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September 12, 2013

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Re: *Lynn v. Ullrich*
C.A. No. 7098-ML-VCN
Date Submitted: June 28, 2013

Dear Counsel:

Plaintiff Judith M. Lynn (“Lynn”) has taken exceptions to the Master’s Final Report¹ which allowed for the withdrawal of an agreed-upon arbitrator because he had concluded that he could not fairly and objectively resolve Lynn’s dispute with Defendant Joanne F. Ullrich (“Ullrich”).² The Master also ordered the parties to select an alternate arbitrator or, if they were unable to agree, the Court would appoint one.

¹ *Lynn v. Ullrich*, 2013 WL 1934935 (Del. Ch. May 10, 2013).

² This dispute about arbitration is governed by the Delaware Uniform Arbitration Act, 10 *Del. C.* ch. 57.

The Court's review of a Master's decision is *de novo* as to both the facts and the law.³ The facts are not in dispute. Thus, the Court takes the facts as they are set forth in the Final Report and considers *de novo* the issues of law raised by Lynn's exceptions. In the Court's view, the Master's conclusions of law are correct and the Court adopts the conclusions of law and the recommended relief set forth in the Final Report.⁴

Ullrich and Lynn agreed to arbitrate their dispute before a specified arbitrator.⁵ Ullrich concluded that the agreed-upon arbitrator was biased and partial. The arbitrator agreed that he could not fairly and impartially resolve the matter. Yet, Lynn insisted upon an arbitration proceeding before an admittedly biased arbitrator. She brought this action to compel arbitration before that arbitrator. The Master concluded that ordering arbitration before an arbitrator who admits his conflicts would serve no useful purpose and that a substitute arbitrator should be designated to resolve the parties' dispute. Refusing to accept the Master's conclusions, which are fully supported by both common sense and the

³ Ct. Ch. R. 144(a)(2).

⁴ This conclusion is reached without the benefit of oral argument which the Court has concluded is not likely to be helpful. Lynn expressly waived oral argument. Letter of Arthur D. Kuhl, Esquire, dated June 28, 2013.

⁵ These facts are set forth in greater detail in the Final Report.

law, Lynn took the exceptions now before the Court. Nevertheless, the Court, perhaps unnecessarily, will address each one briefly.

Exception 1: Lynn complains that, by requiring a different arbitrator, the Master implicitly modified the arbitration agreement which had been confirmed by the Superior Court. That agreement identified a specific arbitrator. An arbitration held before a biased arbitrator will not survive.⁶ Going through the arbitration once in order to go through it a second time, after the first one is set aside because of arbitrator bias, makes no sense. If nothing else, to order arbitration before a biased arbitrator would be totally inconsistent with fundamental equitable principles.

Exceptions 2, 3, and 4: These exceptions are procedural challenges to the Master's recommendation that a new arbitrator be designated. First, Lynn argues that Ullrich did not seek a different arbitrator in her pleadings. The pretrial order, however, specifically sets forth appointment of a new arbitrator as relief sought by Ullrich.⁷ Second, Lynn argues that the Court lacks jurisdiction to appoint an arbitrator in these circumstances. She acknowledges that the Court may vacate an

⁶ See 10 Del. C. § 5714(a)(2).

⁷ Pretrial Stip. at 5 (Docket Item 27) ("In the alternative, order that the arbitrator be court appointed.").

award because of bias after the award is made. Under 10 *Del. C.* § 5704, the Court may appoint an arbitrator “when an arbitrator appointed fails or is unable to act.” In this instance, the arbitrator concedes that he would be partial; that demonstrates an inability to act. Third, Lynn contends that § 5704 does not allow for unilateral substitution. The issue of a successor arbitrator was framed in the pretrial order and the Court’s jurisdiction includes the power to appoint a successor for an arbitrator who is unable to perform his function.⁸ That is all that is required.

Exception 5: Lynn contends that the Master deviated from the teachings of *Anadarko*.⁹ That case involved a challenge to the arbitrator’s impartiality, but the arbitrator had not declared his inability to resolve the dispute fairly. Here, in stark contrast, the arbitrator—to his credit—advised the parties of his lack of partiality. As the Master pointed out, her decision would likely have been different if the arbitrator had not acknowledged his inability to resolve the

⁸ Under § 5704, the Court “on application in an existing case” may appoint the successor. Ullrich made that application in this case.

⁹ *Anadarko Petroleum Corp. v. Panhandle E. Corp.*, 1987 WL 17445 (Del. Ch. Sept. 21, 1987).

dispute fairly. The arbitrator's candor regarding his conflicted status distinguishes this case from *Anadarko*.¹⁰

Exception 6: Lynn raises an issue not addressed in the Final Report. Lynn maintains that her willingness to proceed to arbitration before the conflicted arbitrator discharged all of her duties under the arbitration agreement.¹¹ Agreeing to go forward with an arbitration before a partial arbitrator is not conduct to be rewarded. There was a valid agreement to arbitrate, but that agreement is necessarily subject to the requirement of impartiality.¹² By insisting upon a process inconsistent with statute, Lynn did not satisfy all of her obligations under the agreement.

Exception 7: The agreement to arbitrate included not only the Ullrich claim, but also the claims of a third party. It was anticipated that both sets of claims would be arbitrated at the same time. The other arbitration proceeded, and Lynn now argues that Ullrich's failure to participate at that time constituted a

¹⁰ Furthermore, waiting to see what would have occurred in the arbitration would not have changed the arbitrator's conflicted status (or shown otherwise).

¹¹ The Superior Court, because of the agreement to arbitrate, had concluded that it lacked jurisdiction to address Ullrich's substantive claims.

¹² See 10 *Del. C.* § 5714(a)(2) (“[T]he Court shall vacate an award where . . . [t]here was evident partiality by an arbitrator appointed as a neutral . . .”).

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waiver of her rights under the agreement. Ullrich's decision not to appear may have been at her risk, but, for the reasons set forth above and in the Final Report, there was no duty to arbitrate before an admittedly partial arbitrator and, thus, there are no adverse consequences for her because of the decision not to participate.

* * *

Accordingly, Lynn's exceptions to the Master's Final Report are overruled. The Master's Final Report, with its findings of fact, conclusions of law, and recommended remedy are confirmed and adopted. The relief sought by Lynn is denied. The parties shall endeavor to agree upon a substitute arbitrator. If they are unsuccessful in that effort, the Court will appoint a successor arbitrator in accordance with 10 *Del. C.* § 5704.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: The Hon. Abigail M. LeGrow
Jeffrey S. Friedman, Esquire
Register in Chancery-NC
Register in Chancery-K