IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CHARTIS SPECIALTY INSURANCE COMPANY (f/k/a American International Specialty Lines Insurance Company), an Illinois Company,	:	
Plaintiff,	:	
v.	:	**C.A. No. 6103-VCN**
LASALLE BANK, NATIONAL ASSOCIATION, AS LOAN POOL TRUSTEE FOR EMAC OWNER TRUST 1998-1, a Delaware business trust, UNDER THAT CERTAIN LOAN POOL POOLING AND SERVICING AGREEMENT DATED AS OF JUNE 1, 1998, AS LOAN POOL TRUSTEE FOR EMAC OWNER TRUST 1999-1, a Delaware business trust, UNDER THAT CERTAIN LOAN POOL POOLING AND SERVICING AGREEMENT DATED AS OF MARCH 26, 1999, AS LOAN POOL TRUSTEE FOR EMAC OWNER TRUST 2000-1, a Delaware business trust, UNDER THAT CERTAIN LOAN POOL POOLING AND SERVICING AGREEMENT DATED AS OF FEBRUARY 1, 2000,	:	
Defendant.	:	

MEMORANDUM OPINION

Date Submitted: April 26, 2011
Date Decided: July 29, 2011

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Kevin G. Abrams, Esquire and Nathan A. Cook, Esquire of Abrams & Bayliss LLP, Wilmington, Delaware; Tami Lyn Azorsky, Esquire of McKenna Long & Aldridge LLP, Washington, D.C.; and Barry J. Armstrong, Esquire of McKenna Long & Aldridge LLP, Atlanta, Georgia, Attorneys for Defendant.

NOBLE, Vice Chancellor

I. INTRODUCTION

This action arises from a final arbitration award made in favor of Defendant LaSalle Bank, N.A. ("LaSalle") on December 31, 2010.[1] Plaintiff Chartis Specialty Insurance Company ("Chartis") seeks to vacate that award.

Because the Arbitration Award "references documents and testimony that are protected from disclosure by a [c]onfidentiality [o]rder" that has been entered by the panel of arbitrators, according to Chartis that award "cannot be made public."[2] LaSalle challenges that contention in its motion for a determination that the Arbitration Award should not be filed under seal.

Also raised at this juncture, among the grounds asserted in support of vacatur, Chartis alleges that arbitrator Charles R. Ennis ("Ennis") concealed material information about past adversarial relationships with Chartis-related entities amounting to evident partiality requiring this Court to vacate the Arbitration Award.[3] Chartis seeks discovery of Ennis and other third parties regarding his involvement in those past adversarial relationships. LaSalle has moved for a protective order prohibiting that discovery and for the entry of a scheduling order to permit the prompt filing and briefing of dispositive motions for summary judgment.

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[1] *AISLIC v. LaSalle Nat'l Bank, N.A.*, American Arbitration Association No. 13-195-Y-000359-06 (the "Arbitration Award").
[2] Compl. ¶ 1 n.1.
[3] *Id.* ¶ 2.

For the reasons set forth below, the Court concludes that the existence of a confidentiality order does not necessarily require—without regard for whether it applies to the Arbitration Award or not—the sealing of the award. Rather, Court of Chancery Rule 5(g) controls the treatment of that award and mandates that Chartis show good cause as to why the Arbitration Award should be sealed. In addition, because Chartis is entitled to limited discovery into Ennis's alleged adversarial relationship with it, the Court will deny LaSalle's motion for a protective order and will hold in abeyance the entry of a scheduling order on motions for summary judgment.

II. BACKGROUND

Chartis, an Illinois corporation,[4] is an eligible surplus lines insurer in Delaware. The arbitration proceeding (the "Arbitration") considered purported breaches by Chartis of certain insurance policies that it had issued (the "Policies"). LaSalle, an Illinois banking corporation, served as the trustee for Delaware business trusts[5] that are the Policies' beneficial owners. The Policies allegedly contain arbitration agreements requiring the application of Delaware law.[6]

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[4] Although formerly known as American International Specialty Lines Insurance Company (an AIG member insurance company), the Plaintiff will be referred to only as "Chartis" for convenience.

[5] EMAC Owner Trust 1998-1, EMAC Owner Trust 1999-1, and EMAC Owner Trust 2000-1. Bank of America, N.A., the successor by merger to LaSalle, is the current trustee for these loan pools.

[6] Compl. ¶ 9.

