UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Certain Underwriters at Lloyds', London et al Petitioners, v. Edcouch Elsa Independent School District Respondent.	1:23-cv-08957-PAE

RESPONDENT'S RULE 12(b)(1) MOTION TO DISMISS AND OPPOSITION TO PETITION TO APPOINT ARBITRATION UMPIRE IN THE ALTERNATIVE

COMES NOW, Edcouch Elsa Independent School District and files this opposition to Petitioners' request to appoint an arbitration umpire and states as follows:

INTRODUCTION

Edcouch Elsa is a Texas public school district committed to the educational welfare and futures of the children and families it serves in the Rio Grande Valley of Texas. In July 2020, Hurricane Hanna hit the region, causing substantial damage to school buildings, campuses, and other structures across the district. Petitioner Insurers substantially underpaid Edcouch Elsa's Hurricane Hanna insurance claim, requiring state and local taxpayers to bear the brunt of the costly repairs.

Edcouch Elsa agreed to move forward and arbitrate this matter. In acknowledgement of the potential conflicting positions about whether Texas or New York law will apply (as elucidated in more detail below), Edcouch Elsa appointed former Texas State District Judge Carl Ginsberg as its party appointed arbitrator. Judge Ginsberg is licensed in both Texas and New York.

In contrast, the Insurers are now on their second appointed arbitrator, Mr. Stephen Rogers, who worked for 26 and a half years as the Senior Vice President of Claims at Industrial Risk Insurers and is *not* licensed in either Texas or New York.

This is the framework that the parties are working from. In their eagerness to proceed under what they assume are the favorable auspices of New York law, the Insurers overlook, or worse, dismiss, the essential state and local requirements that are either contrary to their assumptions or would remain applicable, regardless of which state law applies. The profound financial and administrative costs associated with the proposed arbitration for a local school district cannot be overstated, particularly when the district's main mandate is to educate, not litigate. Moreover, the Insurers continue to disregard reasonable alternatives which would more equitably serve the interests of all parties involved.

As a preliminary matter, Edcouch Elsa disputes that this Court has jurisdiction to appoint an arbitrator. Specifically, the Eleventh Amendment precludes federal courts from having jurisdiction over state entities such as Edcouch Elsa; this is in large part because of the concerns associated with having federal or foreign state courts issue judgments against another state. Those same concerns are implicated in this matter.

But, if this Court finds that it does have jurisdiction, Edcouch Elsa asks the Court for the appointment of a reasonable *neutral*. Specifically, the insured respectfully requests that this Court appoint one of the following individuals:

- Hon. Deborah Hankinson – Retired Texas Supreme Court justice and 2019 Arbitration Lawyer of the Year for Dallas, Texas. Judge Hankinson's CV is attached as **Exhibit 01**.

- Hon. Mark Davidson – Retired Texas State District Court judge and current Texas MDL judge. Judge Davidson's CV is attached as **Exhibit 02**.

- Hon. Joseph "Tad" Halbach – Retired Texas State District Court judge. Judge Halbach's CV is attached as **Exhibit 03**.

- Paul Van Osselaer – President of the International Academy of Mediators and consistently recognized insurance specialist. Mr. Van Osselaer's CV is attached as **Exhibit 04**.

Each of these candidates is an excellent fit for this arbitration for a number of reasons: (i) Texas law, *not* New York law will apply; (ii) the excessive costs associated with Insurers' costly candidates could render the arbitration unconscionable; and (iii) each of these neutrals serves as a unique compromise between the parties' positions.

This Opposition sets forth Edcouch Elsa's 12(b)(1) jurisdiction argument as well as substantive arguments relating to the appointment of a specific arbitrator.

FACTUAL BACKGROUND

The Insurers are right that the party-appointed arbitrators at this stage are former Texas State District Judge Ginsberg and former Insurance Claims VP Mr. Rogers. But that does not tell the full story that is relevant to this Court's evaluation of arbitral chairs.

