UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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DDR CONSTRUCTION SERVICES, INC., CLIFFORD R. WEINER, and DEBBIE WEINER,

Petitioners,

-against-

SCHLESINGER ELECTRICAL CONTRACTORS, INC. and JACOB LEVITA,

Respondents.
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MEMORANDUM & ORDER
16-CV-4454 (DRH)(ARL)

APPEARANCES:

For Petitioners:
Peckar & Abramson, P.C.
41 Madison Avenue, 20th Floor
New York, New York 10010
By: Kevin J. O'Connor, Esq.
Joseph M. Vento, Esq.

For Respondents:
Law Offices of Melvin J. Kalish, PLLC
114 Old Country Road, Suite 660
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By: Melvin J. Kalish, Esq.
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HURLEY, Senior District Judge:

Petitioners DDR Construction Services, Inc. ("DDR"), Clifford R. Weiner ("Weiner") and Debbie Weiner ("Debbie Weiner") (collectively "Petitioners") bring this action pursuant to the Federal Arbitration Act, 9 U.S.C. §10 et seq.("FAA") seeking vacatur of an August 1, 2016 arbitration award (the "Award") rendered in favor of Respondents Schlesinger Electrical Contractors, Inc. ("SEC") and Jacob

Levita ("Levita") (collectively "Respondents") after an arbitration conducted pursuant to the American Arbitration Association ("AAA") Commercial Rules as a result of the parties' arbitration agreement. Presently before the Court is Petitioners' petition to vacate the award and Respondent's motion to dismiss and/or deny the petition or, in the alternative, to confirm the award. For the reasons set forth below, the award is modified and as so modified confirmed.

BACKGROUND

The genesis of this dispute goes back more than ten years, traversing both federal and state courts before the matter was submitted to arbitration. As described in the Second Amended Petition ("Petition" or "Pet.") [DE 41], "the disputes between these parties stem from approximately $255 million in principal contracts awarded to non-party Schlesinger-Siemens Electrical, LLC ('SSE' and now known as Siemens Electrical, LLC)" for which SEC "held its member interest in SSE for the benefit of itself and two other corporations (DDR and non-party First Keystone Consultants, Inc. ["Keystone"] . . .) and one-half of the profits from said contracts were to flow to those tri-venture partners under their partnership agreement in a tri-venture called SFD Associates." [Pet. ¶ 2 (internal quotations marks and footnote omitted).]

I. The Arbitration Agreement

The submission of the controversy to arbitration was pursuant to an Arbitration Agreement entered into by Petitioners and Respondents in 2015 (the "Arbitration Agreement") whereby they agreed to discontinue an action then

pending in Supreme Court, Queens County (the "Queens Action") without prejudice and "to submit the claims and counterclaims asserted [therein] to binding arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules." [Pet. ¶ 45, 48 & Pet. Ex. 2 at p. 1.][1] The Arbitration Agreement specifies that the claims to be arbitrated were those set forth in enumerated pleadings filed in the Queens Action, to wit: (1) the Second Amended Third Party Complaint, with exhibits, of DDR and the Weiners, (2) SEC's and Levita's Answer to Second Amended Third Party Complaint and Counterclaims with exhibits, and (3) the Reply of DDR and the Weiners. It was expressly agreed that the parties could not file any new or different claims or counterclaims, although they could change the amount of damages for those existing claims. [Pet. Ex. 2 at p.1.] The arbitrator was to "issue an award in accordance with the AAA Commercial Arbitration Rules," which award was to consist of a "reasoned decision" and "include a provision for the distribution of the approximate $500,000.00 being held in escrow by the Parties' attorneys . . . ." [*Id.* p. 2-3.] It was agreed that the award "shall be final and binding upon the parties, and Judgment may be entered upon the Award in accordance with Article 76 (Arbitration) of the CPLR by application to the Supreme Court, Nassau County, which shall be the exclusive

[1] The parties dispute the reasons why and how they eventually agreed to arbitration. That dispute, like a number of the other matters disputed by the parties, such as why there was no transcript of the arbitration, while indicative of the vituperative relationship between the parties and their counsel, is not material to this Court's determination.

forum for any motions brought pursuant to CPLR Article 75. [*Id*. at pp. 2-3.] The Arbitration Agreement provides that it "shall be governed by New York Law." [*Id*. at pp. 6.]

To place the present dispute in context, it is necessary to describe the background of the claims and counterclaims between Petitioners and Respondents as set forth in the above referenced pleadings in the Queens Action. Those claims relate to two business relationships: one referred to as the Coney Island Joint Venture and the other as the SFD Joint Venture. The Court begins with the allegations in the Second Amended Third Party Complaint.

II. Nature of the Underlying Dispute As Set Forth in the Queens Action

A. Petitioners' Allegations Regarding the Coney Island Joint Venture

In 2002, DDR, Weiner, and non-parties Keystone, Robert Solomon ("Solomon") and Jane Solomon entered into an agreement (initially verbally but later reduced to writing) whereby Keystone agreed to pursue certain contracts with SEC and others with the assistance of DDR and Weiner and to pay DDR fifty percent of Keystone's "net operating profit in any joint venture agreement with [SEC] and all other work pursued plus salary compensation for time spent by . . . Weiner [the "2003 Consulting Agreement"]." Pet. Ex. 21 at ¶ 8. A joint venture between Keystone and SEC was thereafter formed in 2004, known as the Coney Island Joint Venture, "for the purpose of bidding on a contract, which was to be formally bid in [SEC's] , to perform certain electrical work" "as a subcontractor" on

a project called the Coney Island Project; the price of the subcontract was initially $5,250,000.00 with an additional $500,000 in approved change orders and $1.2 million in disputed change orders. (*Id*. at ¶¶ 10-12.) Under the terms of the Coney Island Joint Venture agreement (the "CI Agreement") SEC and Keystone were each owners of a 50% interest in the joint venture and were each designated as Administrative Managing Partners responsible for record keeping and bookkeeping; SEC was designated as Project Managing Partner in charge of the project and payroll. (*Id*. at ¶¶ 10-11.) SEC's designated representative for the project was Levita and Keystone's was Solomon. (*Id*. at ¶ 16.) The CI Agreement provided for the designation of DDR as the Field Project Manager. (*Id*. at ¶ 15.) "The Coney Island Joint Venture agreed to compensate DDR in the amount of $3,000 per week for their services on the Coney Island Project as well as a distribution of profits. In addition to the $3,000 per week consulting services fee that were [sic] to be paid to DDR, in accordance with the . . . 2003 Consulting Agreement between First Keystone and the Solomons on the one part and DDR on the other part, First Keystone and the Solomons agreed to distribute fifty percent of the net profits realized on the Coney Island Project by First Keystone with DDR, and to share in any losses." (*Id*. at ¶¶ 23-24.) Thereafter, net profits were distributed to Keystone and SEC; DDR did not receive either what it claimed to be its share of the profits or an accounting of the profits, despite its demand therefor. (*Id*. at ¶¶ 24-39.)