The Arbitration—initiated by Chartis on February 8, 2006—was conducted by the American Arbitration Association (the "AAA"). A panel of three arbitrators was selected by the parties and included Ennis, W. Jerry Hoover, and Jay W. Elston (the "Arbitration Panel").[7] During the Arbitration, a confidentiality order, dated May 24, 2007 (the "Confidentiality Order"),[8] was entered by the Arbitration Panel. Upon completion of years-long discovery, more than 60 days of evidentiary hearings were held, after which the Arbitration Panel's chair closed the hearings on September 22, 2010.

At some point during the Arbitration (but after the Arbitration Panel had been appointed), Chartis discovered that Ennis had served as general counsel and vice president of GenCorp, Inc. ("GenCorp") from 1986 to 1996. During his tenure with GenCorp, Chartis alleges, Ennis "commenced and oversaw extremely contentious and unsuccessful multi-million dollar insurance coverage litigation against nine American International Group member insurance companies which are corporate affiliates of Chartis involving factual insurance coverage and environmental issues similar to" those raised in the Arbitration.[9] Because of this supposed, undisclosed adversarial relationship—purportedly involving GenCorp and its subsidiary Aerojet—Chartis requested that the AAA remove Ennis from the

[7] Before the Arbitration Panel was installed, the parties maintained the unrestricted right to remove any prospective candidate from consideration.
[8] Pl.'s Opp'n To Def.'s Mot. For A Determination That The Arbitration Award Should Not Be Filed Under Seal ("Pl.'s Opp'n to Unsealing"), Ex. A (Confidentiality Order).
[9] Compl. ¶ 2.

Arbitration Panel. After reviewing supplemental disclosures made by Ennis, the AAA rejected Chartis's requests and reaffirmed Ennis's appointment.

The Arbitration Panel later issued the more than 250 page Arbitration Award, effective as of December 31, 2010. Chartis filed this action that same day to vacate the award under 9 U.S.C. § 10 and the 5th and 14th Amendments to the United States Constitution.[10] The grounds asserted by Chartis in support of vacatur are as follows: (1) Ennis's failure to disclose past adversarial relationships with Chartis constitutes evident partiality; (2) the Arbitration Panel exceeded its powers according to the parties' contractual arbitration agreement as set forth in the Policies; (3) the primary basis for the Arbitration Award is an insurance policy that was not at issue in the Arbitration, for which Chartis was deprived of the opportunity to present evidence; (4) the Arbitration Panel prejudiced Chartis by disregarding the applicable law; and (5) the Arbitration Panel ignored a statute of limitations defense raised by Chartis during the Arbitration.[11] On January 31, 2011, LaSalle filed its answer and counterclaim to confirm the Arbitration Award under 9 U.S.C. § 9.

[10] *Id.* ¶¶ 12-16, 24-25.
[11] *See id.* ¶¶ 2-6.

III. ANALYSIS

A. *Treatment of the Arbitration Award*

Based on its assertion in the Complaint that the Arbitration Award cites documents and testimony protected from disclosure by the Confidentiality Order, Chartis did not attach the award to its pleadings and is of the view that the award "cannot be made public."[12] LaSalle disputes that contention, arguing that the Arbitration Award is not deemed confidential by operation of the Confidentiality Order and that, in any event, references to exhibits and testimony in that award do not disclose confidential information.[13]

In support of its position, Chartis argues that it "only seeks to protect from disclosure documents and testimony that it, and LaSalle, always understood and agreed would be protected by the Confidentiality Order . . . ."[14] Because the Arbitration Award was generated in connection with the Arbitration, Chartis suggests that it falls within the scope of that order. Moreover, the Confidentiality Order remains effective even after the Arbitration has concluded, according to Chartis, such that the Arbitration Award should be kept private because it incorporates and relies upon confidential information. Chartis further contends

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[12] *Id.* ¶ 1 n.1.

[13] The Court ordered that LaSalle be permitted to file the Arbitration Award under seal pending the outcome of its motion for a determination that the award should be unsealed. *See Chartis Specialty Ins. Co. v. LaSalle Bank, N.A.*, C.A. No. 6103-VCN (Del. Ch. Feb. 25, 2011) (ORDER) (Trans. ID No. 36153276).