The Insurers first appointed Courtney E. Murphy, an insurance defense litigator at the firm Hinshaw & Culbertson. Edcouch Elsa's party-appointed arbitrator, Judge Ginsberg, recommended several Texas-based arbitrators to serve as the neutral umpire. Ms. Murphy responded by rejecting the Texas-based umpires recommended by Judge Ginsberg and recommending four New York based umpires—including former insurance company executives and an actual current employee of claims adjuster Sedgwick (the entity retained by the Insurers in *this* case). To make this point clear: the Insurers proposed that the chair of the panel be someone on the payroll of Sedgwick, to whom the Insurers have contractually delegated broad responsibility relating to claims adjustment, management, administration, payment, etc. *That* in and of itself served as demonstrative bad faith on the part of the Insurers and slowed the process down for months.

Then on August 3, 2023—after nearly a year of negotiation on the arbitral chair—the Insurers unilaterally announced that they were replacing Ms. Murphy with Mr. Rogers. During the course of negotiations on the arbitral chair, Judge Ginsberg offered a number of compromises

including, but not limited to: (i) consideration of neutrals with more limited hourly rates; (ii) consideration of neutrals outside of either Texas or New York so as to avoid the perception of a "home court" advantage; and (iii) neutrals along the gulf coast with substantial experience in the insurance space.

Mr. Rogers and the Insurers drew the same line in the sand that they do today: the only qualification that mattered was whether the individual was from New York. Then the Insurers abruptly and without warning filed this suit in hopes that this Court will appoint one of their proposed candidates. As set forth below, each of Edcouch Elsa's proposals would better serve the needs of this arbitration.

ARGUMENT

Edcouch Elsa first moves this Court to find that it lacks jurisdiction and the matter should be dismissed pursuant to Rule 12(b)(1). In the alternative, if this Court rejects Edcouch Elsa's jurisdiction argument, there are three specific facts that support an appointment of one of Edcouch Elsa's candidates: (i) Texas law will control; (ii) the potential unconscionability of the Insurer's candidates due to excessive costs; and (iii) the reasonableness of Edcouch Elsa's candidates.

I. Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(1)

This matter should be dismissed pursuant to Rule 12(b)(1). A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) tests the subject matter jurisdiction of the Court. "A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). "In resolving a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), a district court … may refer to evidence outside the

pleadings." *Id.* The Insurers will bear the burden to prove jurisdiction. *Malik v. Meissner*, 82 F.3d 560, 562 (2d Cir. 1996).

The Eleventh Amendment provides immunity to states from suits brought in federal courts by their own citizens or citizens of another state. The Amendment extends not only to states but to state agents and state instrumentalities, which can be considered "arms of the state." *Northern Ins. Co. of N.Y. v. Chatham Cnty*., 547 U.S. 189, 191 (2006). If an entity is deemed an arm of the state, it is typically immune from suits in federal court. *See, Wade v. N.Y. State Office of Planning, Dev. & Cmty. Infrastructure*, No. 23 Civ. 4707, 2023 U.S. Dist. LEXIS 133524, at *5 (S.D.N.Y. 2023); *Humphries v. City Univ. of N.Y.*, No. 13 Civ. 1641, 2013 U.S. Dist. LEXIS 169086, at *35-36 (S.D.N.Y. 2013) (holding that CUNY is an arm of the state and is therefore not subject to suit in federal court) (citing *Clissuras v. City Univ. of N.Y.*, 359 F.3d 79 (2d Cir. 2004)). Here, Edcouch Elsa is an arm of the State of Texas and is immune from suit in this Court.

The Second Circuit has applied two tests to the determination of whether Eleventh Amendment immunity attaches to a particular party: the *Clissuras* test and the *Mancuso* test. *Leitner v. Westchester Cmty. Coll.*, 779 F.3d 130, 137 (2d Cir. 2015). The Second Circuit recognizes that "the choice of test is rarely outcome-determinative, *id.*, but the Second Circuit has historically looked to the *Clissuras* Test first.[1]

The *Clissuras* Test provides a succinct framework for determining that Edcouch Elsa operates as an arm of the state and is consequently entitled to Eleventh Amendment immunity. For this determination, two critical factors are weighed: (i) the extent of the State's responsibility for

[1] As the tests are related, the analysis is substantially similar. The *Mancuso* Test does include a question regarding whether the entity is "more like" a political subdivision. Here, Edcouch Elsa is defined as a "political subdivision" in Texas statutory language, but federal courts in New York have not considered this a dispositive factor and, in certain circumstances, courts have even ignored the term "political subdivision" in an enabling statute if the outlined powers suggested the entity was more similar to an arm of the state. *See, e.g., Power Auth. Ex rel. Solar Liberty Energy Sys. V. Advanced Energy Indus.*, No. 19-CV-1542-LJV, 2020 U.S. Dist. LEXIS 188214, at *14-15 (W.D.N.Y. 2020) (finding that "documents of origin [were] ambiguous" and the factor was "neutral" as a result).