B. Petitioners' Allegations Regarding the Creation of SSE and the SFD Associates Joint Venture Creation and Demise

1. Creation of SSE

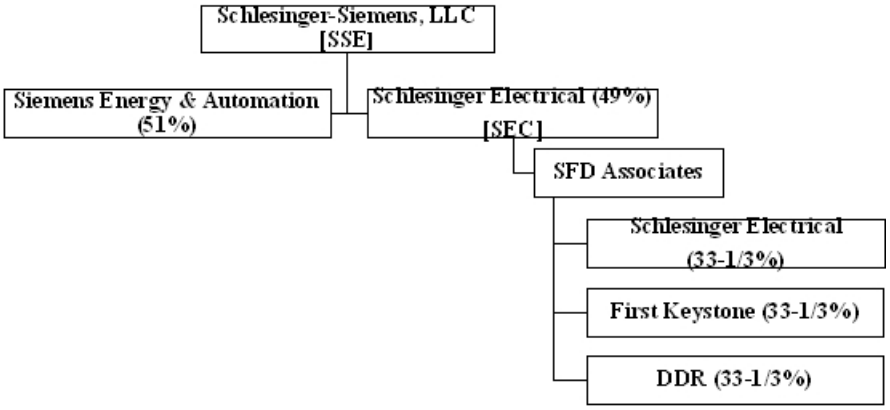
As a result of his long-standing relationship "with non-party Siemens [Energy] & Automation, Inc."[2] ("S&A"), Weiner and DDR became aware that S&A was interested in joining forces with an electrical company to jointly bid on public improvement construction contracts in New York. (*Id*. at ¶¶ 40-41.) In his capacity of Vice President of SEC, Weiner was instrumental in the development of a contractual relationship between S&A and SEC to bid on a contract with the New York City Department of Environmental Protection for work designated as the Manhattan Pump Station Contract; in August 2004, SEC and S&A entered into a written agreement (the "SSE Operating Agreement") to form Schlesinger-Siemens Electrical, LLC ("SSE") for the purposes of bidding on, and if SSE was the winning bid, completing the Manhattan Pump Station Contract. (*Id*. at ¶¶ 42-45.) Under the SSE Operating Agreement, "no member was permitted to resign without the consent of the majority and only if the member's interest [in SSE] was purchased." Initial capital contributions of $4,900 and $5,100 were to be made by SEC and S&A

[2] It appears from the parties' submissions, *e.g.* DE 29 at Ex. I, that "Siemens" is a large conglomerate with a number of subsidiaries and/or related companies, some of which have "Siemens" as a part of their name. It is not always clear from the submissions whether the reference to "Siemens" is to "S&A" or to some other, for want of a better description, Siemens entity. When it appears clear, at least to this Court, that the reference is to Siemens Energy & Automation (the entity identified as part of SSE) the Court uses "S&A;" when it is not clear, the Court, like the parties, uses "Siemens."

respectively once the contract was awarded, with additional contributions when reasonably necessary and in the best interest of the company "after an elaborate process of written, advance notice." SEC's and S&A's ownership interests were 49% and 51% respectively, with SEC to receive 49% of the net profits from any work performed on the Manhattan Pump Station Contract. (*Id*. at ¶¶ 46-48, 53.) The SSE Operating Agreement provided for a Board of Managers comprised of three members appointed by S&A and two appointed by SEC; SEC appointed Solomon and Weiner and S&A appointed Messrs. Volande, Eder and Koebach. (*Id*. at ¶¶ 49-50.)

2. Creation of SFD

At the same time SSE was created, SEC, Keystone and DDR entered into a joint venture agreement (the "SFD Joint Venture Agreement") for an entity named "SFD Associates" ("SFD"), short for Schlesinger, First Keystone and DDR. The SFD joint venture was to bid on the electrical portion of the Manhattan Pump Station contract as nominee for SSE and complete that work for SEC as a member of SSE. The SFD Joint Venture Agreement contained various provisions regarding working capital contributions by the parties and the distribution of profits.[*Id*. ¶¶ 54, 64-67.] "The Business Manager of S&A's Water Technologies Group, Jeffrey Deurlien was fully apprised, and aware of the existence of the joint venture partnership" between SEC, Keystone, and DDR. (*Id*. at ¶ 55.) The relationship between SFD and SSE is illustrated as follows:



[*Id.* ¶ 58.]

Although SSE was unsuccessful in bidding on the Manhattan Pump Station Contract, the members chose not to terminate their agreement and bid on other projects, amending their agreement to cover the submitted bids. [*Id.* ¶¶ 72-77.] Eventually, SSE was the winning bidder on the "26th Ward Project" in 2005, as well as other projects thereafter. [*Id.* ¶¶ 76, 127.]

3. Disintegration of the Relationship of the SFD Partners

In late June 2005, the dispute between DDR and Keystone with respect to the Solomons' and Keystone's "failure to live up to the June 2003 Consulting Agreement and fraudulent misrepresentations about profit distributions in connection with the Coney Island Project began to spill over into the parties' relationship on the SFD Associates Joint Venture." [*Id.* ¶ 79.] As a result, the Solomons, Keystone, and SEC "began a cynical and fraudulent effort to squeeze DDR out of its rights with respect to the SFD Associates Joint Venture and [SSE]. [*Id.* ¶ 81.] The nature of these actions are detailed in the Second Amended Third Party Complaint filed in the Queens Action. It suffices to state that these actions

included an Amended and Restated Operating Agreement for SSE, false allegations against DDR and Weiner, and a call for capital contributions for SFD "that was not preceded by any concomitant demand having even been made by [SSE]" in accordance with the SSE Operating Agreement. [*Id.* ¶¶ 78-129.]

C. Respondents' Answer and Counterclaims in the Queens Action

According to SEC and Levita, DDR was not a party to the Coney Island Joint Venture Agreement and "[SEC] and/or Levita had absolutely no obligation to provide DDR with any profits distributions or any accounting" of the Coney Island Joint Venture and there were no management fees due to DDR. [*E.g.* Pet. Ex. 22 ¶¶ 34-36.]

With respect to SFD, SEC and Levita claimed, inter alia, that DDR and Weiner voluntarily withdrew from the SFD Joint Venture and, relying on Paragraph 13 of the SFD Joint Venture Agreement, DDR was not entitled to any profit of the SFD Joint Venture because it failed to make capital contributions. [*E.g.*, *id.* ¶¶ 63-67.] SEC and Levita denied the allegations set forth in the Second Amended Third Party Complaint in support of the claim that they engaged in fraudulent efforts to deprive DDR of its rights in the SFD Joint Venture. [*E.g.*, *id.* ¶¶ 78-85, 102.] Among the affirmative defenses raised in the Queens Action by SEC and Levita was that the claims were "barred, in whole or in part, by the doctrine of unclean hands" and that under New York Partnerships Law DDR's September 2005 termination of its relationship with SEC and SFD Associated caused a dissolution of the 2004 SFD Associates Joint Venture. [*Id.* ¶¶ 201, 241.] SEC and Levita asserted

various counterclaims as well, including breach of contract by Weiner and DDR on the Coney Island Project, a claim against Weiner for failure to reimburse SEC for health insurance payments advanced on Weiner's behalf, and a request for a declaratory judgment that DDR and Weiner have no interest in the SFD Joint Venture. [*Id.* ¶¶ 275-410.] With respect to the latter claim, the following was alleged:

> 330. In addition, Weiner began to have serious concerns that his "vision" of how SFD was to operate was not coming to fruition. At his deposition he testified that he believed he was obligated to advance [S&A]'s interests, even if these interests conflicted with SFD's interests, by obligating SFD to utilize Weiner' s source of equipment even if SFD and [SSE] (which included [S&A]) could obtain the equipment for a lower cost using sources other than those Weiner stated he was compelled to use.
>
> 331. For example, Weiner testified that in his mind "the whole genesis of creating the LLC, was that Siemens could move equipment, period." Weiner went so far as to admit in clear and simple language that his position was that SFD was, again in his mind, obligated to purchase the equipment from Weiner's source even though the equipment could be purchased for significantly less money in the open market. . . .
>
> . . .
>
> 335. During the Summer of 2005 Weiner complained not only about equipment purchasing but about differences of opinion on numerous aspects of SFD's operations. Weiner went so far as to advocate against SFD even though he had signed the SFD agreement and owed a fiduciary duty to his SFD partners and not to third party suppliers of equipment.
>
> . . .
>
> 337. Weiner's . . .virulent position that SFD was obligated to purchase equipment from Weiner's source, as opposed to in the open market for hundreds of thousands of dollars less . . . led to Weiner's resignation and withdrawal from the SFD Associates Joint Venture in the

Summer of 2005.

[Pet. Ex. 22 at ¶¶ 330-31, 335, 337.]

Having described the nature of the issues that the parties agreed to submit to arbitration,[3] the Court now turns to the Arbitration.

III. The Arbitration

A. Pre-Hearing Matters and Selection of an Arbitrator

On or about June 1, 2015, the American Arbitration Association ("AAA") was notified of the parties' agreement to submit their disputes to arbitration, together with the terms of their agreement; a request was made that an arbitrator be assigned as expeditiously as possible. [*See* Pet. Ex. 5 at p.3.][4] In order to provide an arbitrator "free from conflicts," the AAA provided each of the parties with a "Checklist for Conflicts to list those witnesses [they] expect to present, as well as any persons or entities with an interest in these proceedings." [Pet. Ex. 7.] The

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[3] The Court notes that according to the Arbitration Agreement, (1) the claims asserted by Keystone and the Solomons in the Queens Action were withdrawn with prejudice; and (2) Keystone and the Solomons were held in default vis a vis the counterclaims asserted against them by both Petitioners and Respondents. [*See* Pet. Ex. 2 at p.3.]

[4] Typical of the acrimony that exists between the parties, they each submitted their own description of the nature of the dispute to the AAA. [*Compare* Pet. Ex. 5 (Petitioners' submission) *with* Pet. Ex. 6 (Respondents' Submission.) While the description (as distinct from the Queens Action Third-Party Complaint apparently attached thereto) submitted by Petitioners contains no reference to either "Siemens" or "Siemens Schlesinger Electrical LLC" by name, the Respondents' description refers to "Siemens," "Schlesinger-Siemens LLC" and "SSE LLC." [*See, e.g.*, Pet. Ex. 6 at p. 3 n.1, 5, 7.]

checklist instructs the submitting party to "list below the full names of all interested parties in this case, including, but not limited to, witnesses, consultants, and attorneys" as well as "subsidiaries and other related entities." [*Id.*] In addition to Petitioners, Respondents, and Respondents' counsel, the checklist submitted by Petitioner identified only the following:

Full name	Address	Affiliation
John Rey	Address unknown	Non-party witness (likely to appear by deposition)
Dan Mosu	Siemens Energy & Automation 186 Wood Ave S, Iselin, NJ 08830	Non-party witness (likely to appear by deposition)
Robert Solomon[5]	Address Unknown	Non-party witness (likely to appear by deposition)
Henry Fuentes	SaxBST	Expert forensic accountant for DDR

[*See* Pet. Ex. 8.] The record does not contain the checklist submitted by Respondents.

B. The Arbitrator's Disclosures

The AAA thereafter appointed Ira Schulman, Esq. of Pepper Hamilton, LLP (the "Arbitrator") as arbitrator and forwarded a disclosure form to him. The Arbitrator responded "no" to the following questions, among others:

[5] The Court notes that although a declaration submitted to this Court refers to Solomon as "a principal of Schlesinger-Siemens Electrical, LLC" [DE 22 ¶], he was not so identified in the checklist.

> "Do you or your law firm presently represent any person in a proceeding involving any party to the arbitration?
>
> Have you had any professional or social relationship with any parties or witnesses identified to date in this proceeding or the entities for which they work?
>
> Are there any connections, direct or indirect, with any of the case participants that have not been covered by the above questions?

[Pet. Ex. 9.] The following was disclosed by the Arbitrator in response to the inquiries regarding whether any of the parties or law firms had appeared before him in past arbitration cases and whether he had any professional or social relationship with counsel for any party in this proceeding or the firms for which they work:

> 1. Approximately 5-6 years ago I appeared before Melvin Kalish, Esq. in an AAA Construction Industry arbitration where Mr. Kalish was the sole arbitrator. . . . The matter took approximately 5 hearing days and went to Award. I likely have had other matters with Mr. Kalish over the years where he represented a trade in various lien foreclosure action but I cannot recollect the captions.
>
> 2. I have had several litigation matters with the Peckar firm over my 35 years practicing construction law in NYC. Only one went to trial and judgment and that was approximately in 2006 in Supreme Court, Queens County. . . . The others were settled. I am presently sitting on an arbitration panel where the Peckar firm represents a party. I expect hearings will wrap up this month. I have had no dealings with Kevin O'Connor of the Peckar firm.

[*Id.*]

C. Identified Witnesses; Actual Witnesses

At some point, apparently after the Arbitrator was appointed, the parties

filed their witness lists. SEC identified the following individuals as witnesses, among others:

> "Roland Dung - Siemens"
> "Jeff Deurlein - Siemens"
> "Mark Taylor - Siemens"
> "Wilhelm Kropf - Siemens"
> "Marsha Estrin - Siemens Transportation"

[Pet. Ex. 11.] The identification of these individuals drew an objection from Petitioners. [Pet. Ex. 12.] Among the stated reasons for the objection was the following:

> Lastly, Respondents' inclusion of witnesses from Siemens is inconsistent with its prior position in the Queens County Action that such witnesses had no relevant information. The Arbitrator should know that, not only did Respondents never previously identify such witnesses in disclosure, when a trial was scheduled in the Queens County Action in July 2009, Respondents participated in efforts to prevent any Siemens witnesses from being issued trial subpoenas. The basis of that "rrelevance," and the real reason was the fact that indictments were imminent against Siemens and Respondents. Siemens ended up settling with the authorities and paying a $10 million fine; Respondents were indicted and convicted of fraud stemming from the Principal Contracts.

[*Id*. at p. 2.] The objections were overruled. [Pet. ¶ 13.] However, only four witnesses testified in person at the arbitration: Weiner, Levita, Henry Fuentes (an expert witness) and Alan Chasan, CPA (SEC's accountant). Excerpts from the depositions of several individuals, including Dan Mosu, "who worked for Siemens[6]

[6] According to Mosu's deposition testimony, he worked for Siemens Energy & Automation. *See* Pet. Ex. 25 at pp. 17, 27.

in 2005," Solomon, and Debbie Weiner were submitted as evidence. [DE 32 at ¶ 22.] Excerpts from Mosu's deposition are attached to the Petition [*See* Pet. Ex. 25] and presumably these are the excerpts that were submitted to the Arbitrator. The majority of the excerpts have to do with the bidding for the 25th Ward project, more particularly the equipment component of the bid. [*See id. passim*.] Two particular portions of the excerpts appear to be of note. First, Mosu testified that he never heard of SFD Associates. [*Id*. at p. 46.] Second, he testified that in the fall of 2005 no one "within the Siemens organization" or at SSE itself ever suggested to him "that the bid on 26th Ward had been structured in such a way by Mr. Weiner so as to permit him to take a kickback from any particular supplier." [*Id*. at p. 120.] It does not appear that any of the other "Siemens individuals" identified in Respondents' witness list testified.

The Arbitration "took place over five (5) days" spread out over "several months." [Pet. ¶ 6; *but cf*. DE 26 at ¶ 45 (describing the arbitration as consisting of "one or more pre-hearing conferences and approximately seven (7) hearings between November 12, 2015 and February 3, 2016").] There was no transcript made of the arbitration.

D. The Award

On August 8, 2016, the Arbitrator issued his Final Award in which he (1) denied Petitioner's claim in its entirety; (2) directed counsel for Petitioners and Respondents to disburse to SEC the approximately $500,000.00 being held in escrow; (3) directed Petitioners to pay Respondents the unpaid balance of SEC's

loan to Clifford and Debbie Weiner for health insurance premiums; and (4) denied all other claims by Respondents. [Pet. Ex. 26.]

The Arbitrator summarized the claims before him noting that they arise "from the Schlesinger-First Keystone Joint Venture Agreement for the Coney Island Project and the SFD Associates Tri-Venture Agreement for NYC public works project known as the 26th Ward." [*Id.*] After noting that both Weiner and Levita "presented in most respects a plausible explanation for the events that led up to this arbitration" and that there was "no way to reconcile" their testimony, he rejected the testimony given by Weiner, writing:

> My decision is based on several factors, including but not limited to (i) the record is clear that Mr. Weiner is guilty of blatant self-dealing with respect to trying to rig the purchase of non-Siemens' equipment from sources controlled by Weiner/DDR, (ii) his surreptitious dealings and eagerness to share confidences with Mr. Solomon to the exclusion and potential detriment of Mr. Levita, (iii) his "second" resignation from the SFD partnership followed by his admitted refusal to speak with Mr. Levita or have any other contact with his SFD partners, (iv) his confidant, Mr. Solomon, testifying that Mr. Weiner was a thief (or put another way- a kindred spirit), (v) his remonstrations that he could not satisfy capital requirements while at the same time purchasing a new home, and (vi) his overall demeanor at the arbitration which I found to be less than forthright. That is not to say that I found Mr. Levita's testimony scored an A+ on the credibility gauge, the public record would refute that - but on the key issues in this Arbitration Mr. Levita was simply more credible.

[*Id.*] The Arbitrator rejected the arguments that "the doctrines of law of the case, collateral estoppel and res judicata bar Respondents from re-litigating DDR's

partnership status and other issues" on the grounds that the state court orders cited "are not as expansive as Claimants claims [sic] and are not controlling here." He also rejected Weiner's claim that Levita and Solomon wanted to force him out given that (1) Solomon, Levita and the Siemens' contact prevailed upon him to rescind the resignation he issued in July 2005; and (2) after SSE won the 25th Ward contract, rather than furnish his share of the capital requirements for that project, Weiner again resigned claiming he did not or would not have the funds required to discharge his SFD obligations. Further, "Mr. Weiner's claim that the funding requirements for SFD was conditioned upon the receipt of profits from the Coney Island venture finds absolutely no support in the contemporaneous documentation - nor is there any proof that the absence of such conditional language in the SFD agreement was a scrivener's error or drafting mistake." [*Id.*] The Arbitrator also rejected Petitioners' argument that the September 2005 call for a capital contribution was part of a conspiracy between Levita and Solomon to force them out of SFD: "If this was a conspiracy, it's highly doubtful that Mr. Levita, a putative co-conspirator, would have asked, as he did, for an extension of time to make the capital contribution. . . . [T]he only response by Mr. Weiner to the capital call was complete silence followed up by his taking up consulting work with Siemens . . . for which he was paid a handsome sum without risk." [*Id.*]

The Arbitrator then addressed Weiner's claim for profits:

> The clear terms of the SFD agreement provide that "any profits shall be divided between the parties in the

> proportions in which the parties shall advance working capital." I find no ambiguity in this provision. The Claimants [Petitioners] contributed zero dollars. . . . I will not re-write the agreement to achieve some version of equity. Mr. Weiner knew full well of the consequences of his actions and cannot now be heard to complain that matters with Siemens did not unfold as he planned.

[*Id.*]

Similarly, the Arbitrator declined to "re-write" the Coney Island Joint Venture "to allow a non-signatory to share in profits - whatever those ultimate profits may have been given the crushing loss sustained [in an arbitration relating to the Coney Island Project.]" He further supported his rejection of this claim noting that Weiner received "$246,000 from Mr. Solomon's company as his share of the profits on the Coney Island Job (a surreptitious arrangement unknown to Mr. Levita) and also collected $263,000 in project management fees." [*Id.*]

The Arbitrator found in favor of Respondents on their counterclaim for "the unpaid balance of SEC's loan to Clifford and Debbie Weiner for health insurance," finding it was valid and there was "no bona fide defense offered to justify non-payment or forgiveness of the debt. [*Id.*]

Lastly, the Arbitrator found that "Respondent's counterclaim for $150,000.00 allegedly arising from Claimants' breach of its [sic] fiduciary duty to Respondents is a close call but the damages were in [his] view triggered by the nefarious Mr. Solomon whom apparently has made himself judgment proof." [*Id.*]

IV. The Parties' Positions

A. Petitioners' Claims for Vacatur of the Award

Petitioners assert that "[a]lthough the parties' submissions to the AAA and pre-arbitration conflict forms identified Siemens and its subsidiaries and employees as having involvement in this case and an interest in the proceeding, the arbitrator . . . made no disclosures of his close connection to Siemens; his prior representation of Siemens; or his firm's concurrent and long standing representation of Siemens." [Pet. ¶ 5.] Moreover, "the Arbitrator allowed Respondents to delve into claims that are not even included in their pleading," contrary to the Arbitration Agreement. "He allowed Respondents to inquire about the False Claims Act against Siemens and made a gratuitous remark about how that case could result in millions of dollars in damages against Siemens . . . ." [*Id.* ¶ 6.] The award itself provides further evidence of the Arbitrator's "evident partiality in favor of Respondents" because it "contains no legal analysis to speak of, granted relief on claims that were never properly allowed in the arbitration; and made a finding of alleged 'bid rigging' on Weiner's part that was clearly intended to benefit Siemens and Respondent [SEC]." Also, he "awarded relief as against Debbie Weiner" that was not sought. "In the process, the Arbitrator grossly ignored New York statutes and case precedents as well as the clear agreement of the parties to arbitrate." [*Id.* ¶ 7.] Petitioners assert that "[a]n investigation subsequent to the delivery of the Subject Award showed that the Arbitrator *personally represented the exact business unit involved in this*

arbitration and from which witnesses came; that Siemens has been a long standing client" of the Arbitrator and his law firm; "and that, in fact, Siemens has engaged all but one of [the Arbitrator's law firm's] thirteen (13) offices to fight litigation countrywide in the last ten years. None of this was disclosed." [*Id*. ¶ 8 (emphasis in original).] Asserting that there is evident partiality on the part of the Arbitrator and that he manifestly disregarded the law and exceeded his powers, Petitioners seek vacatur of the award.

B. Respondents' Answer to the Petition and Motion to Dismiss

Respondents deny all the salient assertions of the petition and supporting affidavits and maintain that no grounds exist to vacate the Award. In their answer to the petition and motion to dismiss, Respondents maintain that the petition should be dismissed and/or denied and the award confirmed because (1) Petitioners have willfully mislead this Court by presenting materially inaccurate facts and specious arguments; (2) any post-arbitration proceedings were required to be brought exclusively in Nassau County Supreme Court; (3) Petitioners have waived any objections raised for the first time only after losing the arbitration; (4) the argument that the arbitrator concealed a conflict of interest is false as Siemens had neither a central role in the arbitration nor a stake in it; (5) the arbitrator did not exceed his authority or disregard any laws; (6) the absence of a stenographic record warrants rejection of Petitioners' allegations regarding the arbitration; and (7) the instant petition is nothing more than an effort to relitigate the arbitration.

The Court begins its discussion with whether this action was required to be brought in Supreme Court Nassau County.

DISCUSSION

I. Forum Selection

"[A] forum selection clause is presumptively enforceable only if, among other requirements, 'the claims and parties involved in the suit are subject to the forum selection clause.'" *Dean Street Capital Advisors, LLC v. Otoka Energy Corp.*, 2017 WL 476720, *3 (S.D.N.Y. Feb. 2, 2017) (quoting *Martinez v. Bloomberg LP*, 740 F.3d 211, 217 (2d Cir. 2014)). The party asserting the forum selection clause as a basis for dismissal has the burden of establishing that it actually applies. *See id.*

Respondents rely upon three bases to support their argument that this action should be dismissed because it was required to be brought in Supreme Court, Nassau County. First, they cite a provision in the SFD Agreement that states: "JURISDICTION AND VENUE . . . All disputes, claims and litigation relating to this Joint Venture Agreement shall be venued in New York Supreme Court, Nassau County." [DE 26, Ex. 2 at ¶ 29.]. Second, they cite paragraph 3 of the Arbitration Agreement which provided: "The Award rendered by the Arbitrator shall be final and binding upon the parties and Judgment may be entered upon the Award in accordance with Article 75 (Arbitration) of the CPLR, by application to the Supreme Court, Nassau County, which shall be the exclusive forum for any motions brought pursuant to CPLR Article 75." [Pet. Ex. 2 at ¶ 3.] Third, they rely on Paragraph 6.0

of the Escrow Agreement, which states: "Venue: Any action or proceeding arising out of or pertaining to this Agreement must be commenced and maintained in Supreme Court of the State of New York, County of Nassau." [DE 26, Ex.3D at ¶ 6.0.]

