Virginia:
In the Circuit Court of the City of Richmond, John Marshall Courts Building

JAYNE W. DI VENCENZO,
Petitioner and Cross-Respondent,

v. Case No. CL22-975

DEVIN J. GAROFALO,
Respondent and Cross-Petitioner.

ORDER

On May 19, 2023, and May 31, 2023 came the parties, by counsel, to be heard on the Petition and Cross-Petition. After receiving two days of evidence and argument, the Court took the matter under advisement for a ruling no later than June 23, 2023. Having reviewed the evidence, arguments, filings, and authority presented by the parties, the Court rules as outlined below.

FACTS

On March 4, 2022, the Petitioner filed a "Motion to Confirm Arbitration Award" stemming from a March 3, 2022 award in a Financial Industry Regulatory Authority ("FINRA") arbitration, noting that "[u]pon application of a party any time after an award is made, the court shall confirm an award."[1] On April 4, 2022, the Respondent filed a reply and "Cross-Petition to Vacate Award."[2] As the basis for his "Cross-Petition to Vacate" the Respondent cited two bases for the Court vacating the arbitration award: 1) evident partiality by Arbitrator Glasser or that he engaged in misconduct which prejudiced the rights of the Respondent and 2) that the arbitration panel exceeded its authority by awarding attorney's fees.[3]

Arbitrator Glasser was one arbitrator on the panel of three who heard the underlying arbitration in this matter which stemmed from a disagreement between the parties over an Asset Purchase Agreement between the Petitioner and Lions Bridge ("sellers") and the

[1] Petitioner's Motion, 3/4/22, ¶6, quoting the Virginia Uniform Arbitration Act, §8.01-581.09.
[2] "Respondent Devin J. Garofalo's Response to Jayne W. DiVincenzo's Motion to Confirm Arbitration Award and Cross-Petition to Vacate Award" (hereinafter "Cross-Petition")
[3] Cross-Petition, pg. 3 and 7.

Respondent and Colonial River Wealth Management, LLC ("purchasers")[4]. Arbitrator Glasser disclosed that he was on the Board of Directors at Old Point Financial Corporation and was a shareholder of Old Point National Bank (collectively hereinafter "Old Point Entities").[5] Arbitrator Glasser also serves as chairman for Old Point's Southside Regional Board, which is a voluntary, community-based subsidiary board of Old Point National Bank. Arbitrator Glasser is not and was not directly involved with Old Point Trust,[6] the part of Old Point Entities created to separate investment activities from banking activities. In his Arbitrator Disclosure Checklist, Arbitrator Glasser checked "No" as his response to "Have you had any professional, social, or other relationships or interactions with any of the parties or their employers in the arbitration."[7]

Arbitrator Glasser failed to disclose that he had met the Petitioner and that the Petitioner's company, Lions Bridge Financial, had done business with Old Point Trust which is the separate entity created by Old Point Entities to satisfy the federal requirement that banks separate their investment activities from their banking activities. The business Lions Bridge conducted with Old Point Trust concluded years prior to the commencement of the arbitration. Lions Bridge did business with Old Point Trust for approximately one year. The Court received evidence of two occasions upon which Arbitrator Glasser was in the presence of the Petitioner prior to the arbitration. The agenda for the Southside Regional Board[8] meeting of October 21, 2014 notes that Arbitrator Glasser was scheduled on the agenda at noon, while the Petitioner was scheduled on the agenda at 1:05 p.m. The minutes for the Southside Regional Board[9] meeting of April 21, 2015 reflect that Arbitrator Glasser introduced the Petitioner as "Jayne DiVincenzo, AIF, CIP, Five Star Wealth Advisor of Lions Bridge Financial."[10] The arbitration was initiated on September 28, 2020, over five years after the two meetings. Given the fact that Lions Bridge was in business with Old

