UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EAGLE STAR INSURANCE COMPANY LIMITED and HOME AND OVERSEAS INSURANCE COMPANY LIMITED,

Petitioners,

vs.

ARROWOOD INDEMNITY COMPANY, f/k/a ROYAL INDEMNITY COMPANY,

Respondent,

and

EMPLOYERS INSURANCE COMPANY OF WAUSAU; STRONGHOLD INSURANCE COMPANY LIMITED; ALLSTATE INSURANCE COMPANY; NATIONWIDE MUTUAL INSURANCE COMPANY; NATIONAL CASUALTY COMPANY,

Movant-Intervenors.

Civil Action No.: 13 CV 3410 HB/DCF

MEMORANDUM OF LAW IN SUPPORT OF INTERVENORS' MOTION TO INTERVENE AND TO UNSEAL JUDICIAL DOCUMENTS

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INTRODUCTION

Final arbitration awards which are submitted to federal district courts for confirmation are judicial documents to which the public is entitled access. Yet, in conjunction with the pending motion to confirm, the parties to this action, apparently without submitting any substantive documentation demonstrating why the award should be removed from the public record, filed it under seal. Employers Insurance Company of Wausau, Nationwide Mutual Insurance Company, National Casualty Company, Stronghold Insurance Company Limited, and Allstate Insurance Company (collectively the "Intervenors") now seek to intervene for the limited purpose of removing the seal from the final award.

It is well-settled that the "public has both a common law and a 'qualified First Amendment right' of access to 'judicial documents' and judicial proceedings." *See, e.g.*, *Aioi Nissay Dowa Ins. Co. v. Prosight Specialty Management Co.*, No. 12 CIV 3274, 2012 WL 3583176, at *5 (S.D.N.Y. Aug. 21, 2012) (citing *Lugosch v. Pyramid Co. of Onomdaga*, 435 F.3d 110, 119-20 (2d Cir. 2006)). In applying this principle, courts in this district have routinely found that the "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 of that petition" and, thus, are to be given a strong presumption of access. *Id.* at *6. This right of access is so fundamental to our judicial system that a court cannot deny public access to a judicial document without a strong countervailing purpose. *Id.* at *5. Because the parties cannot satisfy this

heavy burden, Intervenors respectfully request the Court grant their motion to intervene and remove the seal from the final arbitration award.

BACKGROUND

Petitioners, Eagle Star Insurance Company Ltd. and Home and Overseas Insurance Company Ltd. (collectively "Eagle Star"), instituted this action to confirm an arbitration award entered against Arrowood Indemnity Company ("Arrowood") in an arbitration proceeding between Eagle Star and Arrowood. (Dkt. No. 2.) The arbitration sought to resolve the parties' rights and obligations under certain reinsurance contracts that were effective in 1967. (*Id.* at ¶¶ 6-8.) The award issued by the arbitration panel fully and finally resolved the issue "of whether Arrowood [] properly ceded claims related to its insureds General Motors, Anco Insulators Inc., and Graybar Electric Company, Inc." (*Id.* at ¶8.) These each reflect insurance claim settlements purportedly already paid by Arrowood to each of "General Motors, Anco Insulators Inc., and Graybar Electric Company, Inc." and then billed by Arrowood to its reinsurers, including Eagle Star and the Intervenors. (Declaration of Keith A. Dotseth (hereinafter "Dotseth Dec.") at ¶ 8; Declaration of John E. Rodewald (hereinafter "Rodewald Dec.") at ¶ 8; and Declaration of Carey G. Child (hereinafter "Child Dec.") at ¶ 8.)

In that regard, Intervenors are currently parties to arbitration proceedings with Arrowood addressing these same issues, involving these very same contracts, and arising from the very same underlying factual circumstances, because they arise from the same insurance settlements and resulting reinsurance claims. Specifically, the reinsurance contracts at issue between Arrowood and Eagle Star were subscription reinsurance

contracts within a reinsurance program under which the reinsurance obligations to Arrowood were divided amongst a number of "subscribing reinsurers." (Dotseth Dec. at ¶ 4; Rodewald and Child Decs. at ¶¶ 5.) Intervenors, alongside Eagle Star and various other reinsurers, were fellow subscribing reinsurers on those reinsurance contracts. (Dotseth Dec. at ¶ 4; Rodewald and Child Decs. at ¶¶ 6.) Intervenors, like Eagle Star, each disputed the very issue resolved in the arbitration award before this Court: "whether Arrowood [] properly ceded claims related to its insureds General Motors, Anco Insulators Inc., and Graybar Electric Company, Inc." (Dotseth Dec. at ¶ 7; Rodewald and Child Decs. at ¶¶ 9.) Among other things, Intervenors contend that Arrowood's cessions are not just inconsistent with the wording of the reinsurance contracts, but are internally inconsistent as well. (Dotseth Dec. at ¶ 6; Child Dec. at ¶ 9.)