Turning first to the forum selection clause in the SFD Joint Venture Agreement, it does not require that the present action be venued in Nassau County Supreme Court. First, the parties waived this provision when they agreed to submit the dispute relating to the joint venture agreement to arbitration, if not before.[7] More importantly, the present dispute relates to the arbitration. Second Circuit law requires that a party assert "rights or duties under the contract" in order for a dispute to arise under it. *See Phillips v. Audio Active Ltd.*, 494 F.3d 378, 391 (2d Cir. 2007); *Comcast Corp. v. Rovi Corp.*, 2016 WL 7235802, *4 (Dec. 14, 2016) (forum selection clause not triggered by claim for act committed after expiration of agreement); *see also Sempra Energy Trading Corp. v. Algoma Steel, Inc.*, 2001 WL 282684, at *7 (S.D.N.Y. Mar. 22, 2001), *aff'd* 300 F.3d 242 (2d Cir. 2002) (explaining that "forum selection clauses cannot operate to hijack any dispute that may exist ... related or unrelated, and turn a dispute about some other contract ... that would otherwise be litigated elsewhere into a dispute 'relating to' the agreement...."') (internal citations omitted). Here, the dispute centers around rights

[7] *See* DE 29 at ¶¶ 11- 14 (recounting the various forums in which disputes relating to the SFD Agreement were conducted, including the Queens action, an action in Kings County and another action in this Court).

relating to the arbitration. For the same reasons, the Escrow Agreement does not require that this matter be venued in Nassau County Supreme Court; the present dispute centers around the arbitration and the parties waived the venue provision in the Escrow Agreement when they agreed to have the escrow disbursement decided in the arbitration.

Finally, the cited clause in the Arbitration Agreement does not require dismissal of this matter. That clause is mandatory only to the extent that motions pursuant to CPLR Article 75 must be venued in Nassau County Supreme Court. Petitioners are not proceeding by way of CPLR Article 75. This action was commenced under the FAA and the FAA is not mentioned in the Arbitration Agreements's forum selection clause. Had the parties wished to have motions pursuant to the FAA subject to the forum selection clause, they should have either specifically referred to both the FAA and the CPLR or provided that Nassau Supreme Court was the exclusive venue for *any* motion to confirm or vacate the award. They did not. *Accord Schlesinger Electrical Contractors Inc. v. DDR Construction Services, Inc.,* Index No. 606345-16 (Supreme Court, Nassau County, Nov. 7, 2016) (concluding that the present action [referred to therein as "the prior proceeding"] is not precluded by paragraph 3 of the Arbitration Agreement as it makes no reference to the FAA and contains no prohibition or waiver of federal FAA rights; nor is it precluded by the SFD Joint Venture Agreement.)

Having rejected Respondents' arguments that this action was required to be

venued in the Supreme Court, Nassau County, the Court will now address the issue of evident partiality.

II. Whether to Confirm or Vacate the Award

A. Applicable Standard

Pursuant to the FAA, a district court may vacate an award in the following circumstances:

> (1) where the award was procured by corruption, fraud, or undue means;
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10. Confirmation of an arbitration award is "a summary proceeding that merely makes what is already a final arbitration award a judgment of the court . . . and the court must grant the award unless the award is vacated, modified or corrected." *D.H. Blair & Co., Inc. v. Gottdiener*, 462 F.3d 95, 110 (2d Cir. 2006) (internal quotation marks omitted). "[C]ourts must grant an [arbitrator's] decision great deference." *Trs. of Empire State Carpenters Annuity, Apprenticeship, Labor-Mgmt. Cooperation, Pension & Welfare Funds v. HVH Enter. Corp.*, 2014 WL 923350, at *4 (E.D.N.Y. Mar. 10, 2014) (internal quotation marks and citation

omitted); *see also Nat'l Football League Players Ass'n v. Nat'l Football League Mgmt. Council*, 523 F. App'x 756, 760 (2d. Cir. 2013) (finding "the FAA requires district courts to accord significant deference to arbitrators' decisions"). "This deference promotes the twin goals of arbitration, namely settling disputes efficiently and avoiding long and expensive litigation." *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust*, 729 F.3d 99, 103 (2d Cir. 2013) (internal quotation marks omitted). Thus, "the burden of proof necessary to avoid confirmation of an arbitration award is very high and a district court will enforce the award as long as there is a barely colorable justification for the outcome reached." *Id*. at 103-04 (internal quotation marks omitted); *accord D.H. Blair*, 462 F.3d at 110 ("[T]he award should be confirmed if a ground for the arbitrator's decision can be inferred from the facts of the case.") ("Only a barely colorable justification for the outcome reached by the arbitrators is necessary to confirm the award.") (internal quotation marks and citation omitted).

As noted earlier, Petitioners argue that the Award should be vacated because the Arbitrator failed to disclose the relationship between him and/or his firm and Siemens, failed to articulate any legitimate basis for the relief granted and ignored applicable principles of law, including law of the case and New York Partnership Law, and granted relief not authorized by the parties' agreement to arbitrate. In its motion, Respondents maintain that the petition should be dismissed and/or denied because (1) Petitioners should have been aware of the Arbitrator's representation of

Siemens but sat silent and waited to raise this issue until after they received an unfavorable award; (2) Siemens had no interest or stake in the Arbitration and its relationship to the present dispute was tangential at best and, therefore, there was no evident partiality; (3) the arbitrator did not exceed his authority nor disregard any laws; (4) the absence of a stenographic record warrants rejection of Petitioners' allegations regarding the arbitration; and (5) the instant petition is nothing more than an effort to relitigate the arbitration.

The Court will first address the issue of evident partiality.

B. Evident Partiality

1. Applicable Standard

As noted earlier, the FAA provides that an arbitral award may be vacated "where there was evident partiality or corruption in the arbitrators, or either of them." 9 U.S.C. § 10(a)(2). The "Supreme Court [has] held that an arbitrator's failure to disclose a material relationship with one of the parties can constitute 'evident partiality' requiring vacatur," but "did not establish a per se rule requiring vacatur of an award whenever an undisclosed relationship is discovered." *Lucent Techs., Inc. v. Tatung Co.*, 379 F.3d 24, 28, 30 (2d Cir. 2004). "In this Circuit 'evident partiality within the meaning of 9 U.S.C. § 10 will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.'" *Scandinavian Reinsur. Co. Ltd. v. Saint Paul Fire and Marine Ins. Co.*, 668 F.3d 60, 72 (2d Cir. 2012) (quoting *Morelite Constr. Corp. v.*

N.Y.C. Dist. Council Carpenters Benefits Fund, 748 F.2d 79, 84 (2d Cir. 1984)). "[A]n arbitrator is disqualified only when a reasonable person, considering all the circumstances, would *have* to conclude that an arbitrator was partial to one side." *Applied Indus. Mat'ls Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 137 (2d Cir. 2007). The burden of proving evident partiality rests on the party asserting it; it is a "high hurdle." *Scandinavian Reinsurance*, 668 F.3d at 72. Where there is no transcript of the arbitration and the parties do not agree on multiple disputed facts relevant to the issue of vacatur, the party seeking vacatur cannot meet that high threshold. *Kolel*, 729 F.3d at 107. "A showing of evident partiality must be direct and not speculative." *Id*. at 104.

