 70 [2020] [citations omitted].) The court's intervention at this time is premature and fair to no one.

Accordingly, it is

ORDERED that defendants' motion is denied.

4/5/2021
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE