UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

First State Insurance Company, *et al.*,

Petitioners,

-v-

National Casualty Company,

Respondent.

13 Civ. 704 (AJN)

ORDER

ALISON J. NATHAN, District Judge:

On January 31, 2013, Petitioners filed a petition to confirm a final order from an arbitrated dispute. (Docket # 1). Respondent moves to have the Court place under seal certain documents submitted in connection with the petition. (Docket # 13). In support of their application, and in compliance with this Court's rules, Respondent submitted the attached letter explaining why sealing is appropriate under the Second Circuit's decision in *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110 (2d Cir. 2006). The Court is not persuaded by Respondent's letter.

"It is well settled that the petition, memoranda, and other supporting documents filed in connection with a petition to confirm an arbitration award (including the Final Award itself) are judicial documents that directly affect the Court's adjudication" and are therefore subject to a presumption of public access. *Aioi Nissay Dowa Ins. Co. v. Prosight Specialty Mgt. Co., Inc.*, 2012 WL 3583176, at *5 (S.D.N.Y. Aug. 21, 2012) (collecting cases). Respondents have made no showing sufficient to overcome this presumption. The assertion that disclosure violates a separate confidentiality order is insufficient. *Id.* As a result, Respondent's motion is DENIED.

SO ORDERED.

Dated: February 19, 2013
New York, New York

ALISON J. NATHAN
United States District Judge

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February 15, 2013

VIA E-MAIL NATHANNYSDCHAMBERS@NYSD.USCOURTS.GOV

The Hon. Alison J. Nathan
United States District Court
Southern District of New York
Daniel Patrick Moynihan
United States Courthouse
500 Pearl Street
New York, NY 10007-1312

RE: *First State Insurance Company, et al. v. National Casualty Company*
USDC SDNY Case No. 1:13-CV-704-AJN
National Casualty's Response to February 13, 2013 Order

Dear Judge Nathan:

Respondent National Casualty Company ("National Casualty") submits this letter in response to this Court's February 13, 2013 order. Pursuant to the Individual Practices in Civil Cases of the Hon. Alison J. Nathan, we attach as Exhibit A to this letter a copy of the arbitration order that National Casualty requests be sealed, with the requested redactions highlighted.[1]

As the Court knows, First State Insurance Company and its related petitioners (collectively "First State") are currently involved in an on-going arbitration with National Casualty. The Panel in that arbitration, at First State's insistence, issued a Confidentiality Order that prohibits, with certain exceptions, the disclosure of confidential arbitration information. The Panel also issued an order on December 13, 2012 (the "December 13, 2012 order").

First State filed this action seeking judicial confirmation of the December 13, 2012 order. First State placed that order in the public record, maintaining that it was free to do so because the Honorable John G. Koeltl had orally denied its request to keep it under seal. First State first notified National Casualty about this action, Judge Koeltl's oral denial, and the public disclosure

[1] To the extent any document publicly filed by First State quotes from or refers to the terms of the arbitration panel's December 13, 2012 order (*e.g.*, Petitioners' Memo. of Law in Support of Petition (Dkt. #2) 2-3), National Casualty likewise requests redaction.

of the December 13, 2012 order nearly a full week later. National Casualty had no opportunity to present the arguments that it is presenting in this letter before the December 13, 2012 order was made publicly available. Indeed, a day before First State first told National Casualty about this action, an on-line reinsurance newsletter published details of the December 13, 2012 order on the internet.[2] In addition, earlier today, another reinsurance publication (Mealey's) published a short on-line article on the case. The article did not disclose the details of the December 13, 2012 order, but provided links to that order as publicly available in this court's docket.

First State must not be allowed to take advantage of its own breach of the arbitration panel's confidentiality order (described more fully in National Casualty's Memorandum of Law in Support of Motion to Vacate Ex Parte Order Denying Seal (Dkt. #13)) by arguing that the "cat is out of the bag" and, therefore, the Court should not bother sealing anything. Indeed, given the current links provided to this Court's files, an immediate seal would help to prevent any further harm caused by First State's actions.

Had First State notified National Casualty *before* First State made the arbitration order public, National Casualty would have sought to prevent the public release at that time. National Casualty moved as quickly as it could *after* learning what First State had done.

The Court has asked National Casualty to address why redactions are appropriate in light of *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110 (2d Cir. 2006). *Lugosch*, however, did not raise the same questions currently before this Court. *Lugosch* concerned a third-party's attempt to obtain access to judicial documents that had been filed under seal pursuant to a confidentiality order entered by the court based upon the parties' agreement. *Lugosch* did not involve an underlying arbitration, and, thus, the court did not have to confront a confidentiality order issued by an arbitration panel.

National Casualty is unaware of any precedent from this district or the Second Circuit where the court has had to decide what weight to accord to an arbitration's confidentiality order. *But see Goldstein v. Preisler*, 24 A.D.3d 441, 442 (N.Y. Sup. Ct. App. Div. 2005) (holding trial court improperly modified an arbitration award by confirming a stipulation award but denying a portion of the award that recommended expunging all references to the arbitration from public reg-istration records); *Group Health Plan, Inc. v. BJC Health Systems, Inc.*, 30 S.W.3d 198, 205 (Mo. App. 2000) (enforcing confidentiality order of an arbitration panel to deny a subsequent third party from discovering proceedings of a prior unrelated arbitration).

Here, in essence, First State is asking this Court to confirm one panel award (the December 13, 2012 order) while giving no weight to another panel order (the Confidentiality Order).[3] But the highly deferential standard for judicial review of arbitration awards suggests

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[2] The newsletter is available to subscribers only, which include many individuals in the relevant reinsurance arena.

[3] On February 7, 2013, National Casualty filed an action in the United States District Court for the District of Massachusetts, seeking confirmation of the Panel's Confidentiality Order.

that a court should be reluctant to disturb an arbitration panel's order for confidentiality. *See Odfjell ASA v. Celanese AG*, 04-1758, 2005 WL 106897, at *1 (S.D.N.Y. Jan 18, 2005) (noting that an arbitration panel's decision concerning a protective order was "entitled to considerable deference, given the panel's hands-on familiarity with the case and with the confidentiality issues here presented.").

This Court should be hesitant about wading into the middle of an on-going arbitration and crediting one Panel action while essentially overlooking another. The Panel should be free to control the disposition of the proceedings before it. *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) ("Thus 'procedural' 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."). Here, the Panel thought confidentiality was important enough to include it in a written panel order. This Court should defer to the Panel on that type of procedural decision, concerning the conduct of the arbitration proceedings. *Stolt-Nielsen, S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 130 S. Ct. 1758, 1775 (2010) ("it is appropriate to presume that parties that enter into an arbitration agreement implicitly authorize the arbitrator to adopt such procedures as are necessary to give effect to the parties' agreement").

In short, whatever deference this Court accords to the December 13, 2012 order it should give that same deference to the Confidentiality Order. Allowing continued public disclosure of this award while at the same time confirming the December 13, 2012 order would do injustice to the arbitral process.

To the extent that the Court simply adopts the *Lugosch* framework in this arbitration matter, National Casualty acknowledges that there is a presumption of immediate access to judicial documents. *Lugosch*, 435 F.3d at 113. That presumption is rebuttable, however, and may be "overcome by countervailing factors" including "'the privacy interests of those resisting disclosure.'" *Id.* at 113, 120. In evaluating requests to seal documents, courts apply a three-step test to: (1) determine whether the documents for which confidentiality is requested are "judicial documents;" (2) determine the weight of the interest in public access of judicial documents; and (3) balance the competing interests of public access against the privacy interests of the parties. *Id.* at 119-20.

Here, the first step is met: the arbitration order that First State Insurance Company and the related petitioners ("First State") seek to confirm is a judicial document. *See Century Indem. Co. v. AXA Belgium*, No. 11-7263, 2012 WL 4354816, at *13 (S.D.N.Y. Sept. 24, 2012). Yet public interest in access to the arbitration order is slight, and is far outweighed by the parties' privacy interests, including the potential harm to National Casualty and its related companies if the arbitration order were further publicized.

Public interest in the content of the arbitration award is minimal. Absent an objection, "confirmation of an arbitration award is 'a summary proceeding that merely makes what is already a final arbitration award a judgment of the court[.]'" *D.H. Blair & Co. v. Gottdiener*,

462 F.3d 95, 110 (2nd Cir. 2006) (quoting *Forasynth, Inc. v. Pickholz*, 750 F.2d 171, 176 (2d Cir. 1984)); *see also Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.*, 403 F.3d 85, 90 (2d Cir. 2005) ("The burden [on the party opposing enforcement of an arbitral award] is a heavy one, as 'the showing required to avoid summary confirmance is high.'").

Balanced against public access are the parties' privacy interests in confidentiality, the harm that will result to National Casualty and affiliated reinsurers from disclosure, and the federal policy to promote arbitration. *Global Reinsurance Corp. v. Argonaut Ins. Co.*, Nos. 07-8196 & 07-8350, 2008 WL 1805459, at *1 (S.D.N.Y. Apr. 21, 2008), *as modified* (Apr. 24, 2008). Arbitration allows confidentiality, a principle reason that parties opt for arbitration over litigation. *See id.* In furtherance of the privacy interests of First State and National Casualty, the arbitration panel entered a confidentiality order governing the arbitration. Unlike the prototypical situation, therefore, the confidentiality of the arbitration is protected by an order of the same arbitration panel, not just the parties' agreement. *See Century Indem. Co.*, 2012 WL 4354816, at *1413 (quoting cases stating that a mere confidentiality agreement does not "demonstrate that sealing [documents] is necessary"). That confidentiality order specifically recognizes that "serious injury could result to any party and its business if the other party violates its obligations under this Order." *See* Confidentiality Order, ¶ 6 (Dkt# 4, Ex. A).

National Casualty maintains that First State publicly filed the December 13, 2012 order (before giving any notice to National Casualty) because First State wished to use that order to its advantage in a separate arbitration proceeding with a reinsurer related to National Casualty. This improper purpose and the potential harm from disclosure to National Casualty and its affiliated companies must be weighed against granting public access:

> The nature and degree of injury must also be weighed. This will entail consideration not only of the sensitivity of the information and the subject but also of how the person seeking access intends to use the information. *Commercial competitors seeking an advantage over rivals need not be indulged in the name of monitoring the courts*, and personal vendettas similarly need not be aided.

United States v. Amodeo, 71 F.3d 1044, 1051 (2d Cir. 1995)(emphasis added) . Consistent with this, disclosure of "the decretal portions of the [arbitration] awards does present the risk that it will impair [the reinsurer's] negotiating position with other reinsurers[,]" outweighing the interest of public access. *Global Reinsurance*, 2008 WL 1805459, at *1. Thus, "[e]very court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes." *Nixon v. Warner Commc'ns*, 435 U.S. 589, 598 (1978).

Disclosure presents at least two concrete harms in this case. First, as noted above, National Casualty contends that First State, when publicly disclosing the arbitration order in this

case, had very specific designs for the use of that order in another arbitration. National Casualty believes that what has happened in that other arbitration in the weeks since First State filed this action is highly relevant to its current motion before this Court, but, because of a confidentiality order in that matter, cannot disclose that information absent further order from this Court. As the Second Circuit has noted, judicial documents should not be unsealed so that "[c]ommercial competitors" may obtain an advantage over rivals.

Second, in addition to the current First State arbitration with a related entity, National Casualty and its related entities have other arbitrations pending where similar contract language to that interpreted by the arbitration panel is at issue.[4] Consequently, disclosure of the arbitration panel's order is likely to impair National Casualty's position in other arbitrations, contrary to *Global Reinsurance*, 2008 WL 1805459, at *1.

Here, the proper balance between public access and confidentiality would allow the arbitration order to remain confidential. *See Abu Dhabi Investment Auth. v. Citigroup, Inc.*, No. 12-183, Dkt. #11 (Feb. 9, 2012) ("The parties may file the arbitration award under seal and redact portions of future filings that quote from or reference its content.").[5] The Court should exercise its discretion to: (1) seal the arbitration order; and (2) order redacted that portion of any other publicly-filed documents in this case that quotes the arbitration order.

Very truly yours,

GODFREY & KAHN, S.C.

Kendall W. Harrison

KWH:nln
Enclosures

cc: Lloyd Gura (w/encls.; via email)
Amy Kallal (w/encls.; via email)
Matthew Lasky (w/encls.; via email)

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[4] Those arbitrations are subject to confidentiality orders. As with the First State arbitration mentioned above, National Casualty cannot disclose information about these proceedings absent further order of this Court.

[5] A copy of the order is attached as Exhibit B.