Evident partiality may be shown where "an arbitrator fails to disclose a relationship or interest that is strongly suggestive of bias in favor of one of the parties." *Scandinavian Reinsurance*, 668 F.3d at 72. Not all alleged failures to disclose will result in vacatur. Where the undisclosed relationship is "too insubstantial," the evident partiality standard is not met and vacatur will be denied. *Id*. (citing *Lucent,*, 379 F.3d at 28-29 (no evident partiality where arbitrator did not disclose his past work as an expert for one of the parties or his past co-ownership of an airplane with another arbitrator); *Matter of Andros Compania Maritima, S.A.* , 579 F.2d 691, 696, 701–02 (2d Cir. 1978) (no evident partiality where umpire failed to disclose his past joint service on nineteen arbitral panels with the president of a firm that acted as one party's agent)). It is "the materiality

of the undisclosed conflict [that] drives a finding of evident partiality, not the failure to disclose or investigate *per se*." *Nat'l Indemnity Co. v. IRB Brasil Resseguros S.A.*, 164 F. Supp.3d 457, 476 (S.D.N.Y. 2016) (citing *Scandinavian Reinsurance*, 668 F.3d at 77 ("The nondisclosure does not by itself constitute evident partiality. The question is whether the *facts* that were not disclosed suggest a material conflict of interest.") (emphasis in original). "The evident-partiality standard is, at its core, directed to the question of bias." *Scandinavian Reinsurance*, 668 F.3d at 73.

In assessing evident partiality in cases where a party seeks vacatur because of an arbitrator's nondisclosure, the following factors are "useful," although not "mandatory, exclusive or dispositive," *Scandinavian Reinsurance*, 668 F.3d at 74: "(1) the extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceedings; (2) the directness of the relationship between the arbitrator and the party he is alleged to favor; and (3) the proximity in time between the relationship and the arbitration proceeding." *Id.* (quoting *Three S Del., Inc. v Dataquick Info. Sys., Inc.*, 492 F.3d 520, 530 (4th Cir. 2007). "[T]he fact that one party loses at arbitration, does not, without more, tend to prove that an arbitrator's failure to disclose some perhaps disclosable information should be interpreted as showing bias against the losing party." *Id.* at 75. "[I]n ascertaining whether a relationship is material . . . a court must focus on the question of how strongly that relationship tends to indicate the possibility of bias in favor of or

against one party, and not on how closely that relationship appears to relate to the facts of the arbitration."

Claims of partiality can be waived. "Where a party has knowledge of facts possibly indicating bias or partiality on the part of an arbitrator he cannot remain silent and later object to the award of the arbitrators on that ground. His silence constitutes waiver of the objection." *Cook Indus., Inc. v. C. Itoh & Co.*, 449 F.2d 106, 108 (2d Cir. 1971) (internal quotation marks, citation and block quoting omitted). "Arbitrators have an obligation 'to disclose dealings of which the parties cannot be reasonably expected to be aware' but a party cannot avoid recognition of an award based on its discovery of a non-disclosed relationship where the party 'could have made such a review just as easily before or during an arbitration rather than after it lost its case.'" *Schwartzman v. Harlap*, 377 Fed. App'x 108, 110 (2d Cir. 2010) (internal citations omitted).

2. Material Relied Upon by Petitioners

Regarding their claim of evident partiality, Petitioners provided the following evidentiary support:

1. The Arbitrator is a member of Pepper Hamilton, LLP ("Pepper Hamilton") a law firm with more than 500 lawyers and a total of 13 offices. [Pet. Ex. 32.].
2. The Arbitrator represented "Siemens Water Technologies Corporation" in an action pending in the Southern District of New York entitled

Genon Midatlantic LLC v. Stone & Webster, Inc., Civil Action No. 11-1299. Siemens Water Technologies Corporation is a wholly owned subsidiary of Siemens Corporation, which is a wholly owned subsidiary of Siemens USA Holdings, Inc., which is a wholly owned subsidiary of Siemens Beteiligungen USA GmbH, which is a wholly owned subsidiary of Siemens AG. [Pet. Ex. 27.]

3. Members of Pepper Hamilton's Pittsburgh Office represented Siemens Industry Inc. and Siemens Water Technologies LLC in an action entitled *East Richland County Pub. Serv. Dist. v. Envirex, Inc.*, Civil Action No. 13-2159 (D.S.C.), which action did not conclude until November 19, 2015. [Pet. Ex. 30.]

4. Members of Pepper Hamilton's Pittsburgh Office represented Siemens Industry Inc. and Siemens Water Technologies LLC in an action entitled *Canton Textile Mills, Inc. v. Siemens Corp*, Civil Action No. 16-1466 (N.D. Ga.), which action was filed on May 5, 2016. According to the docket sheet, Siemens Corp. was dropped as defendant when an amended complaint was filed on July 11, 2016 but the case continued against Siemens Water Technologies.

5. Members of Pepper Hamilton's Boston Office represented "IBS America, Inc. now known as Siemens Product Lifecycle Management Software" in an action entitled *Lobl v. IBS America Inc.*, Civil Action

> No. 15-14209, which action was filed on December 23, 2015, with the defendant being served on January 7, 2016. [Pet. Ex. 31.]

Also included as an exhibit to the Petition is a list of 20 cases that Petitioners claim represent cases "dating back over ten (10) years" that Pepper Hamilton handled for "Siemens Corporation and its many wholly owned subsidiaries." [Pet. ¶ 83 & Ex. 28.] The list includes the three cases referenced above. Other than these three cases, the captions provided do not disclose that Siemens or an entity with "Siemens" in its name is a party and the listing contains no indication of the attorneys or firms who have appeared in the listed cases. [Pet. Ex. 28.] According to Petitioners, the relationship between the arbitrator and his firm did not come to light when they initially conducted "a lengthy vetting process;" it was not until after the Award was received that they learned of the relationship.[DE 1-40 ¶4] According to Petitioners' counsel:

> A search on any internet browser will not identify any connection between Siemens and the arbitrator or his firm, nor would a review of all cases in Westlaw involving Mr. Schulman. Both of those measures, along with a thorough review of his sworn disclosures, were taken before he was selected. It was only through detailed, expensive and time-consuming docket searches that this connection between Siemens and the arbitrator was discovered after the Subject Award was rendered.

[DE 22 at ¶ 10.][8]

[8] Parenthetically, the Court notes that its own internet searches on Google - prompted by the above quoted assurance - using the search terms "Siemens and Ira Schulman" and "Siemens and Pepper Hamilton" easily revealed a number of cases in which Pepper Hamilton represented a Siemens entity, which cases were

3. Whether Petitioners Could Have Known of Arbitrator's Relationship with Siemens

It is not disputed that at no time during the course of the arbitration did the Arbitrator disclose any relationship with Siemens. However, Respondents maintain that the petition should be dismissed and/or the award affirmed because (1) Petitioners knew or should have known of the relationship between the Arbitrator, his firm and Siemens because Peckar & Abramson, P.C. (the "Peckar firm"), the firm which represents Petitioners, represented a party (Stone & Webster) in the *Genon* litigation pending in the Southern District of New York referenced above, a fact they did not disclose to this Court and (2) contrary to Petitioners' assertions, Siemens was not an interested party, had no stake in its outcome, and did not play a central role in the dispute.

In response to the fact that the Peckar firm represented one of the litigants in the *Genon* litigation, Petitioners state that they did "not conceal that fact from the Court, we informed the Court of that fact and gave the Court the service list."[9] [DE 29 ¶ 4] Counsel "[a]dmittedly did not interview all of the attorneys in the many P&A offices throughout the country to see if any of them had reason to believe that Arbitrator Schulman's sworn disclosures . . . were false, as they turned out to be."

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commenced prior to the commencement of the Arbitration, including the *Genon* case.