In response, Arrowood has commenced separate arbitrations *ad seriatum* against Eagle Star, against each of the Intervenors, and upon information and belief, against a number of other individual subscribing reinsurers. (Dotseth, Rodewald and Child Decs. at ¶¶ 8.) Like the arbitration award that is before this Court, each of those arbitrations will address the question of "whether Arrowood [] properly ceded claims related to its insureds General Motors, Anco Insulators Inc., and Graybar Electric Company, Inc," among others. (Dotseth Dec. at ¶ 7; Rodewald and Child Decs. at ¶¶ 9.) These proceedings involving the Intervenors are still pending in various stages.

Because the instant action seeks confirmation of a final award that is not only directly relevant to, but directly encompasses, key matters at issue in each of the

Intervenors' current arbitration disputes, the Intervenors seek to intervene for the limited purpose of unsealing the final arbitration award.

ARGUMENT

I. Intervenors have a Right to Intervene

Intervenors seek to intervene for the limited purpose of unsealing the final award. It is well-settled that intervention pursuant to Federal Rule of Civil Procedure 24(b) is the proper procedure for a third-party to seek to modify a protective order in a private suit. *Diversified Group, Inc. v. Daugerdas*, 217 F.R.D. 152, 157 (S.D.N.Y. 2003).

Rule 24(b)(1) provides, in part: "On timely motion the court may permit anyone to intervene who: … (B) has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. Pro. 24(b)(1)(B). Intervention under this section is within the court's broad discretion. *Berroyer v. U.S.*, 282 F.R.D. 299, 302 (E.D.N.Y. 2012). In exercising this discretion, courts consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights. *Id.* Courts also consider factors including: the nature and extent of the intervenor's interests, and the degree to which those interests are adequately represented by other parties. *Id.* at 302-03. It is enough for Rule 24(b) if there is a single common question of law or fact. *Techcapital Corp. v. Amoco Corp,* 99 CIV 5093(AGS), 2001 WL 267010, at*3 (S.D.N.Y. March 19, 2001).

A. Intervenors' Motion is Timely

There can be no dispute that the instant motion to intervene was timely filed.

Eagle Star filed this motion to confirm a few weeks ago, on May 21, 2013. The Intervenors became aware of the action shortly thereafter on June 5, 2013. (Dotseth, Rodewald and Child Decs. at ¶¶ 10.) A lapse of a few weeks is not enough to result in the application being untimely.

Moreover, there is no prejudice to the parties. Granting the motion to intervene would in no way delay the proceeding. The Court recently set the pre-trial conference for August 22, 2013, nearly two months away. The parties will therefore have more than sufficient time pursuant to Local Rule 6.1(b) to respond to the Intervenors' motion to intervene for the limited purpose of unsealing the final award in advance of the pre-trial conference. *See* S.D.N.Y.L.R. 6.1(b) ("opposing affidavits and answering memoranda to be served within fourteen days after service of the moving papers").

B. Intervenors have an Interest that is not Adequately Represented by the Parties to the Current Action

Intervenors have an interest in unsealing the final award that can only be addressed through intervention.

First, "In addition to the common law right of access, it is well established that the public and the press have a 'qualified First Amendment right to attend judicial proceedings and access judicial documents.'" *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 120 (2d Cir. 2006) (also noting "the common law right of public access is firmly rooted in our nation's history"); *National Broadcasting Co. v. U.S.*, 635 F.2d 945, 949 (2d Cir. 1980) ("The existence of the common law right to inspect and copy judicial

records is beyond dispute.").[1] Such a right would be meaningless if a party could not intervene to enforce it and challenge a court's decision to allow judicial documents to be sealed. Indeed, the Second Circuit has specifically recognized that "since by its nature the right of public access is shared broadly by those not parties to the litigation, vindication of that right requires some meaningful opportunity for protest by persons other than the initial litigants, some or all of whom may prefer closure." *In re Application of the Herald Co.*, 734 F.2d 93, 102 (2d Cir. 1984). *Accord Jessup v. Luther*, 227 F.3d 993, 998 (7th Cir. 2000) (an order sealing a document triggers the "public's interest in open access," which "serves as the necessary legal predicate for intervention"). This is particularly true in the instant matter where the docket suggests the parties provided the Court with little discussion or analysis of the public's right to access before asking it to grant the right to seal. (*See generally*, Dkt. No. 1-5.)

