No. 20-4

In The
Supreme Court of the United States

ROSANNE L. WOODROOF,
Petitioner,

v.

CUNNINGHAM & ASSOCIATES, PLC AND THE ESTATE OF JOSEPH F. CUNNINGHAM,
Respondents.

On Petition for Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is it a violation of any provision of the Federal Arbitration Act or an abuse of discretion for a court to dismiss a party's case where that party had engaged in long-term, systematic efforts to delay the arbitration process provided for in the parties' contract and repeatedly demanded that the court intervene – prior to any arbitration commencing – to impose some alternative dispute resolution process not provided for in the parties' contract but more to that party's liking?

PARTIES TO THE UNDERLYING PROCEEDINGS

The caption of the Petition timely filed in this Court – *Rosanne L. Woodroof v. Cunningham & Associates, PLC* – does not contain the names of all parties to the underlying proceedings in the D.C. Superior Court ("Superior Court") or D.C. Court of Appeals ("DCCA"). Rosanne Woodroof was the Plaintiff in the Superior Court and Appellant in the DCCA. Cunningham & Associates, PLC and The Estate of Joseph F. Cunningham were Defendants in the Superior Court and Appellees in the DCCA.

Joseph Cunningham, who Ms. Woodroof now seeks to add as a Respondent through an "amended" Petition she mailed to this Court on July 10, 2020, died in 2017 and was replaced as a party below by his Estate. Mr. Cunningham, *in propia persona*, is not a proper Respondent in this proceeding.

Pursuant to Rule 29.6, Cunningham & Associates, PLC, by counsel, states there is no parent corporation and no publicly held corporation that owns 10% or more of its stock.

RELATED CASES

Rosanne L. Woodroof v. The Estate of Joseph F. Cunningham and Cunningham & Associates, PLC, D.C. Court of Appeals, No. 18-CV-309, Rehearing Denied: February 4, 2020

Rosanne L. Woodroof v. Joseph F. Cunningham and Cunningham & Associates, PLC, D.C. Court of Appeals, Nos. 14-CV-939, 14-CV-1426, 14-CV-1441, Decision: October 13, 2016

Rosanne L. Woodroof v. Joseph F. Cunningham and Cunningham & Associates, PLC, D.C. Superior Court, No. 2013 CA 006474 M, Judgment: February 16, 2018 and December 12, 2018

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JURISDICTION

Respondents Cunningham & Associates, PLC and The Estate of Joseph F. Cunningham (collectively, "Cunningham") disagree with Petitioner Rosanne Woodroof's statement of jurisdiction. This matter arises out of the DCCA, the highest court of a State within the meaning of the Rules of this Court. Thus, Ms. Woodroof seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C.§ 1257.

Cunningham hereby objects to Ms. Woodroof's untimely attempt to "correct" or "amend" her Petition. The amended Petition is untimely under this Court's Rules and should not be considered.

Pursuant to this Court's March 19, 2020 Order (589 U.S.), Ms. Woodroof had until Monday July 6, 2020[1] to file a petition for a writ of certiorari following the DCCA February 4, 2020 Order denying rehearing.

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[1] 150 days ran on Friday, July 3, 2020, but due to the federal holiday and the weekend, Ms. Woodroof's deadline was carried over to Monday, July 6, 2020.

The original Petition was mailed on July 2, 2020. However, Ms. Woodroof, without any permission from this Court, mailed out an "amended" Petition on July 10, 2020, well past the filing deadline. The amended Petition attempts to add a new Respondent (Joseph F. Cunningham) and makes numerous other changes to the original Petition.

INTRODUCTION

This appeal represents the culmination of a multi-year, personal vendetta by a disgruntled client against her former and now deceased attorney Joseph Cunningham and his law firm, Cunningham & Associates, PLC d/b/a The Law Offices of Joseph Cunningham (collectively, "Cunningham"). In 2008, Cunningham and Ms. Woodroof entered into a contract for legal representation which contained a provision for dispute resolution by binding arbitration by a panel of three arbitrators: two party-appointed arbitrators and a third, neutral arbitrator chosen by the party-arbitrators. App. 51 ¶ 3. The contract also contained a specific remedy – a bar and waiver of all claims – for a situation where one party does not proceed in a timely fashion to arbitration. App. 51-52 at ¶ 4.

When a dispute arose between Cunningham and Ms. Woodroof, instead of proceeding to arbitration, Ms. Woodroof filed an action in the Superior Court. The action was stayed in favor of the contractually mandated arbitration, but Ms. Woodroof refused to name her party-arbitrator and instead appealed the stay to the DCCA. After losing her appeal, Ms. Woodroof continued to refuse to participate in the arbitration process by refusing to name her party-arbitrator. Instead, Ms. Woodroof filed repetitive,

dilatory motions challenging the arbitration and requesting that the court intercede and either mandate a different form of dispute resolution or else supplant the parties' contractual provisions governing the arbitration panel by appointing a court-appointed neutral arbitrator and disqualifying Cunningham's party-arbitrator. The Superior Court properly rejected these requests and eventually – in fact, nearly four years after the dispute arose – gave Ms. Woodroof an ultimatum to name her party-arbitrator or face dismissal of her case.