[9] Although the service list for Siemens' disclosure form, signed by the Arbitrator, in the *Genon* litigation was included as part of the exhibit, see Pet. Ex. 27, Petitioners made no effort to call the Court's attention to the fact that the Peckar firm represented a party in that action, *see, e.g.*, Pet. ¶ 27.

[*Id*. ¶ 5.] Also, the Peckar firm has 11 offices and over 100 lawyers, and counsel in this case has "always been associated with the New Jersey office in River Edge, New Jersey;" he has not been associated with the New York office and "only rarely visit[s] that office." [*Id*. ¶ 5.]

As Respondents aptly point out, (1) the Arbitrator's disclosure put Petitioners on notice that the Arbitrator had several prior litigations with the Peckar Firm and a conflicts check would have revealed the *Genon* matter; and (2) all the papers filed in the present case (as well as in other litigations involving these parties) list Petitioners' counsel's address as the New York office of the Peckar firm. It seems that at the very least Petitioners were on inquiry notice. *LGC Holdings, Inc. v. Julius Klein Diamonds, LLC*, – F. Supp. 3d –, 2017 WL 782912, *10 (S.D.N.Y. Feb. 28, 2017).

Moreover, it strains credibility that knowing of the Arbitrator's prior litigations with his firm, Petitioners' counsel did not, at the very least, send an email around the firm inquiring as to the Arbitrator. Indeed, while Petitioners' counsel "concedes" that he did not "interview all of the Peckar firm's 100 attorneys," he does not set forth what steps he did take to inquire as to interactions between the Arbitrator and attorneys at his firm - a glaring omission. Further, as declared by Petitioners' counsel:

> I was traveling with my wife in French Polynesia on August 1, 2016 on vacation when the Subject Award was emailed to me by the AAA. I was so shocked by the decision, including the arbitrator's obvious intent to rule

> on issues that were never properly before him in an effort to influence the ongoing *qui tam* action,[10] including Siemens, that I went to work the next day (while on vacation in French Polynesia) to fully investigate any connection between Pepper Hamilton and Siemens.

[DE 29 ¶ 8.] That counsel's first thought when the adverse reward was received was "to fully investigate any connection between Pepper Hamilton and Siemens," causes some hesitation. The reference to "fully investigate" suggests and indeed counsel's declaration confirms [DE 22 at ¶ 10 (quoted *supra* at p. 31)], that counsel had investigated - just not fully - a connection between Pepper Hamilton and Siemens. The question therefore arises as to what prompted counsel to make that prior inquiry given that the arbitrator's disclosure did not suggests any such connection.

The Court need not decide, however, whether Petitioners knew or should have known of the Arbitrator's relationship with Siemens because, as discussed below, the standard for evident partiality has not been met.

3. The Standard for Evident Partiality Has Not been Met

The relationship of Siemens to the present dispute was tangential at best. Neither Siemens nor S&A was a party in the dispute presented to the Arbitrator. Siemens and S&A were not involved in the Coney Island Joint Venture and were not a party to the SFD Joint Venture Agreement. The testimony of only one "Siemens" employee was presented (via deposition) at the Arbitration and, as set forth earlier, that employee testified that he never heard of SFD Associates. That

[10] The *qui tam* action is further discussed later in this opinion.

DDR's claim for profits from SFD sought profits derived from SEC's participation (a nominee for the SFD partners) in SSE with S&A does not change this conclusion. While the Arbitrator should have been more forthcoming given his prior representation of another Siemens entity, viz., Siemens Water Technologies Corp., his initial failure to disclose does not rise to the level of evident partiality.

Nor does the existence of a q*ui tam* action change the landscape.

While there is no transcript of the arbitration, the petition does include as exhibits certain correspondence between Petitioners' counsel and the Arbitrator referencing a *qui tam* action. The first such exhibit is a letter dated November 17, 2015. The letter references an issue that arose at the second day of hearings in this matter when "Respondents asked Mr. Weiner on cross-examination if he is a 'whistleblower' in any case against Siemens Industry, Inc. or its affiliate(s) ('Siemens')." (Pet. Ex. 16.) Petitioners' position, as set forth in the letter, was that "there is no conceivable relevance to this line in inquiry" as "SEC sold its interest in Schlesinger-Siemens Electrical LLC ("SSE") in September 2010 and has no potential liability from its operations or any *qui tam* against SSE or its successors." Additionally, the letter points out that Weiner would be prohibited from confirming the existence of such an action given that *qui tam* actions are sealed. (*Id.*)

The second exhibit is an email from Petitioners' counsel to the Arbitrator dated December 23, 2015, stating that motions in the *qui tam* action "in which Weiner is the relator" to unseal the case and for the City of New York to file a

superseding complaint had been granted and enclosing a copy of that order. (Pet. Ex. 17.) The order references the filing of a superseding complaint naming as defendants "Siemens Electrical, LLC f/k/a/ Schlesinger-Siemens Electrical, LLC," "Siemens Industry, Inc., f/k/a Siemens Energy & Automation, Inc." and "Schlesinger Electrical Contractors, Inc." and, pursuant to State Finance Law, ordered the "action . . . converted in all respects from a *qui tam* civil action brought by a private person into a civil enforcement action by the City under State Finance Law § 190(1)." [*Id*.]

The Petition also asserts that the Arbitrator not only allowed the questions concerning the *qui tam* action, he even asked questions and made comments about it himself. (Pet. ¶ 69). There is no transcript to verify this and Respondents dispute the assertion. (DE 42 ¶ 69). The Petition also includes a copy of the superseding complaint and SEC's answer thereto (Pet. Exs. 18 & 19), but there is no indication that these pleadings were provided to the Arbitrator (*see* Pet. ¶70). There is no indication in the record before this Court that either the Arbitrator or his law firm represented Siemens or any other party in the *qui tam* action.

Given the correspondence with the Arbitrator, it is apparent that the *qui tam* action came up in some way, shape, or form during the Arbitration. Because of the absence of a transcript, it is impossible to know exactly how it came up and the extent to which it was the subject of testimony. Without such a transcript and given there is no indication either that the Arbitrator was given a copy of the superseding

complaint in the *qui tam* action or that the Arbitrator or his firm were involved in that action in any matter or how the results in the Arbitration benefitted "Siemens" vis a vis the *qui tam* action, Petitioners have failed to pass the high hurdle of demonstrating evident partiality.

Further, the contention that evident partiality is apparent because "the Arbitrator allowed Respondents to argue at the arbitration that [Weiner] had engaged in some kinds of 'bid rigging' scheme, even though that argument was not made in Respondents' 530 paragraph Verified Answer and Counterclaim" [DE 1-40 ¶ 9; *see* Pet. ¶ 7] is rejected.[11] Respondents' pleading in the Queens Action raised not only the defense of unclean hands, it specifically referred to Weiner's attempt to have SFD purchase equipment for the 25th Ward from his sources rather than less expensive "open market" sources. [Pet. Ex. 22 at ¶¶ 201, 330-31, 335, 337.] Nor was it improper for the Arbitrator to consider evidence of this "attempt" in his assessment of Weiner's credibility. Finally, the contention that the Arbitrator exhibited evident partiality by considering the claim that "DDR somehow magically waived its partnership rights because its lawyer wrote a pre-suit letter demanding payment of $1.2 million," [DE 1-41 at pp. 19-20] is underwhelming. That is not what he did. What the Arbitrator did was to cite counsel's letter, which made "no

[11] The Court notes that in an affidavit Weiner refers to twice coming back from lunch during the arbitration and finding the Arbitrator "sitting and talking alone" with Levita. [DE 1-40 ¶ 7.] Given the absence of any other details, the Court will not consider this further.

mention of any wrongful exclusion," as one of a number of reasons for his rejection of Petitioners' claim that Levita and Solomon conspired to force him out of SFD. [Pet. Ex. 26 at (unnumbered) pp. 2-3.] This was not improper.