Second, although Intervenors' right of public access to judicial documents, such as the final award, is a good and sufficient necessary legal predicate for intervention, Intervenors have additional, particularized interests that further justify intervention. Intervenors have an interest in the unsealing of the final award because that award directly addresses reinsurance contracts to which they are subscribing reinsurers, and reinsurance claims that have also been asserted against them in separate serial arbitrations commenced by Arrowood. The award Eagle Star seeks to confirm, and the Intervenors

[1] The Court ought to be aware that the filings to confirm arbitration awards against Arrowood regarding these same underlying claims has already received coverage in the relevant reinsurance industry press, including the LexisNexis Mealey's Reinsurance News. (Dotseth Dec. at ¶ 11, at Ex. D.) Clearly, the actions of this Court on these issues is of broad interest to members of the media covering this industry.

seek to unseal, addresses the same reinsurance contracts, the same underlying conduct, and the same legal issues in those active and on-going disputes between Arrowood and the Intervenors. (Dotseth Dec. at ¶ 7; Rodewald and Child Decs. at ¶¶ 9.)

As such, there is intrinsic value to Intervenors, to other subscribing reinsurers, and to the industry as a whole in knowing how an arbitration panel, typically comprised of industry veterans, has decided those issues. There is further value in unsealing the award, as doing so will provide at least a limited check on the serial arbitrations initiated by Arrowood regarding the same disputed matters, including by preventing Arrowood from using a cloak of secrecy (1) in a manner that would exacerbate Intervenors' existing concerns about internal inconsistencies in Arrowood's reinsurance claims to date; (2) to obtain an even greater advantage as a serial litigant by adjusting its arguments from arbitration to arbitration based on the reaction of each panel of industry veterans; (3) to undermine the possibility of settlement by preventing the parties from better evaluating the true settlement value of the claims asserted by Arrowood; and (4) to prevent the various other reinsurance panels from knowing that Arrowood is asserting claims that have previously been rejected.[2] If permitted to continue, the foregoing will tend to unnecessarily increase the costs and time associated with resolving the disputes that

[2] It is notable that Arrowood's arguments on the very same reinsurance contracts and very same underlying cessions have also been rejected by at least one other panel. This is apparent in Generali- U.S. Branch's motion to confirm filed in this Court on May 20, 2013. *See Generali- U.S. Branch v. Arrowood Indemnity Co.*, 13-cv-03401-WHP (S.D.N.Y. May 20, 2013). Generali's Petition notes that "Arrowood demanded arbitration against Generali under the Reinsurance Contracts for amounts allegedly due to Arrowood on account of a settlement payment made by Arrowood to its insured General Motors." *Id.* at ¶8. In its Petition, Generali asserted that the panel issued a final award denying all of Arrowood's claims and requests for relief. *Id.* at ¶10.

Arrowood has with the Intervenors. Thus, the Intervenors have a particularized interest in unsealing the final award.

Finally, the Intervenors' interest is not adequately represented by the parties. There is no indication in the docket that any of these issues have been presented by the parties to the Court. If the necessary showing had been made, it presumably would have been reflected in the docket, particularly in light of the standards established by this Court's procedures and Individual Practices. Under the Southern District of New York's Sealed Records Filing Instructions, before a document may be filed under seal:

> a protective order must be signed or a request by letter must be granted by a judge. A copy of the order or letter must be presented when filing the document. The only exceptions are if the entire action has been placed under seal or a judge has signed the sealing envelope and submits it directly to the sealed Southern District of New York records clerk.

Requesting Court Records, NYSD.USCOURTS.GOV, http://www.nysd.uscourts.gov/cases_records.php?records=sealed_records (last visited June 24, 2013). Under Section 5.M of this Court's Individual Practices, it is further stated that:

> Courts have long recognized the importance of public access to judicial documents, and filing such documents under seal in an exceptional procedure. I will carefully and skeptically review requests and stipulations to file documents under seal. In order to ensure the existence of a genuine need to seal a document, a party should be ready to demonstrate that a clearly defined and serious injury would result from disclosure.

Individual Practices of Judge Harold Baer, Jr., available at: http://www.nysd.uscourts.gov/cases/show.php?db=judge_info&id=552 (last visited June 24, 2013).

However, instead of demonstrating that the parties attempted to meet this burden, the docket reflects that the order to seal the final award was made without any briefing (and certainly no substantive or extensive briefing) from the parties being reflected on the docket. This lack of substantive briefing demonstrates that the Intervenors', and the public's, interest in access to the final award was not, and is not, adequately protected by the parties. It is already evident from the actions of the parties that they do not intend in any manner to argue for the final award to be unsealed. This is, of course, not surprising since confirmation of the award would fully and finally resolve the issues between these parties, thereby eviscerating any interest they would have in preventing Arrowood from asserting the same failed arguments in subsequent arbitrations.

