

WRITER'S DIRECT DIAL NO.
(212) 849-7364

WRITER'S EMAIL ADDRESS
alexspiro@quinnemanuel.com

December 9, 2018

VIA NYSCEF AND HAND DELIVERY

Hon. Barry Ostrager
Supreme Court, New York County,
Commercial Division
60 Centre Street, Room 629
New York, NY 10007

Re: *Shawn C. Carter et al. v. Iconix Brand Group, Inc. et al.*, Index No. 655894/2018

Dear Justice Ostrager:

We represent Petitioners Shawn C. Carter, S. Carter Enterprises, Marcy Media Holdings, LLC and Marcy Media LLC in connection with the above-captioned matter. Following the filing of the Petition in this action, the American Arbitration Association (“AAA”) has committed to work with Petitioners to identify and make available African-American arbitrators for consideration, which may moot Petitioners’ need for further relief. Accordingly, Petitioners hereby withdraw Motion Sequence 001 for a temporary restraining order and preliminary injunction to allow for negotiations with AAA and Respondents on an arbitrator selection process that comports with New York public policy.

I. Background

As the Court is aware, this dispute stems for AAA’s failure to provide a diverse roster of arbitrators to oversee a complex commercial arbitration in New York. Petitioners filed an Article 75 Petition seeking a temporary stay, preliminary injunction, and permanent injunction of a pending AAA arbitration on the ground that the applicable arbitration provision is void as against public policy due to AAA’s failure to provide diverse arbitrator candidates and, specifically, African-American arbitrators. On November 28, 2018, the Court (Scarpulla, J.) granted Petitioners’ application for a temporary restraining order, preventing the parties from proceeding with the arbitrator selection process while the Court considered Petitioners’ claims. The hearing on the preliminary injunction is set for December 11, 2018.

Respondents here, Iconix Brand Group, Inc. and Icon DE Holdings, LLC, filed the AAA arbitration, Case No. 01-18-0003-6487 (the “Arbitration”), on October 1, 2018. As the parties proceeded to consider ways in which to select an arbitrator for the dispute, AAA specifically instructed the parties that their selected arbitrator “should come from [the Large Complex] group of more experienced arbitrators.” Doc. 33. Petitioners’ counsel reviewed more than 200 potential arbitrators in the New York area, but were unable to identify a single African-American arbitrator on the Large Complex Cases roster with the necessary qualifications to oversee the present case. AAA since has confirmed that *only* “*one arbitrator on the New York Large Complex Case Roster has self-identified as African American.*” Exhibit A, Response to Respondents’ Request No. 2.

Prior to the filing of the Article 75 Petition, Petitioners raised their concerns with the AAA, noting that Mr. Carter is black. At the time, AAA responded by providing the names of three African-American candidates—two men, and one woman—one of whom had an obvious conflict. Doc. 5. Under the operative arbitrator selection framework, Petitioners were to identify four arbitrators, who would be combined with four arbitrators selected by Respondents, and four arbitrators selected by AAA, from which a single arbitrator would be chosen. Thus, the information AAA provided—at most, two non-conflicted African-American arbitrators in contrast to the hundreds of non-diverse candidates—failed to provide Petitioners with a diverse slate of candidates from which to make their selection.

Despite Petitioners’ protestations over the lack of diverse candidates, AAA did not provide further information or a process for ensuring consideration of a diverse slate of candidates. AAA instead required Petitioners to select their four candidates from the 200 non-diverse candidates reviewed and the individuals the AAA identified in response to Petitioners’ concerns; otherwise, the AAA would make selections for Petitioners. Doc. 6. Over Petitioners’ objections, AAA declined to provide further means for consideration of diverse arbitrator candidates and instead selected potential arbitrators for Petitioners. Doc. 7. AAA imposed a deadline of November 30, 2018 for each of the parties to strike up to four of the twelve candidates. The AAA warned, “[i]f the list of arbitrators is not returned by the date specified,” they would proceed to appoint an arbitrator. Doc. 8.

Petitioners sought relief by order to show cause in advance of the November 30, 2018 deadline.