judgments against the entity; and (ii) the degree of state supervision over the entity. *Clissuras v. City Univ. of N.Y.*, 359 F.3d 79, 82 (2d Cir. 2004). Both factors weigh in favor of finding that Edcouch Elsa is an arm of the state and directly implicate "the two main aims of the Eleventh Amendment, as identified by the Supreme Court: preserving the state's treasury and protecting the integrity of the state." *Leitner,* 779 F.3d at 135 (citing *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994).

a. Texas is Responsible for Judgments Against Edcouch Elsa

The State of Texas is solely responsible for judgments against Edcouch Elsa, and the treasury could be substantially impacted by rulings in this case. This is unique not just to Texas districts, but to Edcouch Elsa in particular.

Most school districts in Texas receive a substantial portion of their annual funding from the State of Texas.[2] But Texas has further ensured that districts will receive additional money based on certain other factors, such as whether students are bilingual, the population of low-income students, etc. *Id.* Outside of state funding, school districts may receive additional funding from local property taxes.[3] But for districts with lower median property values—and communities with lower income families that do not have the luxury of paying higher property taxes—school districts are more dependent on state funding. Simply as an example, public data suggests that Hidalgo County—where Edcouch Elsa is located—has a median home value of only $73,000 in conjunction with a low median property tax of 1.92%, amounting to minimal property tax

[2]Brian Lopez, *How a State Effort to Fund Texas Schools Equitably is Shortchanging Dozens of Rural Dsitricts,* TEX. TRIB., Aug. 25, 2023, https://www.texastribune.org/2023/08/25/texas-school-districts-funding-property-values/#:~:text=Texas%20guarantees%20every%20school%20district,has%20certain%20other%20educational%20needs.

[3] Texas Comptroller of Public Accounts, *Texas Public Education Funding Sources,* FISCAL NOTES, (Jan. 2019), https://comptroller.texas.gov/economy/fiscal-notes/2019/jan/funding.php

collections of $1,402 per year per residence.[4] But the average household income in Edcouch Elsa was $44,666 and nearly a third of residents live in poverty. Benjamin Castillo Dec. at ¶ 3 (attached hereto as **Exhibit 05**). Three fourths of students are "at risk" of poor educational outcomes. Castillo Dec. at ¶ 3. These factors make it even more difficult for the city to enact greater property taxes, which is why the voters recently declined a tax increase that deprives Edcouch Elsa of an additional $1,000,000 in funding *this* year. Castillo Dec. at ¶ 4.

As a result, districts such as Edcouch Elsa are even *more* dependent on state funding than the average Texas district. According to the most recent data, **nearly 78%** of Edcouch Elsa's funding came from the state.[5] That is in contrast to many other districts in Texas. Simply as an example, Houston Independent School District receives close to 90% of its funding from *local* sources and approximately 10% comes from the state.[6]

In *Clissuras*, the Second Circuit held that City University of New York was an arm of the state because the comptroller of New York was responsible for judgments and "The state also reimburses CUNY senior colleges for their net operating expenses." *Clissuras v. City Univ. of N.Y.*, 359 F.3d 79, 82 (2d Cir. 2004). But *state* funding supplies just "60% of the operating budget for CUNY senior colleges"[7] as compared to the 75% that goes toward Edcouch Elsa's funding.

Moreover, the "judgment" that may be ordered in this case is the fee associated with the arbitral chair. *That* expense may only be paid "from funds the legislature specifically appropriates to pay the fee or reimburse the expense." Tex. Gov't Code § 2254.108. In other words, the State

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[4] Tax-Rates.Org, *Hidalgo County Property Tax Rate 2023*, https://www.tax-rates.org/texas/hidalgo_county_property_tax

[5] Texas Education Agency, *2020-2021 Actual Financial Date Totals for EDCOUCH-ELSA ISD*, https://rptsvr1.tea.texas.gov/cgi/sas/broker?_service=marykay&_service=appserv&_debug=0&_program=sfadhoc.actual_report_2021.sas&who_box=&who_list=108903