Faced with that ultimatum, Ms. Woodroof named her party-arbitrator and, pursuant to the contractual arbitration terms, the two party-arbitrators successfully agreed upon a neutral third arbitrator. The fully constituted arbitration panel then proceeded to meet and agreed unanimously to standard arbitration rules (in this case the JAMS Streamlined Arbitration Rules – as well as a procedure agreeable to all three arbitrators for ensuring payment of the neutral's fees. Ms. Woodroof refused to consent to these procedures and, as a result, the neutral resigned and the arbitration was aborted. Ms. Woodroof then continued her campaign to have the court intercede in the dispute resolution process and re-write the parties' contract.

By that point, Mr. Cunningham, a key witness, had died. The Superior Court determined that the unconscionable delay caused by Ms. Woodroof's conduct, the absence of merit to her repetitive, dilatory motions and the prejudice to Cunningham caused by Mr. Cunningham's death during the course of the delay justified dismissal of Ms. Woodroof's claims. This action was consistent with the terms of

the contract between the parties which provided for barring the claim of a party who did not proceed with due diligence to arbitration. Time and again, Ms. Woodroof avoided the duty to arbitrate by returning to court with a dizzying array of complaints and "justifications" for why she would not pursue arbitration in the manner agreed to by contract. After years of patiently countenancing delay and obstruction by Ms. Woodroof, and after repetitive warnings, the trial court acted to enforce the contract provisions. See App. 18-22.

For the reasons set forth herein, the Superior Court did not abuse its discretion in dismissing Ms. Woodroof's claims and the case presents no issue to this Court worthy of review.

STATEMENT OF THE CASE

In 2008 Ms. Woodroof negotiated a retainer agreement with Cunningham to represent her in connection with the condominium dispute. The retainer agreement included a binding arbitration provision, App. 50-53, and specifically provided the parties must proceed to arbitration in the manner provided for in the contract with "reasonable diligence" on pain of having their claims "waived and forever barred". App. 51-52 at ¶ 4.

Cunningham succeeded in resolving the condominium dispute, obtaining a payment of $160,000 for Ms. Woodroof. Ms. Woodroof accepted that settlement but, at some point, determined she was not satisfied with the money she had taken. There then ensued this multi-year litigation between Ms. Woodroof and Cunningham.

Notwithstanding the negotiated, binding arbitration provision in the retainer agreement with Cunningham, Ms. Woodroof filed a civil lawsuit in the Superior Court. See Superior Court Clerk's Index and Record of Proceedings Docket Sheet ("Record") No. 1; DCCA Joint Appendix ("RR") at 068.[2] The Superior Court then stayed the litigation in favor of the contractually agreed upon arbitration. Record Nos. 50, 54. Pursuant to the terms of the agreement, each party had 30 days within which to name a party-arbitrator and the two party-arbitrators would then work together to agree upon and name a neutral third arbitrator to complete the arbitration panel. App. 51 ¶ 3.

Consistent with its obligation, Cunningham named its party-arbitrator. Ms. Woodroof refused to name her party-arbitrator within the required time frame but chose instead to appeal the stay of her litigation to the DCCA. Record No. 63. The DCCA heard argument on the appeal, ruled the stay was proper and remanded the case for arbitration. Woodroof v. Cunningham, 147 A.3d 777 (D.C. 2016).

Notwithstanding the DCCA decision, Ms. Woodroof refused to name her party-arbitrator, choosing instead to file motions with the Superior Court continuing to challenge the arbitration provision she had executed, see Record No. 82 (*Motion for Hearing and Discovery on Cost of Arbitration/Prohibitive Cost and Validity of the Agreement to Arbitrate*), and insisting that the court impose some other form of dispute resolution more to her current liking, id. No. 84 (*Motion for Leave to File*

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[2] The Joint Appendix was filed in the DCCA by Ms. Woodroof (RR 001-288) and Cunningham (RR 289 - 323).

Reply and … Potential Illegal Fee Maneuver), No. 95 (*Plaintiff's April 24, 2017 Opposition* requesting the court "order the parties to an affordable, disciplined arbitration under the Multi-Door Alternative Dispute Resolution Division of the D.C. Superior Court"), No. 101 (*Motion for Order to Select Multi-Door Arbitrator*);[3] RR 130; see also id. No. 119 (*Motion to Protect the Record*). Each of these motions were heard by the Superior Court and rejected. Id. Nos. 85, 110, 130. Still, Ms. Woodroof did not name her party-arbitrator.