[14] Pl.'s Opp'n to Unsealing ¶ 2.

that good cause exists for sealing the Arbitration Award because: "(1) Delaware law favors enforcement of confidentiality orders on which parties have relied; (2) it would be unjust to allow LaSalle to ignore the terms of the order; and (3) the award is based on confidential Chartis business information and trade secrets."[15]

In response, LaSalle contends that the Confidentiality Order "does not extend confidential treatment to the Arbitration Award" and, as a result, Chartis is incorrect in its conclusion that the Arbitration Award cannot be made public.[16] More specifically, because the Confidentiality Order limits a party's ability to designate as confidential only that party's own documents, argues LaSalle, "[t]he Arbitration Award is *not* a Chartis document and, therefore, Chartis has no right to designate the document as confidential."[17] Moreover, LaSalle asserts that because the Arbitration Panel never ordered that the Arbitration Award be treated as confidential, disclosure of that award is unrestricted. Although Chartis purports to demonstrate good cause for sealing the Arbitration Award, Chartis fails to make the necessary showing, according to LaSalle; "rather, the interests of LaSalle, the bondholders [of the loan pools that beneficially own the Policies,] and the general public support public access to the award."[18] For that reason, LaSalle requests that

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[15] *Id.* ¶ 20.
[16] Def.'s Mot. For A Determination That The Arbitration Award Should Not Be Filed Under Seal ¶¶ 3, 10.
[17] *Id.* ¶ 12 (emphasis in original).
[18] Def.'s Reply To Pl.s' Opp'n To Def.'s Mot. For A Determination That The Arbitration Award Should Not Be Filed Under Seal ("Def.'s Reply to Mot. to Unseal") ¶ 6.

the Court grant its motion and order that the Arbitration Award become part of the public record.

Under Court of Chancery Rule 5(g), "all pleadings and other papers, including deposition transcripts and exhibits, answers to interrogatories and requests for admissions, and affidavits or certificates and exhibits thereto . . . filed with the Register in Chancery shall become a part of the public record . . . ." That default does not apply, however, where a party, seeking to file documents under seal, obtains for good cause shown, in accordance with Rule 5(g)(2), "an order of this Court specifying those documents or categories of documents which should be filed under seal." Good cause may exist "to seal documents containing (1) trade secrets, (2) third-party confidential material or (3) nonpublic financial information."[19] Rule 5(g) balances "the tradition of open proceedings" in Delaware courts by "plac[ing] strict limits on parties' ability to maintain filings under seal"[20] with the importance of keeping private that which "constitutes confidential, proprietary, or commercially or personally sensitive information . . . ."[21] Thus, it is Delaware's policy that private parties should not be

[19] *Romero v. Dowdell*, 2006 WL 1229090, at *2 (Del. Ch. Apr. 28, 2006); *see also In re Yahoo! Inc. S'holders Litig.*, 2008 WL 2268354, at *1 (Del. Ch. June 2, 2008).
[20] *Kronenberg v. Katz*, 872 A.2d 568, 607 (Del. Ch. 2004).
[21] *Amalgamated Bank v. UICI*, 2005 WL 1377432, at *6 (Del. Ch. June 2, 2005).

allowed to "litigate in courts of public record behind a judicially enforced screen,"[22] with limited exceptions.

Turning to the specific issues raised here, the Court first considers whether the Arbitration Award cannot be made public because of the Confidentiality Order entered by the Arbitration Panel. Consistent with principles of comity, at least one Delaware court has refused to modify or to interpret a confidentiality order entered by a court of another jurisdiction.[23] In this instance, however, Chartis seeks to utilize judicial resources to vacate an arbitration award while simultaneously claiming that the award should remain private because of a confidentiality order entered by a panel of arbitrators. Under these circumstances, the Court is not convinced that it should defer to the Confidentiality Order;[24] rather, because the Arbitration Award "is at the heart of what the Court is asked to act upon, the part[y seeking to maintain confidentiality] must demonstrate why the presumption of access should be overcome."[25] Under Delaware law, that necessary showing requires Chartis to demonstrate good cause for why the Arbitration Award should be sealed.

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[22] *Kronenberg*, 872 A.2d at 608.
[23] *See Monsanto Co. v. Aetna Cas. & Sur. Co.*, 1991 WL 35684, at *1 (Del. Ch. Mar. 13, 1991).
[24] That is, assuming the Confidentiality Order even applies to the Arbitration Award, which is unclear.
[25] *Global Reinsurance Corp.-U.S. Branch v. Argonaut Ins. Co.*, 2008 WL 1805459, at *1 (S.D.N.Y. Apr. 21, 2008). There, the court stated that where a party seeks to confirm (and presumably also where a party seeks to vacate) an arbitration award, "the public in the usual case has a right to know what the Court has done." *Id.* at *2.