[6] Texas Education Agency, *2020-2021 Actual Financial Data Totals for HOUSTON ISD*, https://rptsvr1.tea.texas.gov/cgi/sas/broker?_service=marykay&_service=appserv&_debug=0&_program=sfadhoc.actual_report_2021.sas&who_box=&who_list=101912

[7] PSC CUNY, *CUNY's Funding Sources*, Aug. 29, 2022, https://psc-cuny.org/cunys-funding-sources/

of Texas—at the discretion of the Legislature—is responsible for any fees associated with this Court's ruling. This is unique to Texas statutory law and differentiates this matter from other cases that may have ruled school districts cannot avail themselves of Eleventh Amendment immunity.

b. Texas Substantially Supervises Edcouch Elsa

Further, Edcouch Elsa is subject to strict oversight from the State of Texas, particularly as it relates to this litigation. Simply as a starting point, Edcouch Elsa is subject to the State Board of Education Rules, Commissioner of Education Administrative Code rules, State Board for Educator Certification rules, State Board of Special Education rules, the Texas Education Code, the Texas Constitution, and the Texas Administrative Code. The State of Texas explicitly outlines the right to public free education in its constitution. Tex. Const. Art. VII, § 1.

Moreover, the State exercises substantial oversight over *litigation* pursued by Edcouch Elsa. Even if this Court would determine that the Eleventh Amendment may not be implicated in an ordinary school district dispute, it is implicated here due to additional state requirements on this type of litigation. The State's Attorney General was required to authorize the representation of Edcouch Elsa by undersigned counsel. Texas law requires that entities such as Edcouch Elsa enter into legal contracts "for a fair and reasonable price." Tex. Gov't. Code § 2254.1032. The broader section explicitly notes that reimbursable expenses with a governmental entity will be "payable only from funds the legislature specifically appropriates to pay the fee or reimburse the expense," along with a requirement for pre-approval as well as clear auditing rights. Tex. Gov't. Code § 2254.108.

Edcouch Elsa qualifies as an arm of the state pursuant to the *Clissuras* Test, and—as a result—Edcouch Elsa is immune from litigating in federal courts pursuant to the Eleventh

Amendment because an order or judgment by this court would directly implicate the state treasury and affect the integrity of the state protected by the Eleventh Amendment.

II. Alternatively, Edcouch Elsa Motions the Court for the Appointment of an Appropriate Umpire

Substantively, the Insurers' primary argument for the appointment of one of their proposed umpires boils down to one toothless concept: the chair should be "a New York lawyer or a retired New York judge" because New York law applies. Petition at ¶ 40. For the avoidance of doubt, the Insurers have invented this requirement out of whole cloth. It is *not* a contractual requirement.

a. The Policy Does Not Require a New York-Licensed Umpire

At every turn, the Insurers misread and misapply the Policy's arbitration clause. Simply as an example, the Policy notes: "If the Arbitrators cannot agree to an Umpire, either may request the selection be made by a judge of a New York court." Petition at ¶ 21. In other words, either *Arbitrator*, not either party, may go to a New York court. As a threshold matter, the Insurers have usurped a right that belongs solely to the party-appointed arbitrators.

More obviously, this Court is an Article III court of the United States Federal Government. It is *not* a "New York court." A review of case law coming out of this Court and the Second Circuit suggests "New York court" exclusively refers to courts of the State of New York. *See, e.g., Northrop Grumman Overseas Serv. Corp. v. Banco Wiese Sudameris*, No. 03 Civ. 1681, 2004 U.S. Dist. LEXIS 19614, at *19 (S.D.N.Y. 2004) (referencing the findings of "New York courts" when citing state courts); *Penguin Grp. (USA) Inc. v. Am. Buddha*, 609 F.3d 30, 39 (2d Cir. 2010) (discussing the findings of "some New York courts" when evaluating state case law). This is contrasted with how this Court and the Second Circuit reference federal courts that happen to be located *in* New York. *See, e.g., Ramgoolie v. Ramgoolie*, No. 16 Civ. 3345, 2016 U.S. Dist. LEXIS

176912 at *6 (S.D.N.Y. Dec. 20, 2016) (discussing a requirement to "defend this case in federal court in New York"), adopted by, No. 16-CV-3345, 2017 U.S. Dist. LEXIS 19932 (S.D.N.Y. Feb. 10, 2017); *Bonime v. Avaya, Inc.* 547 F.3d 497, 497 (2d Cir. 2008) (discussing a plaintiff's decision to bring a class action "in federal court in New York"); *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 142 (2d Cir. 2013) (discussing a transfer to "a New York federal court").