During this delay, Mr. Cunningham – the only person besides Ms. Woodroof with first-hand knowledge of the events surrounding the disputed representation –died. Id. No. 108. Ms. Woodroof then substituted Cunningham's Estate but took no steps to proceed with the arbitration. Id. No. 114.

Eventually, Cunningham requested the Superior Court dismiss the case because of (a) the unconscionable delay and (b) the prejudice caused by the death of Mr. Cunningham during that delay. RR 112-19. At a June 30, 2017 hearing, in lieu of dismissing the case, the Superior Court held Cunningham's Motion to Dismiss "in abeyance," and ordered Ms. Woodroof to select an arbitrator by July 30, 2017, explaining that if "Plaintiff does not comply her case will be dismissed for want of prosecution." RR 075; Record No. 10. The trial court explained:

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[3] Ms. Woodroof demanded the court require the parties to forego their contractually chosen dispute resolution method and instead submit their arbitrable dispute to the voluntary D.C. Multi-Door Dispute Resolution Program. RR 130; Record Nos. 95, 101, 102.

> This is a case that involves an agreement between an attorney and a client, and what they agreed upon among other things was this. If there's a dispute between us, it will be arbitrated. Now, not only was that overall expression made, but there were specifications as to the arbitration. Each side was to pick an arbitrator. Those two arbitrators would then pick a third as I understand it. You end up with what we call an arbitration panel, and they would hear the case.
>
> * * *
>
> You agreed to an arbitration panel. I don't have the authority to come in and for equitable or legal or any other reason change the contract that binds the two of you.
>
> * * *
>
> Ms. Woodroof, having your case delayed and consuming resources is not the response to your lack of resources, okay. As the plaintiff, you are charged with moving the case along.

RR 195-98 (Hr'g Tr. 9:1-9; 11:14-17; 15:10-13).

Faced with a final deadline, Ms. Woodroof named her party-arbitrator, RR 146, and the two party-arbitrators[4] located and agreed to a neutral

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[4] As a result of the delay, Cunningham was required to substitute a new party-arbitrator for its original choice and named an Arlington County attorney as its party-arbitrator. Ms. Woodroof found fault with this choice and added it to her list of grievances preventing the arbitration from proceeding.

third arbitrator (David Clark, a seasoned neutral and distinguished professor of law at the American University, Washington College of Law). App. 33-34, 36-37. The neutral confirmed he had no conflicts. App. 32-34. The neutral then introduced himself to the parties and the panel of three arbitrators together agreed upon the rules governing the arbitration (the JAMS Streamlined Arbitration Rules) and provisions for securing payment of the neutral's fees, including a normal and customary deposit to secure that payment. App. 39-41; see id. 26, 32, 33. The neutral explained: "It is not unusual to make arrangements for payment ahead of time", citing the American Arbitration Association's arbitrator deposits. App. 32-33. Further, the arbitration agreement provides that "[e]ach party to the arbitration shall pay such party's *pro rata* share of the expenses and fees of the neutral arbitrator, together with other expenses of arbitration, incurred or approved by the neutral arbitrator." App. 51 ¶ 3.

Upon presentation of these agreements, together with a request that the parties indicate their concurrence, Cunningham agreed to the terms. App. 49. Ms. Woodroof refused to agree to the terms of the arbitration or to securing payment of the neutral's fee in the manner agreed upon by the panel of arbitrators. App. 42-45, 46-47. As a result, the neutral indicated he could not proceed and withdrew, thus aborting the already much delayed arbitration before it could even get started. App. 46; see also id. 47-49.

Cunningham then returned to the Superior Court and once again requested the case be dismissed. RR 188-223. On November 26, 2017 Ms. Woodroof

filed a *Motion to Appoint Neutral Arbitrator and Disqualify Defendants' Party Arbitrator*. Ms. Woodroof requested the Superior Court (1) appoint a single arbitrator to resolve the parties' dispute, or alternatively appoint a third arbitrator to the panel; and (2) disqualify Cunningham's party-arbitrator. RR 265-69. After hearing from the parties, the court dismissed the case because of the unconscionable delay caused by Ms. Woodroof's conduct, the absence of merit to her repetitive, dilatory motions, and the prejudice to Cunningham caused by Mr. Cunningham's death during the delay. App. 8-22; RR 312-15. Ms. Woodroof once again appealed to the DCCA and the DCCA once again affirmed the decision of the Superior Court. App. 1-7. Ms. Woodroof then filed her petition to this Court.

Ms. Woodroof's litany of grievances was unpersuasive to any court below and presents no issue to this Court worthy of certiorari.