Chartis argues that good cause exists for sealing the Arbitration Award because it "references confidential documents and hearing testimony, including Chartis trade secrets."[26] More specifically, Chartis contends that the award makes "frequent references to Chartis' policy development, underwriting strategies, and claims materials [which] constitute trade secrets, and/or confidential business information that should be kept under seal."[27] In response, LaSalle argues that "Chartis has failed to demonstrate that any documents or testimony cited in the Arbitration Award consist of trade secrets or otherwise confidential information" because "[n]either the insurance underwriting testimony and documents nor the claims handling documents cited in the Arbitration Award" fall into either of those protected categories.[28] Thus, Chartis has failed, according to LaSalle, to show good cause "to overcome the presumption under Delaware law against sealing court records."[29]

Although good cause may exist for sealing certain parts of the Arbitration Award that consist of Chartis's trade secrets or competitively sensitive information, the award is not entirely comprised of private information. Accordingly, sealing the award *in toto* is not necessary and would improperly encroach upon the public's right of access. Moreover, because Chartis does not

[26] Pl.'s Opp'n to Unsealing ¶ 30.
[27] *Id.* ¶ 31 (citation omitted).
[28] Def.'s Reply to Mot. to Unseal ¶¶ 21, 30.
[29] *Id.* ¶ 31.

identify specific portions of the award containing confidential information, the Court cannot determine whether redactions would be appropriate; that analysis would require the Court to balance Chartis's "privacy interests against the public's disclosure interests . . . ."[30] Thus, the Arbitration Award may be unsealed subject to Chartis first having an opportunity to confer with LaSalle regarding any proposed redactions it might have. If the parties cannot reach agreement, they may submit supplemental briefing as to why good cause does or does not exist for any disputed redactions.[31]

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[30] *Espinoza v. Hewlett-Packard Co.*, 2011 WL 941464, at *6, *22 (Del. Ch. Mar. 17, 2011).

[31] Chartis also purports to show good cause in arguing that (1) sealing of the Arbitration Award is necessary because Chartis relied upon the Confidentiality Order to prevent disclosure of information from the Arbitration and, if the Arbitration Award is made public, Chartis may be prejudiced by its use in other ongoing litigation; and (2) assuming that the Confidentiality Order applies to the Arbitration Award, fairness dictates that it be filed under seal because LaSalle did not challenge Chartis's confidentiality designations during the course of the Arbitration.

With the Court's determination that the Confidentiality Order cannot be relied upon to demonstrate that the Arbitration Award should be sealed, Chartis must demonstrate some other good cause basis for the Court to override the default position of Rule 5(g) mandating public access. These additional grounds asserted by Chartis are not among those traditionally recognized by Delaware courts as meeting this burden; that is, they do not specifically raise concerns about disclosure of Chartis's trade secrets, third-party confidential materials, or private financial information. Although the Court must be careful in "balancing the need to protect sensitive material from public disclosure and the public's right of access[,] . . . [a]ny documents or information that do not fit the above criteria, cannot harm the parties or third parties, or previously have entered the public sphere should be deemed available for public disclosure." *One Sky, Inc. v. Katz*, 2005 WL 1300767, at *1 (Del. Ch. May 12, 2005).

Under that framework, the only contention warranting additional consideration is Chartis's suggestion that it may suffer "substantial and undue harm" if the Arbitration Award is unsealed because LaSalle's counsel could then use the award in federal litigation between Chartis and a nonparty before this Court has confirmed or vacated it. Chartis ignores, however, that any court presented with the Arbitration Award would likely have knowledge of the ongoing proceedings here and would thus understand that the award may be vacated on one (or more) of the grounds articulated in the Complaint. For that reason, the risk of any harm to Chartis is at best minimal and does not outweigh the public's right of access to the Arbitration Award. *See Espinoza*, 2011 WL 941464, at *23 (observing that a party seeking to maintain a document under seal "failed to