The Insurers have circumvented the requirements of the Policy repeatedly. But in addition to ignoring the Policy's actual written requirements, the Insurers go a step further: they have wholly fabricated a New York chair requirement that cannot be found anywhere in the Policy.

But, if this were a mandatory trait for the arbitrators, only Edcouch Elsa's party-appointed arbitrator Judge Ginsberg—and *not* Mr. Rogers—would qualify as a candidate for the tribunal. Judge Ginsberg is licensed in New York. Mr. Rogers, however, does **not** hold a New York license, despite this being the sole qualifying factor the Insurers raise.[8] Instead, Mr. Rogers worked for 26 and a half years in Connecticut as the Senior VP of Claims at Industrial Risk Insurers before he became a partner at insurance defense firm Zelle Hofmann Voelbel & Mason in Boston, Massachusetts.

Simply put, the Insurers raise the specter of New York law not out of an unbiased belief that a candidate need to be an expert in New York law, but simply because it is convenient for the position that Insurers take today.[9] Indeed, the Insurers' prior appointment of an individual *without* a New York license belies the sole argument raised by the Insurers in this Petition.

[8] Counsel for Edcouch Elsa utilized the New York State Unified Court System to evaluate current attorneys available at: https://iapps.courts.state.ny.us/attorneyservices/search?1.

[9] Curiously, the Insurers allege that use of an umpire from a neutral state would be "inconsistent with the Policy." Petition at ¶ 29. It is unclear then how they justify the use of Mr. Rogers, a Connecticut-based attorney.

b. This Court Need Not Determine What Law Will Apply

In any event, it is certainly not so simple to say New York law would apply. As a threshold matter, the alleged choice of law provision occurs in the arbitration delegation clause. Petition at ¶ 21. In other words, the applicable of choice of law is a question for arbitration, not this Court. *See, e.g., Conmed Corp. v. First Choice Prosthetic & Orthopedic Serv*., No. 6:21-cv-1245, 2023 U.S. Dist. LEXIS 4702 at *27-30 (N.D.N.Y. Jan. 11, 2023) (holding that a choice of law determination is appropriate for an arbitration panel); *Advanced Aerofoil Techs. V. Todaro*, No. 13 Civ. 7181, 2014 U.S. Dist. LEXIS 53671 at *17-19 (S.D.N.Y. Apr. 15, 2014) (upholding arbitral award that applied federal common law rather than state law).

The Insurers improperly ask this Court to substantively rule on an issue that will be subject to the arbitration itself: what state law applies to the dispute. Edcouch Elsa takes the position that it will be Texas, *not* New York law. As a result, this Court should not utilize New York licensure as the sole test for the appropriateness of a particular candidate.

c. Texas, Not New York Law, Will Apply

To the extent this Court intends to issue a ruling as to which state law applies, Edcouch Elsa maintains that Texas law will govern the arbitration.

Texas law requires that an insurance contract payable to a Texas resident apply Texas law. Tex. Ins. Code art. 21.42. New York has the same preference to apply the state law of the state in which the insured sits. NY Ins L § 3103 (2015) (requiring that insurance policies for "property then in this state" not apply the laws "of any jurisdiction other than this state"). As a practical matter, the Policy will be read to comply with Texas law. *See, e.g., McGinnes Indus. Maint, Corp. v. Phx. Ins. Co.*, 571 F. App'x 329, 333 (5th Cir. 2014) (applying § 21.42 for purposes of applying Texas law to an insurance policy for a Texas corporation); *Simmons v. Liberty Mut. Fire Ins. Co.*,

420 F. App'x 388, 390 (5th Cir. 2011) ("The Texas Insurance Code dictates that Texas law applies to insurance contracts. *See* TEX. INS. CODE ANN. art. 21.42."). Moreover, there is at least some ambiguity in the choice of law concept as the Policy explicitly provides that the Policy is provided "under the Texas insurance statutes," which would require application of Texas law. Petitioner's Exhibit A at p. 10 [Dkt. 5-1].