REASONS FOR DENYING THE PETITION

A. The Petitioner's First Question Presented Arguing for Application of the Federal Arbitration Act to the Facts of this Case Is Unworthy of Review.

Ms. Woodroof submits that the trial court erred in not applying the Federal Arbitration Act ("FAA") to intervene in a contractual arbitration and appoint an arbitrator. The FAA has no application to the facts of this case. Ms. Woodroof concedes that the parties' arbitration agreement "should be rigorously enforced according to its terms." Petition at p. i. Respondents agree. The Superior Court rigorously enforced the parties' arbitration agreement, which spelled out

exactly how an arbitration panel would be selected. Ms. Woodroof repeatedly tried to enlist the court's assistance in changing those terms in an effort to avoid arbitration or have arbitration only on her terms (instead of the contract terms). As a result, her claims were dismissed by the court pursuant to the terms of the agreement. For these and the reasons that follow, the petition should be denied.

1. Section 5 of The FAA Does Not Permit a Court to Appoint An Arbitrator When The Parties Already Have a Panel In Place Selected Pursuant To The Parties' Written Agreement and Therefore The Superior Court Correctly Denied Ms. Woodroof's Motion.[5]

Ms. Woodroof complains the Superior Court had an obligation to appoint an arbitrator under the FAA, 9 U.S.C. §§ 1-16, and committed reversible error because it refused to do so. Ms. Woodroof is incorrect. The Superior Court had no right or obligation and did not commit error by refusing to intercede to appoint an arbitrator when the parties already had in place a panel appointed pursuant to their contract.

Ms. Woodroof relies on Section 5 of the FAA, 9 U.S.C. § 5, for her proposition that the Superior Court was required to appoint an arbitrator. Section 5 provides:

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[5] Although Ms. Woodroof's motion was denied as moot following the dismissal of her claims, the analysis is the same as if the Superior Court had denied Ms. Woodroof's motion on the merits.

> **If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed**; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be **a lapse in the naming of an arbitrator or arbitrators or umpire,** or in filling a vacancy, **then** upon the application of either party to the controversy **the court shall designate and appoint an arbitrator or arbitrators or umpire**, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

Id. (emphasis added).[6]

The provisions of the FAA with regard to selection of arbitrators are always secondary to the contractual agreement of the parties. Id. ("If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an

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[6] Section 5 of the FAA further does not permit judicial intervention to appoint an arbitrator "for any reason," only if the reason relates to the failure to constitute a panel. See Cargill Rice, Inc. v. Empresa Nicaraguense Dealimentos Basicos, 25 F.3d 223 (4th Cir. 1994).

umpire, such method shall be followed"). The FAA expressly favors the selection of arbitrators by parties rather than courts and places arbitration agreements on an equal footing with other contracts, requiring courts to enforce them according to their terms. 9 U.S.C. §§ 2, 5; Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 67 (2010) ("The FAA reflects the fundamental principle that arbitration is a matter of contract."). As this Court has explained, "[i]t falls to courts and arbitrators to give effect to [ ] contractual limitations, and when doing so, courts and arbitrators must not lose sight of the purpose of the exercise: to give effect to the intent of the parties." Stolt-Nielsen S.A. v. Animal feeds Int'l Corp., 559 U.S. 662, 684 (2010).

In this case, the parties had contractually agreed to a mechanism for naming an arbitration panel. App. 51. Although there was an unconscionable delay in Ms. Woodroof naming her party-arbitrator, **the issue that led to the ultimate demise of the arbitration was not a "lapse" in the "naming of" an arbitrator (which is the only time Section 5 comes into play)**. **The panel was in place and prepared to proceed.** The fatal wound was the decision by Ms. Woodroof to refuse to accept the decisions of the panel as to fees and procedures, leading the neutral to resign and remanding the process to its state of perpetual limbo. RR 318.[7]

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[7] Notwithstanding Ms. Woodroof's assertion that someone "manipulated" the resignation of the neutral (Petition at p. 16), it is clear the only "manipulation" was done by Ms. Woodroof herself who caused the demise of the arbitration panel and then insisted that the court interject itself in the process to provide a different process more to Ms. Woodroof's liking.

Whatever rights a party may have to invoke Section 5 of the FAA to override the contract between the parties and allow the court to name an arbitrator, it certainly cannot be invoked by one party who acts unilaterally to **prevent** a panel already put in place by the mechanism agreed to by the parties from proceeding because that party disagrees with the rulings of the panel. Simply put, the FAA does not permit one party to frustrate the contractual arbitration process and then come to court, declare the process a failure, and ask that the court substitute a new arbitrator or panel or process more to her liking.

The law and record is clear that the Superior Court lacked authority to act under Section 5 of the FAA and, therefore, it was not an abuse of discretion to deny Ms. Woodroof's motion to appoint an arbitrator and refuse to rewrite the terms of the parties' contract.