B. *Discovery Issues*

Although the AAA denied its earlier requests to remove Ennis from the Arbitration Panel, Chartis continues to allege bias as "one of the many tactics," according to LaSalle, "it has employed in an attempt to increase the length and cost of LaSalle's effort to recover damages . . . ."[32] LaSalle contends that "there is no evidence of non-disclosure, hostile conduct, bias or lack of impartiality on the part of Ennis that would require vacatur of the Arbitration Award."[33] For that reason, LaSalle seeks a protective order to prevent Chartis from engaging in discovery of Ennis and other third parties related to his purported lack of impartiality. Because Chartis "seeks to establish 'evident partiality' of an arbitrator," LaSalle argues that post-arbitration discovery is appropriate only if Chartis "first demonstrates 'clear evidence of impropriety.'"[34] Under that standard, suggests LaSalle, Chartis must show "that there is 'nonspeculative, reasonably certain evidence' that the arbitrator

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articulate the harm he would suffer if it were unsealed, let alone that such harm would be irreparable or outweigh the public's right to know"). Accordingly, these additional contentions raised by Chartis do not amount to good cause for purposes of overcoming the default position of public access under Rule 5(g).

[32] Def.'s Mot. For A Protective Order And For Entry Of A Scheduling Order ("Def.'s Mot. for Protective Order") ¶ 4.

[33] *Id.* ¶ 8.

[34] Def.'s Reply To Pl.'s Opp'n To Def.'s Mot. For A Protective Order And For Entry Of A Scheduling Order ¶ 8 (quoting *Midwest Generation EME, LLC v. Continuum Chem. Corp.*, 768 F. Supp. 2d 939, 943 (N.D. Ill. 2010)).

acted with meaningful impropriety"[35]—a showing that LaSalle argues has not been made.

In requesting that the Court deny LaSalle's motion for a protective order, Chartis asserts that "the limited third-party subpoenas . . . demonstrate on their face that Chartis seeks information extremely relevant to one of the main issues in this case: whether arbitrator Ennis' pre-selection failure to disclose . . . litigation between his company and various AIG insurers requires that the [A]rbitration [A]ward be vacated."[36] For that reason, Chartis insists that "the subpoenas seek information clearly discoverable under Court of Chancery Rule 26" and are "narrowly tailored and directed only to the third parties that have the information relevant to Mr. Ennis' failure to disclose and/or investigate."[37]

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[35] *Id.* ¶ 16 (quoting *Midwest Generation*, 768 F. Supp. 2d at 946).

[36] Pl.'s Answering Br. In Opp'n To Def's. Mot. For A Protective Order And For Entry Of A Scheduling Order ("Pl.'s Opp'n to Protective Order") ¶ 1. Ennis's pre-selection disclosures revealed that, at some point in the past, he had owned shares of AIG stock. Beyond that, he revealed no other conflict pertaining to AIG or its affiliates. Chartis, in its pre-selection disclosure checklist had listed some—but not all—of its related AIG member insurance companies to determine if any of the potential arbitrators had past dealings with those entities. It appears that that checklist did not include any of the AIG member insurance companies involved in litigation with GenCorp and its affiliates. For that reason, although Ennis disclosed his former employment as general counsel for GenCorp, he appears to have represented to Chartis that he had no conflicts based on that checklist.

[37] *Id.* ¶ 2. A review of the third-party subpoenas and requested commissions reveals that Chartis, at this juncture, seeks only discovery in the form of the production of documents. Thus, consistent with counsel's representation at argument, the scope of discovery currently at issue does not include any request for deposition testimony. The Court's ruling addresses only the narrow question as to whether requests for the production of documents are appropriate in this instance.

Chartis further contends that LaSalle attempts to impose "an inapplicable 'clear evidence of impropriety' standard to the discovery" it seeks; however, a requirement of that sort, argues Chartis, "would force [it] to satisfy a higher standard of proof for issuing discovery than achieving vacatur based on evident partiality."[38] That standard—which is contrary to Court of Chancery Rule 26 and has not been applied by any Delaware court—does not govern here, according to Chartis.