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[4] Cross-Petition, Ex. A.
[5] Arbitrator Disclosure Report, Ex. 1 to Petitioner's filing of 5/16/23.
[6] The Respondent argues that Arbitrator Glasser indirectly oversaw Old Point Trust by virtue of his positions with Old Point Entities, acknowledging no direct relationship between Arbitrator Glasser and Old Point Trust.
[7] Arbitrator Disclosure Checklist, Ex. 2 to Petitioner's filing of 5/16/23.
[8] A subsidiary of Old Point National Bank
[9] The minutes reflect that it was a "meeting of the Southside Regional Board for Old Point National Bank."
[10] Lions Bridge Financial was involved in business with Old Point Trust. The Petitioner had office space for that purpose at an Old Point Bank & Trust branch. Arbitrator Glasser had a financial interest in the bank whose branch provided the office space.

Point Trust for only one year, there was at least four years between the cessation of business between the two entities and the commencement of the arbitration. Arbitrator Glasser acknowledges he probably had contact with the Petitioner but does not recall ever meeting her prior to the arbitration.

LAW AND DISCUSSION

Pursuant to §8.01-581.09, when a party applies to confirm an arbitration award, the Court is required to confirm the award unless there is a timely motion to vacate, modify, or correct the award. In the present case, the Respondent filed a timely Cross-Petition requesting the Court vacate the award pursuant to §8.01-581.010 based upon §8.01-581.010(2) and §8.01-581.010(3). §8.01-581.010(2) requires the Court vacate an award where "[t]here was evident partiality by an arbitrator appointed as a neutral" or where there was corruption in one of the arbitrators or misconduct prejudicing the rights of any party. The Respondent does not allege corruption in the present case.

The Court may only vacate an arbitration award in unusual circumstances. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995). "[T]he public policy of Virginia favors arbitration." *Mission Residential, LLC v. Triple Net Properties, LLC*, 275 Va. 157, 161 (2008). The scope of the court's permitted review of awards granted in arbitration is among the narrowest at law. *Apex Plumbing Supply, Inc. v. U.S. Supply Co.*, 142 F.3d 188, 193 (4th Cir. 1998).

§8.01-581.010(2): Evident Partiality

The Virginia Uniform Arbitration Act ("VUUAA") permits the vacatur of an arbitration award where there is "evident partiality" on the part of an arbitrator. "Evident" means "clear to the vision or understanding."[11] "Partiality" is "[b]ias or favoritism toward one person, side, or thing over others; an undue inclination to favor one side of a dispute over others."[12] The plain reading of the statute would require a showing that there was clear bias or favoritism by an arbitrator in a proceeding. The words themselves require that the partiality be in existence, as opposed to potentially in existence, and that the existence of the actual bias be obvious. The Respondent argued that this phrase would encompass the

[11] *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/evident.
[12] *Black's Law Dictionary* (11th ed. 2019), partiality.

"appearance of impropriety," but those words do not appear in the statute and would apply a more stringent standard than that imposed in §8.01-581.010.[13]

This Circuit has recently addressed the issue of what constitutes "evident partiality" by applying the test promulgated by the federal court of appeals in *ANR Coal Co., Inc. v. Cogentrix of North Carolina, Inc.*, 173 F.3d 493 (4th Cir. 1999), noting the similarity in language between the Virginia Uniform Arbitration Act and the Federal Arbitration Act regarding "evident partiality."[14] As it does not appear that Virginia has yet established an analytic framework to determine "evident partiality" and as the Supreme Court of Virginia has previously cited cases decided under the FAA,[15] this Court will apply the test in *ANR* to the present case.