2. The Neutral Arbitrator's Resignation Did Not Trigger Section 5 of The FAA or Any "Integral Exception" Analysis Because The Neutral Was Not Specifically Named in The Written Arbitration Agreement and The Arbitration Appointment Process Provided For By The Agreement Was Capable of Being Performed.

In her Petition, Ms. Woodroof attempts to set forth some argument about unavailable arbitrators, unavailable forums, and integral parts of arbitration agreements. See Petition at pp. i-ii, 13-16. Ms. Woodroof also cites to caselaw addressing the

validity and enforcement of arbitration agreements when an arbitration forum specifically named in an agreement is unavailable or non-existent. See Petition at pp. 14-15. None of this is relevant or apposite to the facts of this case. There was no "unavailable arbitrator" or "unavailable arbitration forum" resulting in the dismissal of Ms. Woodroof's Complaint. This is a case where the parties' written arbitration agreement clearly spelled out the appointment process for a three-person arbitration panel: each party selects a party-arbitrator and then the two party-arbitrators collectively appoint a neutral, third arbitrator. App. 51. There is no "specific" arbitrator mentioned by name in or required by the agreement. The parties simply agreed on a process by which the three arbitrators were to be selected. Id. And, the process, although much delayed, worked. No term of the agreement failed, and the neutral's resignation did not render the arbitration agreement, or the arbitration appointment process, impossible to perform.

Contrary to Ms. Woodroof's Petition, there is no circuit split on an issue relevant to the claims in this case, and this Court has already held that "parties may specify *with whom* they choose to arbitrate their disputes." Stolt-Nielsen S.A., 559 U.S. at 683 (emphasis in original). Thus, there is no issue presented here that merits review by this Court.

3. The Superior Court Has No Authority, in Advance of any Arbitration Hearing or Award, to Disqualify, Remove or Replace One Party's Selected Party-Arbitrator and Therefore the Court Correctly Denied Ms. Woodroof's Motion Seeking Such Relief.

In further attempts to sabotage and avoid the arbitration process clearly set forth in the parties' arbitration agreement, Ms. Woodroof, ostensibly relying on Section 10 of the FAA, requested that the Superior Court disqualify Cunningham's party-arbitrator. RR 268. Section 10 of the FAA, however, provides no such authority for the disqualification, removal or replacement of an arbitrator from service prior to the arbitration or issuance of a final award – even where there is alleged to be bias on the part of the arbitrator. Accordingly, the Superior Court did not err when it denied Ms. Woodroof's motion to remove an arbitrator.

The FAA provides for judicial review for issues such as arbitrator bias, but only through the mechanism of a post-award motion to vacate an award on grounds the arbitrator was biased. The FAA does not provide court authority to remove or disqualify an arbitrator **prior to the issuance of any arbitral award**. See 9 U.S.C. § 10; Gulf Guar. Life Ins. Co. v. Conn. Gen. Life Ins. Co., 304 F.3d 476, 489-90 (5th Cir. 2002) ("there is no authorization under the FAA's express terms for a court to remove an arbitrator from service"); Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co., 307 F.3d 617, 622 (7th Cir. 2002) ("party-appointed arbitrators can't be dismissed on

the ground that they are inclined to support the party who named them"); Aviall, Inc. v. Ryder Sys., Inc., 110 F.3d 892, 895 (2d Cir. 1997) ("Although the FAA provides that a court can vacate an award 'where there was evident partiality or corruption in the arbitrators,' … it does not provide for pre-award removal of an arbitrator." (quoting 9 U.S.C. § 10)); see also Trustmark Ins. Co. v. John Hancock Life Ins. Co., 631 F.3d 869, 873-74 (7th Cir. 2011) ("When one party is entitled to choose its own arbitrator, and in doing so follows all contractual requirements, a court ought not abet the other side's strategy to eject its opponent's choice.").

The FAA also does not permit court inquiry into the qualifications or capacity of an arbitrator to serve prior to the issuance of an award. Gulf Guar., 304 F.3d at 490 ("prior to issuance of an award, a court may not make inquiry into an arbitrator's capacity to serve based on a challenge that a given arbitrator is biased"); Cox v. Piper, Jaffray & Hopwood, Inc., 848 F.2d 842, 843-44 (8th Cir. 1988) ("Appellants cannot obtain judicial review of the arbitrators' decisions about the qualifications of the arbitrators … prior to the making of an award."); Florasynth, Inc. v. Pickholz, 750 F.2d 171, 174 (2d Cir. 1984) ("The Arbitration Act does not provide for judicial scrutiny of an arbitrator's qualifications to serve, other than in a proceeding to confirm or vacate an award, which necessarily occurs after the arbitrator has rendered his service."). This rule protects and promotes the fundamental rationale behind arbitration. The Congressional purpose of the FAA is to "move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily

as possible." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 22 (1983). Pre-award objections regarding the qualifications, bias, or other issues related to arbitrators would clearly frustrate that purpose. As the Fifth Circuit explained,

> A "prime objective of arbitration law is to permit a just and expeditious result with a minimum of judicial interference" and any other such rule could "spawn endless applications to the courts and indefinite delay" and that otherwise "there would be no assurance that the party seeking removal would be satisfied with the removed arbitrator's successor and would not bring yet another proceeding to disqualify him or her."