Under Court of Chancery Rule 26, "[t]he scope of discovery . . . is broad and far-reaching."[39] Subsection (b)(1) of that rule provides that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ." Thus, Rule 26 "renders discoverable any information that 'appears reasonably calculated to lead to the discovery of admissible evidence.'"[40] The Court, however, may limit discovery that is "unreasonably cumulative or duplicative" or "unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation."[41] Accordingly, the scope of discovery is "squarely within the sound discretion of this

[38] *Id.* ¶¶ 2, 12.
[39] *Pfizer Inc. v. Warner-Lambert Co.*, 1999 WL 33236240, at *1 (Del. Ch. Dec. 8, 1999).
[40] Ct. Ch. R. 26(b)(1).
[41] *Id.*

Court."[42] Moreover, Rule 26(c) provides that the Court may, for good cause shown, "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . ."[43]

The parties are in apparent agreement that the Federal Arbitration Act (the "FAA")[44] applies to the Arbitration Award. The Court has subject matter jurisdiction to vacate or to confirm the award under that Act.[45] The Delaware Uniform Arbitration Act (the "DUAA")[46] mandates that the Court determine whether to confirm or to vacate the Arbitration Award "in conformity with the Federal Arbitration Act . . . , and such general principles of law and equity as are not inconsistent with that Act."[47] Moreover, because the FAA controls, "the other provisions of [the DUAA] are without standing and [this] case[] shall be adjudicated in accordance with the Court of Chancery's Rules of Procedure."[48]

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[42] *In re Tyson Foods, Inc.*, 2007 WL 2685011, at *1 (Del. Ch. Sept. 11, 2007) (citing *Dann v. Chrysler Corp.*, 166 A.2d 431, 432 (Del. Ch. 1960)). For that reason, discovery may be limited "to guard against 'fishing expeditions' or to ensure that the discovery sought is properly related to the issues presented in the litigation." *Id.*

[43] Ct. Ch. R. 26(c).

[44] 9 U.S.C. §§ 1-16.

[45] *SBC Interactive, Inc. v. Corporate Media Partners*, 1998 WL 749446, at *1 (Del. Ch. Oct. 7, 1998) ("[T]his Court has subject matter jurisdiction over the enforcement, modification or vacating of an arbitration award rendered under the FAA. Neither the FAA nor the Delaware Uniform Arbitration Act derogates this Court's inherent equity jurisdiction to enforce, modify or vacate arbitration awards.").

[46] 10 *Del. C.* §§ 5701-5725.

[47] *Id.* § 5702(c).

[48] *Id.*

Under the FAA, the Court must confirm the Arbitration Award, "unless the award is vacated, modified, or corrected as prescribed in Sections 10 and 11" of the FAA.[49] A decision of the United States Supreme Court teaches that "these statutorily enumerated circumstances are the only circumstances under which a court may grant vacatur or modification under the FAA."[50] In accordance with those enumerated exceptions, the Court may vacate the award if "there was evident partiality or corruption in the arbitrators, or either of them."[51]

Noting the lack of case law interpreting the evident partiality standard under the DUAA, the Court in *Beebe Medical Center* looked to applications of analogous language in the FAA and the Uniform Arbitration Act, from which the DUAA standard is derived.[52] There, the Court observed "that the statutory phrase 'evident partiality' has not been interpreted literally as requiring a showing of obvious bias for one party. Rather, the phrase has been read as reflecting a more general requirement that neutral arbitrators be impartial and unbiased."[53] The bulk of the case law, according to *Beebe Medical Center*, instructs that "an arbitrator's failure

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[49] 9 U.S.C. § 9.
[50] *TD Ameritrade, Inc. v. McLaughlin, Piven, Vogel Sec., Inc.*, 953 A.2d 726, 732 (Del. Ch. 2008) (citing *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008)).
[51] 9 U.S.C. § 10(a)(2).
[52] *See Beebe Med. Ctr., Inc. v. InSight Health Servs. Corp.*, 751 A.2d 426, 432 (Del. Ch. 1999). *Compare* 9 U.S.C. § 10(a)(2), *with* 10 *Del. C.* § 5714(a)(2).
[53] *Beebe Med. Ctr.*, 751 A.2d at 433.

to disclose a substantial relationship with a party or a party's attorney justifies vacatur under the evident partiality standard."[54]

Because discovery is limited in actions challenging an arbitration award under the FAA,[55] the "[f]ederal courts have been understandably hesitant to grant extensive discovery in cases alleging arbitrator bias."[56] The Ninth Circuit has observed that "[t]he Federal Rules of Civil Procedure do not apply to 'post hoc' questioning of arbitrators in [FAA] proceedings and 'any questioning of arbitrators should be handled pursuant to judicial supervision and limited to situations where clear evidence of impropriety has been presented.'"[57] Courts have interpreted *Woods* as teaching that, without clear evidence of impropriety, post-arbitration discovery of arbitrators is not allowed.[58] The Sixth Circuit has addressed post-arbitration discovery by considering, first, whether the party seeking discovery has

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[54] *Id.* at 434-35. In vacating an arbitration award in that action because of evident partiality, the Court noted that if an arbitrator does not "disclose a relationship with a party . . . that creates a reasonable impression of bias, the party seeking vacatur should not bear the burden of demonstrating that the arbitrator was actually aware of that relationship." *Id.* at 438.