"A court should examine four factors to determine if a claimant has demonstrated evident partiality: (1) the extent and character of the personal interest, pecuniary or otherwise of the arbitrator in the proceeding; (2) the directness of the relationship between the arbitrator and the party he is alleged to favor; (3) the connection of that relationship to the arbitration; and (4) the proximity in time between the relationship and the arbitration proceeding." *ANR*, 500.[16] "When considering each factor, the court should determine whether the asserted bias is 'direct, definite and capable of demonstration rather than remote, uncertain or speculative' and whether the facts are sufficient to indicate 'improper motives on the part of the arbitrator.'" *Id.*[17] The "party seeking vacatur must put forward facts that *objectively* demonstrate such a degree of partiality that a reason-able person could assume that the arbitrator had improper motives." *Id.*, 501. This is an "onerous" standard, which places a "heavy" burden upon the party seeking vacatur. *Id.*[18]

Factor one calls the Court to examine any interest Arbitrator Glasser had in the arbitration proceeding. The Court **FINDS** that the Respondent has not demonstrated that Arbitrator Glasser had any interest in the proceeding, whether personal, pecuniary, or otherwise. In making that determination, the Court has considered the Respondent's

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[13] Respondent draws its standard from FINRA training practices regarding disclosure, not the VUAA.
[14] Letter Opinion, 2/24/23, *Williams Trading, LLC v. Michael Aaron Manaster v. David B. Williams*, CL21-2706.
[15] *McMullin v. Union Land & Mgmt. Co.*, 242 Va. 337 (1991).
[16] Citing *Consolidated Coal Co. v. Local 1643, United Mine Workers of America*, 48 F.3d 125, 130(4th Cir. 1995)
[17] Quoting *Consolidated Coal*, at 129.

argument that as a shareholder of Old Point National Bank, Arbitrator Glasser may have somehow benefited from the sale contemplated in the Purchase Agreement, which was the subject of the arbitration. The evidence, however, showed that Lions Bridge and the Petitioner did business with Old Point Trust, not Old Point Bank. Arbitrator Glasser's tenuous relationship with Old Point Trust stems from his position on the Board of Old Point Financial Corporation, which he fully disclosed to the parties. Lions Bridge ceased to do any business with Old Point Trust at least four years before the initiation of the arbitration. It is unclear how Arbitrator Glasser could possibly benefit from the arbitration proceeding. The Court **FINDS** this assertion of bias to be "remote, uncertain or speculative" and not "direct, definite and capable of demonstration" as required by *ANR*. *Id.*, 500.[19]

Factor two requires the Court examine the directness of the relationship between Arbitrator Glasser and the Petitioner. The Court received evidence that Arbitrator Glasser had an indirect relationship with the Petitioner through Arbitrator Glasser's involvement with Old Point Financial Corporation. The Petitioner had previously done business through Lions Bridge with Old Point Trust, the one of the Old Point Entities to whom Arbitrator Glasser had the most tenuous connection.[20] The only evidence presented as to a direct relationship between them was the agenda of the Southside Regional Board[21] meeting of October 21, 2014, and minutes for the Southside Regional Board[22] meeting of April 21, 2015 reflect that Arbitrator Glasser introduced the Petitioner as "Jayne DiVincenzo, AIF, CIP, Five Star Wealth Advisor of Lions Bridge Financial."[23] The agenda for the October meeting only reflects that Arbitrator Glasser would have attended the meeting around the same time as the Petitioner, who was scheduled on the agenda an hour and five minutes after

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[18] Citing *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141, 146(4th Cir. 1993) and *Al-Harbi v. Citibank, N.A.*, 85 F.3d 680, 683 (DC Cir. 1996).

[19] Quoting *Consolidated Coal*, at 129.

[20] Arbitrator Glasser's direct connections to Old Point Entities were with the over-arching Old Point Financial Corporation, with Old Point Bank, and with a subsidiary board of Old Point Bank, the Southside Regional Board. The Respondent argued that Old Point Trust must be kept separate from Old Point Bank pursuant to federal law, so it is Arbitrator Glasser's position on the board of Old Point Financial Corporation that would have been tenuously connected to Old Point Trust with whom the Petitioner did business through the entity of Lions Bridge.

[21] A subsidiary of Old Point National Bank

[22] The minutes reflect that it was a "meeting of the Southside Regional Board for Old Point National Bank."