Because this motion to intervene was timely filed to protect an interest not otherwise protected by the parties, the Court should permit the Intervenors to intervene for the limited purpose of unsealing the final award.

II. Motion To Unseal.

There is a strong presumption that judicial proceedings and documents are a matter of public record. *See, e.g., Istithmar World PJSC v. Amato,* 12 Civ 7472, 2013 WL 66478, at *3 (S.D.N.Y. Jan. 7, 2013). "This presumption of access is based on the need for federal courts, although independent—indeed, particularly because they are independent—to have a measure of accountability and for the public to have confidence in the administration of justice." *Aioi Nissay Dowa*, 2012 WL 3583176 at *5.

Arbitration awards are "indisputably judicial documents to which the presumption of access attaches." *Century Indemnity Co. v. AXA Belgium,* 11 CIV 7263, 2012 WL

4354816, at *13 (S.D.N.Y. Sept. 24, 2012). In fact, this Court recently noted that "Courts in this district have generally been loath to seal arbitration awards." *Istithmar*, 2013 WL 66478 at *3. In so concluding it noted, "Disputants may be drawn to arbitration out of a desire for privacy, but once one side seeks judicial confirmation of an arbitral award, that petition, as well as the underlying award, become 'judicial documents' to which the common law right of access is presumed to attach." *Id.*

Therefore, in considering this motion to remove the sealing from the final award, the issue the Court must address is whether the party, or parties, seeking to keep the documents sealed has rebutted the strong presumption of access. *See id; Diversified*, 217 F.R.D. at 158 (noting that once the presumption is established, courts then must balance the countervailing factors such as law enforcement concerns, judicial efficiency, and the privacy interests of the parties, against the presumption).

Here, the parties did not submit extensive briefing relating to the sealing of the final award. By failing to do so, the parties failed to set forth sufficient substantive reasoning by which this Court may conclude they have overcome the strong presumption of access.

However, Intervenors suspect that one or both of the parties will argue that the final award is subject to a confidentiality agreement and therefore was properly sealed. Courts in this jurisdiction have routinely concluded that the "mere existence of a confidentiality agreement covering judicial documents is insufficient to overcome the presumption of access … and have consistently refused to seal the record of a petition to confirm an arbitration award, notwithstanding the existence of such an agreement." *Aioi*

Nissay Dowa, 2012 WL 3583176 at *6. This conclusion recognizes that "while parties are permitted to keep their private undertakings from the prying eyes of others the circumstance changes when a party seeks to enforce in federal court the fruits of their private agreement to arbitrate, i.e., the arbitration award." *Century Indemnity*, 2012 WL 4354816 at *14. These prior decisions make clear that a confidentiality agreement is insufficient to overcome the strong presumption of access.

Finally, Intervenors expect that one or both parties will assert that proprietary and confidential information is included in the arbitration award. Of course, every arbitration award includes information that one side or the other does not want public: the fact that, and circumstances under which, it lost an arbitration. That, however, is not enough. In order for such a contention to overcome the strong presumption in favor of access, the party seeking to seal an award must show why the type of information found in the award is different or more proprietary than one might find in any other case concerning a contractual dispute. *Istithmar*, 2013 WL 66478 at *4. As a general matter, proprietary information consists of trade secrets or other matter, the disclosure of which would harm a party's ability to compete, and this must be shown with "a particular and specific demonstration of fact showing that disclosure would result in an injury sufficiently serious to warrant [continued] protection." *See Koch v. Greenberg*, 07 CIV 9600 (BSJ/DF), 2012 WL 1449186, at *2 (S.D.N.Y. April 13, 2012) (addressing protective order) (citation omitted); *Topalian v. Hartford Life Ins. Co.*, ___ F.Supp.2d ___, 2013 WL 2147553 (E.D.N.Y. May 16, 2013) (rejecting argument that public-record quotations from insurer's claims manual that court had previously included in a

protective order "would have a deleterious effect on Hartford's ability to compete in the insurance marketplace," and stating "the court is not convinced that Hartford will suffer any harm").

The parties have not met and presumably cannot meet this heavy burden. The contracts at issue date back ***more than forty years***. The insurance settlements at issue have ***already been paid*** by Arrowood, and they have been submitted under those same contracts to a multitude of subscribing reinsurers. As such, the parties cannot clear the hurdle of demonstrating that the award contains information different from other similar contractual disputes that would somehow entitle these parties to a full or partial judicial seal, despite the heavy presumption in favor of public access.

Because arbitral awards are subject to public scrutiny as a judicial document, Intervenors respectfully request the Court grant its motion to unseal the final award.

CONCLUSION

In light of the above, Intervenors respectfully request the Court grant their motion to intervene for the limited purpose of unsealing the final arbitration award, and grant their motion to unseal the same.

Date: June 28, 2013

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