Gulf Guar., 304 F.3d at 492 (quoting Marc Rich & Co. v. Transmarine Seaways Corp., 443 F. Supp. 386, 387-88 (S.D.N.Y. 1995)); Certain Underwriters at Lloyd's, London v. Argonaut Ins. Co., 264 F. Supp. 2d 926, 936 (N.D. Cal. 2003) ("Disqualifying an arbitrator can be highly disruptive to the expeditious arbitration process fostered by the FAA.").

Thus, not only was Ms. Woodroof's request without authority, it was severely premature and, if permitted, would only foster the type of ping-pong between arbitration and court that undermines, as it did here, the entire arbitration process. Accordingly, the first question in the petition is unworthy of review.

B. The Petitioner's Second Question Presented – Complaining that the Superior Court Erred in Refusing to Consider Under 9 U.S.C. § 10 of the FAA Evidence of Party-Arbitrator Partiality Prior to Any Arbitration Hearing or Award – Presents No Issue for Review.

Section 10 of the FAA, 9 U.S.C. § 10, lists the grounds that may form the basis for vacating an arbitration award, and authorizes courts to vacate awards due to the "evident partiality" of a neutral arbitrator. The statute makes no mention of any duty to disclose information in advance of an arbitration, nor does it provide any authority for a trial court to intervene prior to an arbitration hearing or award to disqualify a party-arbitrator. See Sphere Drake Ins. Ltd., 307 F.3d at 622 ("To the extent that an agreement entitles parties to select interested (even beholden) arbitrators, § 10(a)(2) has no role to play."). Here, there was no arbitration hearing or award and Ms. Woodroof only takes issue with a party-arbitrator, not a neutral; thus, Section 10 of the FAA does not apply.

Ms. Woodroof is aggrieved that the party-arbitrator named by Cunningham was an attorney who, at one point, had practiced law with Cunningham's counsel. Ms. Woodroof appears to take issue with the fact that Cunningham's party-arbitrator engaged in communications with Cunningham's counsel which, in her view, gives rise to an appearance of "evident partiality". See RR 268. To begin with, it is difficult to see how a party-arbitrator can be selected if the party or his counsel cannot communicate with the potential party-

arbitrator regarding his or her appointment. Not surprisingly, therefore, none of the cases cited by Ms. Woodroof deal with a party-appointed arbitrator. See Petition at pp. 16-18. The cases she relies upon involve only claims of evident partiality of a panel's neutral. See, e.g., Thomas Kinkade Co. v. White, 711 F.3d 719, 720 (6th Cir. 2013) (vacating award for neutral's evident partiality); Andersons, Inc. v. Horton Farms, Inc., 166 F.3d 308, 329 (6th Cir. 1998) (all three arbitrators on panel were neutrals).

An analysis of an arbitrator's evident partiality is limited to neutrals and does not apply to party-arbitrators. See Sphere Drake Ins. Ltd., 307 F.3d at 622, 623 (party-appointed arbitrators can't be dismissed on grounds they are inclined to support the party who named them) ("Nor did Commonwealth Coatings so much as hint that party-appointed arbitrators are governed by the norms under which neutrals operate") (citing Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145 (1968) (Plurality)); see also Nationwide Mut. Ins. Co. v. Home Ins. Co., 429 F.3d 640, 645 (6th Cir. 2005) (alleged contacts between arbitrator and party counsel did not warrant finding of evident partiality, "particularly where … complaint of evident partiality concerns a party appointed, as opposed to neutral, arbitrator"). Likewise, the disclosure requirements for neutral arbitrators "do[] not extend to party-appointed arbitrators." Winfrey v. Simmons Foods, Inc., 495 F.3d 549, 552 (8th Cir. 2007); Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 759 (11th Cir. 1993) (distinguishing between party-appointed and neutral arbitrators); Lozano v. Maryland Cas. Co., 850 F.2d 1470, 1472 (11th Cir. 1988) (same).