But even if New York's substantive law applies, the Insurers' conduct is still regulated by the Texas Insurance Code. Because Texas is the "home state" of Edcouch Elsa, and Petitioners are "eligible surplus lines insurers," their conduct is regulated exclusively by the Texas Insurance Code. Tex. Ins. Code § 981.003; *see also* Petitioner's Exhibit A at p. 9 [Dkt. 5-1]. As with choice of law provisions, mirror rules exist in New York insurance law. N.Y. Comp. Codes R. & Regs. Tit. 11 § 27.13 (New York statute regulating excess lines carriers that provide policies to New York insured).

Since the insured is a public entity, there will also be questions about whether the Petitioners complied with government disclosure requirements. *See, e.g.*, Tex. Gov't Code § 2155. Specifically, Edcouch Elsa issued a Request for Proposals regarding obtaining insurance coverage at the district, as most government entities must. But in the Insurers' formal response to the district, attached hereto as **Exhibit 05-B**, they failed to reference New York law, New York locations, or any other indication that they would attempt to force Edcouch Elsa into federal court in New York, conduct arbitration in New York, or apply New York law to any dispute arising out of the insurance policy. The Insurers may try to shield their impropriety through the use of confidential arbitration, but Texas insurance regulators will utilize Texas law for purposes of evaluating their conduct and impropriety during the disclosure process may subject the Insurers to significant administrative action, such as debarment for future bidding of government projects. Tex. Gov't Code § 2155.077.

And aside from substantive law, a number of state and local requirements will govern the construction standards that will drive the recoverable damages in the dispute. In fact, a substantial portion of the dispute involves Ordinance or Law coverage under the Policy that relates to improvements resulting from state and local construction issues. Petitioner's Exhibit A at p. 21 [Dkt. 5-1]. The applicable building codes come from municipalities in Texas such as the City of Elsa, Texas. These will all apply regardless of what substantive law applies.

The Insurer's insistence on *only* a New York based arbitrator and their refusal to consider *any* highly qualified neutrals located outside of New York is unreasonable at best. There is no contractual provision and no legal argument that supports their directives. And this position is inconstant with the licensure of the Insurer's own party appointed arbitrator. As a result, the Court should either (i) prioritize appointing an arbitrator familiar with Texas law; or (ii) at least diminish the importance of New York experience when contemplating the most important traits for appointment.

d. The Insurer's Proposed Candidates Risk Unconscionability due to Excessive Costs

Fee splitting arrangements, like the one present in the insurance contract at hand drafted by the Insurers, must be closely scrutinized by courts and taken into consideration, with special attention given to the status of the claimant and what they are being asked to pay. To be clear, the Insurers' arbitration provision in the matter at hand states that the expenses of the Arbitration and Umpire will be shared equally. *See* Petition at ¶ 38.

Since the United States Supreme Court's ruling in *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000), many state and federal courts have addressed the issue of high arbitration costs and fees that a claimant is required to pay in order to pursue its claims. *See, e.g., Gray v. Rent-A-Center W., Inc.*, 314 Fed. Appx. 15 (9th Cir. 2008); *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*,

163 F.3d 1230, 1234 & n.4 (10th Cir. 1999); *Lennar Homes of Tex., Inc. v. Rafiefi*, 652 S.W.3d 532 (Tex. App.—Houston [14th Dist.] 2022, pet. filed); *Glassford v. BrickKicker*, 35 A.3d 1044 (Vt. 2011); *OF Servs., LLC v. Santorsola*, No. 13-14-00641-CV, 2016 Tex. App. LEXIS 2975, at *7-8 (Tex. App.—Corpus Christi Mar. 24, 2016). Case law on the subject notes that unconscionability of fee-splitting arrangements is more concerning when it relates to "arbitration of more complex and fact-related aspects" of the case. *Kuehn v. Citibank, N.A.*, No. 12 Civ. 3267, 2012 U.S. Dist. LEXIS 173346, at *11-12 (S.D.N.Y. 2012).