II. Following Petitioners’ Request For A Stay Of Arbitration, AAA Reversed Course And Provided The Parties With Potential Means To Allow For The Consideration Of Diverse Arbitrator Candidates

As a direct result of the Petition filed in this action, AAA now has provided Petitioners with a list of African-American arbitrators qualified to hear large commercial cases and committed to work with Petitioners to expand the roster of diverse arbitrators.

Following the Court’s grant of the temporary restraining order, AAA confirmed it would stay the arbitration and offered assistance to the parties, including offering to provide additional information to the parties. While the information AAA provided has confirmed that AAA lacks

an appreciable number of minority (and particularly, African-American) arbitrators, AAA has indicated an openness both to an arbitrator selection process in this Arbitration that will allow for meaningful consideration of African-American arbitrators and to broader remedial measures intended to improve the diversity of the arbitrator roster for future arbitrations.

First, in response to Petitioners' action and the TRO, AAA now has provided considerable new, non-public information, including the names of "eighteen individuals on the AAA's national Large Complex Case Roster [who] have self-identified as African American." Only one such individual is located in New York, confirming the legitimacy of Petitioners' original complaint. While the ability to consider eighteen African-American arbitrators far exceeds the number of such arbitrators provided to Petitioners prior to the filing of this Petition, this number is only a small fraction (less than 2 percent) of the more than 1,000 individuals on AAA's national Large Complex Case Roster.

Second, AAA has indicated a willingness to other means of improving diverse representation in the arbitrator selection process. Specifically, Petitioners have set forth numerous proposals designed to allow for meaningful consideration of diverse arbitrator candidates, including the use of a three-arbitrator panel, and AAA has indicated it would be open to such a process.

Third, in recognition of the lack of African-American candidates on the Large Complex Case Roster, since the imposition of the TRO, AAA has been receptive to working with Petitioners to improve the diversity of the arbitrator slate. In particular, AAA is willing to consider diverse candidates proposed by Petitioners to expand its roster for future arbitrations.

Finally, as part of this process, at Petitioners' request, "AAA is also considering other means of encouraging the selection of diverse roster members to parties and representatives." Petitioners believe such a commitment will help improve the diversity of arbitrators on the Large Complex Case Roster.

In total, the identification of diverse arbitrators outside New York on the Large Complex Case Roster, combined with the potential for a new selection process (including potentially a three-arbitrator panel), could provide a meaningfully different selection process. If AAA and the parties are able to agree on such a process, it could moot the relief sought by the Petition. Notwithstanding the willingness of AAA and Petitioners to work toward a solution that avoids further court intervention, AAA has indicated that "the AAA's response is limited by the court ordered stay of the arbitration." Accordingly, Petitioners are willing to withdraw their request for a preliminary injunction and respectfully request the Court lift the stay entered on November 28, 2018. Should AAA and the parties be able to agree on a fair process, Petitioners then will withdraw their Article 75 Petition.

III. Petitioners Request A Status Conference In 90 Days

As a result of AAA's attention to Petitioners' complaints about the lack of diverse arbitrator candidates following the filing of the Petition, Petitioners now believe they can work with AAA to resolve their concerns and engage in an arbitrator selection process that complies

with New York public policy. Petitioners, however, do not believe dismissal of the Petition is appropriate at this time. Despite the good-faith efforts of Petitioners and AAA to resolve this issue without the need for further court intervention, Respondents unfortunately have indicated they may stand as a roadblock to such a process. Respondents have declined to agree to any process that would preserve even one non-conflicted African-American members of the 12-person arbitrator pool. Respondents also have rejected Petitioners' proposal to proceed with a three-arbitrator panel, as the underlying contract allows, to avoid the problems inherent in the restrained selection process.

Accordingly, at this time, Petitioners only withdraw their motion for a preliminary injunction and request that the Court lift the temporary stay of arbitration. Petitioners propose that the Court exercise its discretion under CPLR § 2201 to stay proceedings on the Article 75 Petition and schedule a status conference in ninety (90) days.

Because Petitioners have withdrawn their motion for a preliminary and permanent injunction, Petitioners respectfully request that the December 11, 2018 hearing be removed from the Court's calendar.

Respectfully submitted,

/s/ Alex Spiro
Alex Spiro

Enclosure

cc (via NYSCEF and email): Samuel D. Levy, Esq.
Craig M. Flanders, Esq.
Andrew J. Rossman, Esq.
Ellyde R. Thompson, Esq.