Here, the parties contracted for a three-member arbitration panel consisting of two party-arbitrators and one neutral. App. 51. Thus, the fact that a party-arbitrator had a prior affiliation with a party should not be a surprise to anyone. The cases that have addressed this situation recognize the obvious fact that some degree of partiality is inherent in a procedure that calls for each party to name their own arbitrator. See, e.g., Thomas Kinkade Co., 711 F.3d at 720 ("Per the arbitration rules, each party was entitled to appoint one arbitrator, who would de facto advocate that party's position on the panel."); United Transp. Union v. Gateway W. Ry. Co., 284 F.3d 710, 714 (7th Cir. 2002) ("Though the party-designated arbitrators are not neutral, each being biased in favor of the party that designated him, they are not rubber stamps"); Bhd. of Maint. of Way Emples. v. Terminal R.R. Ass'n, 307 F.3d 737, 739 (8th Cir. 2002) ("The members appointed by the parties are theoretically arbitrators, but they advocate the position of the party that appointed them and virtually always cast their votes for their own sides, so that the neutral arbitrator ultimately decides the dispute."); see also NFL Mgmt. Council v. NFL Players Ass'n, 820 F.3d 527, 548 (2d Cir. 2016) ("Parties to an arbitration can ask for no more impartiality than inheres in the method they have chosen.").[8]

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[8] This common-sense concept is also reflected in the official comments to the Uniform Arbitration Act, on which the D.C. Revised Uniform Arbitration Act is based. See Official Comment on Section 23(a)(2), (5), (6), and (c) ("The reason 'evident partiality' is a grounds for *vacatur* only for a neutral arbitrator is because non neutral arbitrators, unless otherwise agreed, serve as representatives of the parties appointing them. As such, these non-neutral, party-appointed arbitrators are not expected to be impartial in the same sense as neutral arbitrators.").

Whatever problem possible party-arbitrator partiality may present is obviated by the requirement, as contained here, that the two party-arbitrators agree upon and name a neutral third arbitrator. Ms. Woodroof had no stated grievance regarding the neutrality of the third arbitrator in this case. Her problem is that she did not want to abide by the rules that all three arbitrators unanimously agreed upon for the conduct of the arbitration. Accordingly, the second question in the petition is unworthy of review.

C. The Petitioner's Third Question Presented – Complaining that the Arbitration Panel Exceeded Its Authority By Agreeing to the Applicable Rules of Procedure Governing the Arbitration Hearing and Maintaining that the Superior Court Erred in Refusing to Intervene and Micro-Manage, In Advance of Any Arbitration Hearing or Award, the Decisions of the Arbitration Panel – Presents No Issue for Review.

Ms. Woodroof's argument that the arbitration panel in this case somehow exceeded its powers when it outlined the rules for the parties' arbitration is without merit. As discussed herein, see supra Sections A, B, trial courts are not permitted to obviate clear, contract terms and impose their own rules on arbitration or replace arbitrators prior to hearing and award, and Ms. Woodroof cites to no authorities otherwise. Rather, she cites to six cases addressing the vacatur (or affirmance) of arbitration *awards*, see

Petition at pp. 19-20,[9] and recognizes "[a]n arbitrator is charged with the interpretation and application of the [arbitration] agreement." N.Y. City Transit Auth. v. Transp. Workers' Union, Local 100, 6 N.Y.3d 332, 336, 845 N.E.2d 1243, 1245 (2005).

Here, the record reveals there was no substantive re-write of the parties' arbitration agreement and the arbitration panel did not exceed its powers in outlining rules for the arbitration. Compare arbitration agreement at App. 50-53, with proposed rules of arbitration at App. 39-41, 47-49. For example, the neutral's prepayment request does not violate any explicit provision of the arbitration agreement. Section 3 specifically addresses payment of the neutral and provides that "[e]ach party to the arbitration shall pay such party's *pro rata* share of the expenses and fees of the neutral arbitrator, together with other expenses of arbitration, incurred or approved by the neutral arbitrator." App. 51 ¶ 3 (emphasis in original). This prepayment protocol is a legitimate interpretation of the agreement's implied expectation that the neutral arbitrator would be promptly paid. Thus, the arbitration panel's prepayment protocol effectuates the agreement's purpose.

By way of further example, the arbitration agreement is silent as to any specific rules to be applied at the arbitration. Thus, it was not irrational

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[9] On Page 19 of her Petition, Ms. Woodroof incorrectly states her cited cases are examples of arbitrators exceeding their authority. See, e.g., Eastern Seaboard Constr. Co. v. Gray Constr., Inc., 553 F.3d 1, 5-6 (1st Cir. 2008) (arbitrator did not exceed authority to amend award); N.Y. City Transit Auth, 6 N.Y.3d at 336-37, 845 N.E.2d at 1245-46 (reinstating award).

or contrary to the agreement for the arbitration panel to decide the arbitration should be guided by a recognized and established body of rules, in this case the JAMS Streamlined Arbitration Rules, or that the two party-arbitrators would be governed by the ABA Code of Ethics for Arbitrators in Commercial Disputes, Canon X. App. 40.