Without even considering costs of an out-of-state arbitration, the hourly fees charged by the Insurers' only agreeable New York candidates—fees for which EdCouch Elsa, a rural Texas school district, ultimately bears the same responsibility as the global insurance companies—are high. Yet, the Insurers flippantly dismiss cost consideration differences between their proposed candidates and Edcouch Elsa's. The Insurers do not refute the cost analysis Edcouch Elsa put forth in its September 18, 2023 letter, attached to the Insurers' Petition as Exhibit E [Dkt. 5-5]. They simply state that the differential is "*de minimus*." Petition at ¶ 37. To be clear, the following table sets out the cost differences between the two sides' proposed candidates:

Insurers' Candidates		District's Candidates	
Hon. Dolinger	$ 847.00	Hon. Hankinson	$ 750.00
Hon. Pitman	$ 904.00	Hon. Davidson	$ 400.00
Hon. Roberts	$1,017.00	Hon. Halbach	$ 600.00
		Mr. Van Osselaer	$ 800.00
Average	**$ 922.67**	**Average**	**$637.50**
Difference Per Hour		**$ 285.17**	

The Insurer's baseless allegation that the "approximately $50,000" in additional costs pales in comparison to Edcouch Elsa's claims is *wholly* irrelevant. The premise behind this statement is as factually unsupported as it is tone deaf. Neither party has any definitive assurances as to the

overall costs of arbitration. The unsubstantiated "additional costs" suggested by the Insurers could ultimately end up being $100,000 or $150,000, or any other amount within rational projection.

But beyond that, even if the Insurers unfounded "additional costs" projection were correct, the Insurers ignore the potential impact a $50,000 expenditure could have on a rural school district in Texas. The additional funds could provide two additional teachers or counselors for the district, in addition to needed funds for extracurricular activities, uniforms, etc. Castillo Dec. at ¶ 8. $50,000 would eclipse the *entire* district budgets for Pre-Kindergarten education.[10] Accounting for every expenditure in the district, Edcouch Elsa spends less than $12,000 per student.[11] An additional $50,000 in expenses is at least four students worth of expenses.

Ultimately, even after agreeing to pay the associated costs and fees in order to pursue its claims, Edcouch Elsa is guaranteed *nothing* at the end of this arbitration process.[12] Rather, the only guarantee is that the fees must be paid. The alternative, of course, is for EdCouch Elsa to abandon its claims entirely.[13] It is misleading and inappropriate for the Insurers to downplay the added cost of its arbitrators based on an argument that $50,000 pales in comparison to the amount that the Insurers wrongfully withheld from Edcouch Elsa. Recognizing the impropriety of fee-splitting provisions between claimants and companies which are taking front and center in courts across the country, some corporations have offered to waive enforcement of the provision requiring a claimant to equally bear the arbitration fees. *See Feuer v. Stoler of Westbury, Inc.*, No. 20-CV-

[10] Texas Education Agency, *2020-2021 Actual Financial Date Totals for EDCOUCH-ELSA ISD,* https://rptsvr1.tea.texas.gov/cgi/sas/broker?_service=marykay&_service=appserv&_debug=0&_program=sfadhoc.actual_report_2021.sas&who_box=&who_list=108903

[11] Texas Education Agency, *2020-2021 Actual Financial Date Totals for EDCOUCH-ELSA ISD,* https://rptsvr1.tea.texas.gov/cgi/sas/broker?_service=marykay&_service=appserv&_debug=0&_program=sfadhoc.actual_report_2021.sas&who_box=&who_list=108903

[12] Truly, the mere fact that the Insurers' take for granted that $50,000 will be less than one half of percent of the payout owed to Edcouch Elsa is indicative of Insurers' bad faith in this case. If the Insurers' truly thought Edcouch Elsa is entitled to no further payments, this whole line of argument would be nonsensical.

[13] To be clear, EdCouch Elsa is not challenging the propriety of the arbitration clause as a whole at this time.

6094, 2021 U.S. Dist. LEXIS 199224, at *12 (Oct. 15, 2021). In addition to completely refusing to consider *any* of the District's premier candidates, the Insurers have never made any good faith attempt to work with the District to alleviate the disproportionately large financial burden of the process they propose.

In fact, this economic consideration is one of the primary considerations behind the Eleventh Amendment, which is set forth more clearly in the first part of this brief. An appointment of a more expensive arbitrator will impose a financial burden on Edcouch Elsa and thereby a financial burden on the State of Texas. To be clear, at this stage and for this Court, it is *not* a question of whether arbitration is more costly than litigation. Instead, this Court should recognize that the umpire is likely to spend significant time on this matter, and a substantial reduction in the hourly rate of the umpire will drastically reduce the costs for Edcouch Elsa, all while still achieving the same desired outcome for all the parties—a resolution.