In sum, there is insufficient support for Petitioners' claim of evident partiality. The Court will now address the claim that the Award exhibits a manifest disregard of the law.

C. Manifest Disregard of the Law

An award may be vacated if it exhibits "manifest disregard of the law." *Porzig v. Dresdner, Kleinwort, Benson, N. Am. LLC*, 497 F.3d 133, 139 (2d Cir. 2007). This requires that an arbitrator "knew of a governing legal principle yet refused to apply it or ignored it altogether, and the law ignored by the arbitrator[ ] was well defined, explicit, and clearly applicable to the case." *Wallace v. Buttar*, 378 F.3d 182, 189 (2d Cir. 2004). An award cannot be vacated merely because the court "is convinced that the [arbitrator] made the wrong call on the law." *Id.*

Petitioners argue that "t]he Second Department already ruled in a published decision that DDR was and is a partner in SFD and was thereby entitled to an accounting," [DE 1-41 at p. 20 (citing *First Keystone Consultants, Inc. v. DDR Const. Servs. Inc.*, 74 A.D.3d 1135, 1139 (2d Dept. 2010)] and "the Arbitrator had no power to reconsider that decision[;] [h]e ignored it and thereby exceed his powers." More specifically, they argue:

> Since DDR prevailed in the Second Department when Respondents sought to challenge its status as a partner

> and argued the same tired arguments made here (i[.]e., that DDR "resigned" when its Vice President wrote a letter to Siemens resigning only from the SSE BOM [Board of Managers], and that DDR "disassociated itself" and/or failed to meet capital requirements), and since DDR prevailed in its litigation with the First Keystone Parties in establishing that they conspired with Respondents to hold back profits from Coney Island as part of a fraudulent conspiracy to oust claims and defenses, principles of *res judicata*, collateral estoppel and the law of the case, bar Respondents from relitigating those issues in this arbitration.

[DE 1-41 at p. 20.]

As set forth in the Second Department's decision, *First Keystone Consultants, Inc. v. DDR Const. Servs. Inc*, involved an appeal by DDR and the Weiners from an order granting SSE's motion to dismiss the claims against it and denying DDR's cross-motion to conduct an accounting of SFD and SSE. 74 A.D.2d at 1136. The majority of the court's opinion addresses the granting of SSE's motion to dismiss the claims against it, which dismissal was affirmed by the Second Department. Among the reasons for that affirmance was the "documentary evidence," which included the SFD Joint Venture Agreement, that "established that SSE was not a partner in SFD." *Id*. at 1137. The Second Department did, however, reverse that portion of the lower court's order which denied DDR's cross motion to appoint a referee to conduct an accounting of SFD. It stated:

> For reasons that are not clear from the record before this Court, the referees appointed by the Supreme Court in its prior orders dated June 4, 2008 and July 23, 2008 respectively, never conducted such an accounting. DDR was a partner in SFD Associates, and is entitled to an

> accounting of that joint venture (*see Wesselmann v. International Images*, 259 A.D.2d 448 (1999); *Grossman v. Laurence Handprints- N.J.*, 90 A.D.2d 95, 105-05 (1982)).

70 A.D.2d at 1139.

In an apparent reference to the foregoing as well as the default judgment entered against Keystone in the Queens Action, the Arbitrator stated: "I have considered and reject in their entirety Claimants' arguments that the doctrines of law of the case, collateral estoppel and res judicata bar Respondents from re-litigating DDR's partnership status and other issues. The orders . . . are not as expansive as Claimants claim[ ] and are not controlling here." [Pet. Ex. 26 at (unnumbered) p. 2.]

The doctrines of law of the case and collateral estoppel (or issue preclusion) both require that an issue not only be raised but also that it be squarely "decided." *See Ross v. Med. Liab. Mut. Ins. Co.*, 75 N.Y.2d 825, 826 (1990) (issues that were "actually litigated, squarely addressed and specifically decided" in a prior proceeding or on appeal will be precluded from relitigation); *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 500 (1984) (collateral estoppel "precludes a party from relitigating . . . an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same.").

Given this standard, the Court perceives no "manifest disregard of the law" in the Arbitrator's decision. The Appellate Division's decision in *First Keystone Consultants* that DDR was a member of SFD did not necessarily decide

Respondent's arguments as evidenced by its citation to *Wesselmann*. The *Wesselmann* Court held that it was proper to direct the parties to account to each other "since an accounting will help sort out what assets were involved and will enable the parties *to meaningfully pursue their respective claims concerning their prior business arrangement*." 259 A.D.2d at 449 (emphasis added). In other words, the *First Keystone Consultants'* decision can be read to have directed an accounting as the appropriate forum for Petitioners' and Respondents' respective claims against each other to be pursued and decided.[12] Moreover, if in fact, Respondents were prohibited by the foregoing doctrines from pursuing these claims, it makes no sense that Petitioners would agree to submit the claims to arbitration.

Nor was there a manifest error of law in the Arbitrator's rejection of the argument that the default judgment obtained by Petitioners in the Queens Action against Keystone and Solomon on the claims that they conspired with Respondents to oust DDR barred Respondents from litigating these issues. Respondents continued to defend against these claims in the Queens Action and that court did not determine these claims as against Respondent prior to their submission to arbitration. *See, e.g., Henderson-Jones v. City of New York*, 120 A.D.3d 1123 (1st Dept. 2014) (default judgment against city and one police officer did not bind remaining officers or otherwise affect their substantive rights).

Finally, the Court rejects the argument that the Arbitrator disregarded the

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[12] The Court also notes that contrary to Petitioners' assertion the Appellate Division did not hold that DDR "was and is" a partner; the decision reads that DDR "was" a partner of SFD.

law in granting relief to Respondents on their claim for reimbursement of insurance premiums because "New York Labor Law § 198-b prohibits requiring an employee to kick back wages or other benefits" and because there was a lack of evidence to support the claim. [DE 1-41 at p. 24.] Given the lack of a transcript, the Court need not address the question of evidentiary support. Further, as the health insurance was for Weiner's benefit, a benefit he could be required to pay for, Respondents' claim for reimbursement of the costs it advanced for the premiums can appropriately be viewed as outside the purview of N.Y. Labor Law 198-b. *See generally Porter v. Donahoe*, 962 F. Supp.2d 491 (E.D.N.Y. 2013) (upholding deductions to cover cost of insurance premiums employer paid for employee while he was suspended); N.Y. Labor Law § 193 (authorizing deductions for payments for insurance premiums and similar payments made for the benefit of the employee).

D. Exceeding His Powers

The last issue to be addressed is whether the Arbitrator exceed his powers when he awarded Respondents relief on their claim for the unpaid balance of the loan for health insurance premiums as against Debbie Weiner. The Court finds that he did. Under the terms of the parties' Arbitration Agreement, the only claims being submitted were those set forth in the specified pleadings in the Queens Action and the parties were precluded from filing any new or different claims and counterclaims. [Pet. Ex. 2 at p. 1.] Respondents' claim vis a vis the loan was asserted solely against Weiner. [Pet. Ex. 22 ¶¶ 288-294.] Accordingly, the Arbitration Award will be modified to vacate the award for the unpaid balance of the loan as against Debbie Weiner.

CONCLUSION

For the reasons set forth above, Petitioners' petition to vacate the Award and Respondents' motion to dismiss the petition and/or confirm the award are decided as follows: The Award is modified to delete that portion of the award directing Petitioner Debbie Weiner to pay Respondents the sum of $14,211.18 with interest at the statutory rate of 9% from January 1, 2006, and as so modified the Award is confirmed. The Clerk of Court is directed to enter judgment accordingly and to close this case.

SO ORDERED.

Dated: Central Islip, New York
July 11, 2017

/s Denis R. Hurley
Denis R. Hurley
United States District Judge