[55] *Midwest Generation*, 768 F. Supp. 2d at 943 ("Post-arbitration discovery is rare, and courts have been extremely reluctant to allow it.").

[56] *In re EquiMed, Inc.* (*EquiMed II*), 2006 WL 1865011, at *6 (E.D. Pa. June 30, 2006); *see also STMicroelectronics, N.V. v. Credit Suisse Sec. (USA) LLC*, 2011 WL 2151008, at *5 (2d Cir. June 2, 2011) ("Although we have limited the availability of discovery regarding the completeness of an arbitrator's disclosures, we have not forbidden it altogether.").

[57] *Woods v. Saturn Distribution Corp.*, 78 F.3d 424, 430 (9th Cir. 1996) (quoting *Andros Compania Maritima, S.A. v. Marc Rich & Co.*, 579 F.2d 691, 702 (2d Cir. 1978)). In *Woods*, the Ninth Circuit also recognized that "[a]lthough it may be difficult to prove actual bias without deposing the arbitrators, deposition of arbitrators are 'repeatedly condemned' by courts." *Id.* (citing *O.R. Sec., Inc. v. Prof'l Planning Assocs., Inc.*, 857 F.2d 742, 748 (11th Cir. 1988)).

[58] *See, e.g.*, *Midwest Generation*, 768 F. Supp. 2d at 943-44; *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 90 F. Supp. 2d 893, 898-99 (S.D. Ohio 2000).

presented clear evidence of impropriety and, second, whether "a reasonable person would have to conclude that an arbitrator was partial"—a more relaxed standard.[59] Thus, implicitly it has declined to decide which standard is controlling.[60]

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[59] *See Uhl v. Komatsu Forklift Co., Ltd.*, 512 F.3d 294, 308 (6th Cir. 2008) ("In *Nationwide II*, we were ambiguous as to whether the party seeking additional discovery must offer clear evidence of improper conduct or simply establish that a reasonable person would have to conclude that an arbitrator was partial, but we concluded that under either standard no additional discovery was warranted. . . . Here too, [the party seeking discovery] does not merit additional time for discovery under either standard."); *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 278 F.3d 621, 628-29 (6th Cir. 2002) (concluding that additional post-arbitration discovery into arbitrator bias was not warranted because the party seeking discovery had not demonstrated either clear evidence of improper conduct or that a reasonable person would have to conclude arbitrator partiality).

[60] Chartis cites *In re EquiMed, Inc.* (*EquiMed I*), 2005 WL 2850373, at *2 & n.1 (E.D. Pa. Oct. 28, 2005), as analyzing a post-arbitration discovery request "under the lens of an 'appearance of bias' standard, i.e., *not* under a 'clear evidence of impropriety'" standard. Pl.'s Opp'n to Protective Order ¶ 13 (emphasis in original). In that case, the court determined that evidence of past business relationships among an arbitrator and certain parties to an arbitration was "sufficient to warrant further discovery in th[at] matter given the applicable legal standard." *EquiMed I*, 2005 WL 2850373, at *2. The legal standard for analyzing the plaintiff's petition to vacate the arbitration award, according to the court, was an appearance of bias standard, "'which holds that evident partiality is established when arbitrators fail to disclose any relationships that might create an impression of possible bias.'" *Id.* at *2 n.1 (quoting *Crow Constr. Co. v. Jeffrey M. Brown Assoc. Inc.*, 264 F. Supp. 2d 217, 221 (E.D. Pa. 2003)). The Court later rejected the plaintiff's request for additional discovery because of a "fail[ure] to identify any compelling reason" for it, while recognizing that courts are reticent to allow broad discovery where a party alleges arbitrator bias. *EquiMed II*, 2006 WL 1865011, at *6.

Although Chartis argues that *EquiMed I* rejected a clear evidence of impropriety standard, *Midwest Generation*, 768 F. Supp. 2d at 943-44, cites to that opinion in support of its determination that post-arbitration discovery of arbitrators is only permitted where the party seeking discovery has demonstrated clear evidence of impropriety.