The Insurers' argument that a New York licensed attorney will not need to review New York law and will therefore save more time is unpersuasive. This case will substantially be about the *facts* of the case, and Edcouch Elsa anticipates the number of hours expended in review of this case will be substantially similar for any arbitrator, which is further enforced by the Insurers' decision to appoint there own party-appointed arbitrator that is not licensed in New York.

e. Edcouch Elsa's Candidates Strike a Balance

Aside from the Insurers' argument that the chair must be a New York judge or lawyer, the Insurers' raise no other argument in favor of their candidates.

As an initial matter, each of Edcouch Elsa's candidates have sufficient experience analyzing and applying New York law, should that be a relevant factor. Former Texas Supreme Court Justice Hankinson thoroughly evaluated New York law in at least one dissent she wrote

while serving on the Texas Supreme Court. *Cvn Grp. v. Delgado*, 95 S.W.3d 234, 249 (Tex. 2002) (Hankinson, J., dissenting). Similarly, Judge Davidson has evaluated New York law from the bench. *See Bailess v. Kaiser Gypsum Co.*, No. 2006-20461, 2008 Tex. Dist. LEXIS 3903, *11-12 (evaluating findings of a number of New York courts in application of New York law) (Davidson, J.). Paul Van Osselaer identifies New York as one of his primary mediation and arbitration locales on his profile page for the National Academy of Distinguished Neutrals. His CV notes that he was invited to speak on insurance coverage at the DRI Insurance Coverage and Practice Symposium in New York.[14] On information and belief, the Insurers have worked with at least three of the four neutrals proposed by Edcouch Elsa in mediator capacities. In fact, Judge Halbach is mediating a dispute between the same Insurers and another Texas school district under an identical policy on the very day this submission is due.

But aside from that, there are a number of factors that this Court should consider when appointing an umpire.

First, experience with gulf coast windstorms and hurricanes is key. The Insurers' simply say "the Policy does not require an Umpire to have such experience." Petition at ¶ 41. This is a red herring. The Policy similarly does *not* require a New York judge or lawyer. However, experience with gulf coast windstorms and hurricanes would substantially help any potential panelist evaluate the claims of this case. Both sides have retained experts to opine on matters related to wind damage arising from hurricanes, and disputes of this nature frequently turn on technical evaluation and testimony. A familiarity with wind damage analysis would be exceedingly helpful in this particular dispute.

[14] The National Academy of Distinguished Neutrals, *Academy Member: Paul J. Van Osselaer,* https://www.nadn.org/paul-vanosselaer.

And contrary to the Insurers' allegations regarding former Texas Supreme Court Justice Hankinson, she does have substantial experience evaluating these types of claims. *See, e.g., MCI Telecomms. Corp. v. Tex. Utils. Elec. Co.*, 995 S.W.2d 647, 649 (Tex. 1999) (unanimous) (Hankinson, J.) (discussing windstorms in Texas); *Balandran v. Safeco Ins. Co. of Am.*, 972 S.W.2d 738, 741 (Tex. 1998) (7-2 decision) (addressing an insurance dispute in which Justice Hankinson joined the majority opinion); *Va. Power Energy Mktg. v. Apache Corp.*, 297 S.W.3d 397, 401 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (representing appellant in force majeure claim due to hurricane).

Each of Edcouch Elsa's proposed candidates is more cost effective for this dispute, is knowledgeable about the substantive law at issue, capable of managing a complex dispute such as this, and has experience in factual matters similar to this. In the event the Court determines it has jurisdiction over this dispute, the Court should appoint someone from Edcouch Elsa's list.

PRAYER

Edcouch Elsa respectfully requests that this Court dismiss the matter pursuant to Rule 12(b)(1). In the alternative, Edcouch Elsa respectfully requests that the Court appoint one of the proposed candidates raised by Edcouch Elsa and for such other relief that the Court deems appropriate.

Dated: November 13, 2023

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CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that a true and correct copy of the foregoing document was forwarded to counsel of record on this the 13th day of November 2023, via ECF, hand delivery, overnight courier, U.S. Mail, certified mail, return receipt request, or facsimile, pursuant to the Federal Rules of Civil Procedure.

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