In this case, the parties' arbitration panel did not exceed the scope of its authority or re-write the parties' agreement and the cases cited by Ms. Woodroof are inapposite. See, e.g., PMA Capital Ins. Co. v. Platinum Underwriters Berm., Ltd., 400 Fed. App'x 654 (3d Cir. 2010) (arbitrator eliminated material portions of the contract); Aspic Eng'g & Constr. Co. v. ECC Centcom Constructors LLC, 913 F.3d 1162 (9th Cir. 2019) (arbitrator disregarded portions of the agreement in an effort to prevent what he deemed would be an unfair result); Stolt-Nielsen S.A., 559 U.S. 662 (arbitration panel imposed its own view of "sound policy" by imposing a class arbitration in lieu of a bilateral arbitration). Accordingly, the third question in the petition is unworthy of review.

D. After years of Delay and Obstruction By Ms. Woodroof, The Superior Court Did Not Abuse its Discretion In Dismissing Ms. Woodroof's Lawsuit or Denying as Moot Ms. Woodroof's Motions.

The decision of the Superior Court was correct and should not be disturbed. The Superior Court did not abuse its discretion when, after protracted delay by Ms. Woodroof and repeated warnings, the court dismissed Ms. Woodroof's claims with prejudice and denied as moot Ms. Woodroof's motion for the court to step-in and supplant the contract provisions by

appointing a neutral arbitrator and disqualifying Cunningham's party-arbitrator.

This Court has repeatedly recognized that trial courts have inherent powers to "manage their own affairs so as to achieve the orderly and expeditious disposition of cases", including the discretion to dismiss a complaint for failure to prosecute under those inherent powers and Federal Rule of Civil Procedure 41(b). See Link v. Wabash R. Co., 370 U.S. 626, 629, 630-31, 633 (1962);[10] see also Beckwith v. Beckwith, 379 A.2d 955, 958 (D.C. 1977); Wells v. Wynn, 311 A.2d 829, 830 (D.C. 1973) ("A delay which is unexplained (and thus unexcused) and of long duration may constitute such a lack of diligence as to require dismissal of an action as a matter of law."); cf. Sutton v. Sutton, 164 A.2d 477, 478 (D.C. 1960) ("when the court is faced with a long and continuing disobedience of its order there is no bar, statutory or otherwise, to imposing the ultimate sanction of dismissal"). When the "issues presented are no longer 'live' or the parties lack 'a legally cognizable interest in the outcome,' a case is moot." Settlemire v. D.C. Office of Emple. Appeals, 898 A.2d 902, 904-05 (D.C. 2006).

Ms. Woodroof's lawsuit was improperly filed to begin with and was properly stayed for arbitration. See App. 2. Notwithstanding the clear contractual mandate to arbitrate, Ms. Woodroof engaged in a multi-year pattern and practice of delay and harassing and vexatious conduct. She repeatedly challenged the arbitration requirement even though it was clearly stated in the contract and affirmed by

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[10] D.C. Superior Court Rule 41(b) is identical to Federal Rule of Civil Procedure 41(b).

both the Superior Court and the DCCA. See App. 1-7, 20. She repeatedly insisted her alleged financial distress constituted a valid reason for the court to step in to obviate the contract terms and provide a method of dispute resolution that was, in Ms. Woodroof's view, more favorable to her. Record Nos. 84, 95, 101, 119; RR 130. She refused to accept any ruling that required her to proceed with the arbitration and only acquiesced when the court gave her a hard and fast deadline on pain of dismissal. Even then, her cooperation was short-lived. See App. 1-7.

Ms. Woodroof then maintained that the arbitration panel exceeded its authority by agreeing on rules for the arbitration, and that the neutral should be paid and his payment be reasonably secured. Ms. Woodroof's interests were represented on the panel by her party-arbitrator and the arbitration terms were unanimously agreed to by all three arbitrators. Determining issues of process, procedure and payment in connection with an arbitration fall squarely in the wheelhouse of the arbitrators and, as noted, any objections that either party may have should be presented to the arbitrators first for determination. Ms. Woodroof instead acted to scuttle the arbitration and maintained her position that the trial court should interject itself and rewrite the arbitration agreement in a manner to her liking. See App. 1-7.

Based on the record evidence, including the "reasonable diligence" requirement of the parties' arbitration agreement (App. 52), briefing and argument, the Superior Court held arbitration did not occur due to Ms. Woodroof's actions and failure to move her case along with reasonable diligence.

App. 21-22; see also id. 9. Once the case was dismissed, it was proper to deny any remaining pending motions as moot. App. 6. Accordingly, the Superior Court did not abuse its discretion in disposing of Ms. Woodroof's claims.

CONCLUSION

For the reasons discussed herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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