Ultimately, it is unclear what standard controlled the decision in *EquiMed I* to allow post-arbitration discovery; the court offered little insight into the clear evidence of impropriety standard and, instead, cited to the legal standard governing the merits of the plaintiff's bias claim. In *EquiMed II*, the court's decision to deny additional post-arbitration discovery was seemingly guided by the plaintiff's failure to offer a compelling justification for that discovery. In addition to the case law discussed *supra*, these cases further illustrate the difficulties courts confront in articulating the governing standard for their decisions as to whether post-arbitration discovery will be allowed where arbitrator bias is alleged.

Based on the current record, Chartis has made a sufficient showing to justify limited post-arbitration discovery. Indeed, although post-arbitration discovery is rarely permitted, Chartis has offered evidence that adequately satisfies the various standards[61] that courts have employed in determining whether to allow a party to take discovery of an arbitrator.

Before he was empanelled, Ennis did not disclose that GenCorp—for which he served as general counsel—was involved in litigation with certain AIG companies during his tenure. During the Arbitration, on July 15, 2009, Ennis disclosed as follows:

> As previously disclosed, I recall that GenCorp filed two . . . lawsuits [against several primary and excess insurance companies involving environmental pollution] between about 1986 and 1994. . . . An Assistant General Counsel for GenCorp who reported to me had primary responsibility for direction of the lawsuits.
>
> . . . I do not recall now, the name of any insurance company that was a named defendant in either lawsuit. I did not read, review or approve of the complaints that were filed, nor did I read any answer or other response thereto. . . .
>
> . . . .
>
> I simply do not know whether [AIG] or any of its subsidiaries was a named defendant in any lawsuits filed by GenCorp or any of its subsidiaries. But I do know that I was not involved, as a lawyer or otherwise, in the identification or selection of any defendant, the preparation of any complaint, review of the facts, insurance policies or submissions by any party, or the direction, management or settlement of any lawsuit filed by GenCorp or any of its subsidiaries in respect of

[61] For example, the record demonstrates that Chartis can, at this juncture, make colorable arguments in support of clear evidence of impropriety, a compelling justification for discovery, and a reasonable appearance of bias.

> environmental pollution under a general liability or other type of insurance policy.[62]

In a supplemental November 2009 disclosure, Ennis reiterated that he had previously fully disclosed information regarding his role as GenCorp's general counsel and its involvement in environmental pollution insurance lawsuits. He further stated that, contrary to Chartis's assertions, the lawsuits it complained of had been dismissed or settled by the time Ennis had joined GenCorp, and another lawsuit involving Aerojet was managed by an internal legal team of that subsidiary, not GenCorp's lawyers.[63] Thus, the totality of Ennis's disclosures seemingly indicate that he either had no knowledge of or no involvement in the lawsuits raised by Chartis. The record, however, refutes that assertion. For example, in deposition testimony taken in an unrelated matter, Ennis was identified as a member of GenCorp's legal department involved in insurance-related matters.[64] Moreover, based on a privilege log from an insurance coverage lawsuit between GenCorp and an AIG member company, Ennis authored or received over twenty documents related to that litigation.[65]

Thus, because Chartis points to sufficient evidence to warrant limited discovery into Ennis's involvement in litigation between GenCorp and AIG and its

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[62] Def.'s Mot. for Protective Order, Ex. D (July 15, 2009 Letter from Ennis to Karen Fontaine) ¶¶ 1, 2, 5.
[63] Def.'s Mot. for Protective Order, Ex. I (Nov. 11, 2009 Facsimile from Ennis to Barbara Cook).
[64] Pl.'s Opp'n to Protective Order, Ex. 10 (Timothy M. Melhus Dep., Mar. 20, 1991) at 46.
[65] Pl.'s Opp'n to Protective Order, Ex. 14 (GenCorp Privilege Log).

affiliates, the Court will deny LaSalle's motion for a protective order. The third-party subpoenas issued by Chartis and the commissions it seeks represent permissible post-arbitration discovery based on the inconsistencies in Ennis's disclosures and the limited record now before the Court.

IV. CONCLUSION

For the foregoing reasons, LaSalle's motion for a determination that the Arbitration Award should not be filed under seal is granted consistent with the Court's ruling *supra*. Its motion for a protective order prohibiting discovery and for the entry of a scheduling order to permit the prompt filing and briefing of motions for summary judgment is denied.

Counsel are requested to confer and to submit an implementing form of order.