[23] Lions Bridge Financial was involved in business with Old Point Trust. The Petitioner had office space for that purpose at an Old Point Bank & Trust branch. Arbitrator Glasser had a financial interest in the bank whose branch provided the office space.

Arbitrator Glasser. The agenda offers no proof of a direct relationship between the two. The minutes for the April meeting, on the other hand, do at least show a direct interaction between Arbitrator Glasser and the Petitioner and a direct relationship between them to the extent a relationship is formed by the making of an introduction. The Court **FINDS** that the Respondent has demonstrated one minor direct relationship between Arbitrator Glasser and the Petitioner, that of an introducer to the person who is being introduced. The Court **NOTES** that the Respondent argues that the actual motives or ill-intent of Arbitrator Glasser are irrelevant, that what matters is the appearance of such. However, the Court **FINDS** these facts, and this minor relationship, insufficient to indicate "improper motives on the part of the arbitrator," as required by *ANR. Id.*[24]

Factor three calls the Court to examine any connection between that relationship and the arbitration. The subject of the arbitration was a sale in which the Petitioner and Lions Bridge were the sellers. Arbitrator Glasser formed a minor, direct relationship with the Petitioner when he introduced her in her role at Lions Bridge. The Court **FINDS** that there is a tenuous connection between the relationship created by the introduction of the Petitioner and the arbitration. Both the introduction and the arbitration involved the Petitioner and Lions Bridge. In that way there is a faint connection between the two. Lions Bridge and the Petitioner had ceased to conduct business with Old Point Trust at least four years before the arbitration. Arbitrator Glasser's sole connection to Old Point Trust was his position on the Board of Old Point Financial Corporation, an over-arching entity. Arbitrator Glasser was not directly involved on the boards of Old Point Trust. Accordingly, there is no basis for the Court to find a continuing relationship between Arbitrator Glasser and the Petitioner or Lions Bridge. The Court **FINDS** these facts insufficient to indicate "improper motives on the part of the arbitrator," as required by *ANR. Id.*[25]

The fourth and final factor for the Court to examine is the length of time between the relationship and the arbitration proceeding. The direct relationship created between Arbitrator Glasser and the Petitioner by virtue of his introduction of her in April of 2015 began at the commencement of his introduction of her on April 21, 2015 and concluded when he completed his introduction of her on that day. The arbitration proceedings

[24] Quoting *Consolidated Coal*, at 129.
[25] Quoting *Consolidated Coal*, at 129.

commenced on September 28, 2020. Accordingly, the Court **FINDS** that over five years separate the direct relationship from the arbitration proceedings. The Court **FINDS** these facts insufficient to indicate "improper motives on the part of the arbitrator," as required by *ANR. Id.*[26]

The Respondent cited, in his trial brief, a case from the Supreme Court of the United States and other cases from sister states.[27] The Court has reviewed the authority provided by the Respondent and distinguished those cases from the one at bar. *Coatings v. Continental Casualty*, 393 U.S. 145 (1968) involved an arbitrator who was involved in a direct business relationship with the prevailing party who was a regular customer for the arbitrator's business as an engineering consultant, resulting in fees of about $12,000 over a period spanning nearly five years involving services being rendered on the projects involved in the arbitration proceeding. In distinguishing *Coatings* from the present case, the Court **NOTES** that: (1) the present case does not involve a direct business relationship between the Petitioner and Arbitrator Glasser; (2) there is no evidence of contact at regular intervals between Arbitrator Glasser and the Petitioner; (3) Arbitrator Glasser and the Petitioner did not work together on the sale that was the subject of the arbitration proceedings; (4) the last

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[26] Quoting *Consolidated Coal*, at 129.

[27] While not controlling authority, the Court will briefly address the issues in the other cases cited in the Respondent's trial brief that distinguish those cases clearly from the present matter. *Tenaska Energy, Inc. v. Ponderosa Pine Energy, LLC*, 437 S.W.3d 518 (Tex. 2014) involved an arbitrator's failure to disclose: (1) that the two attorneys who represented a party to the arbitration were the same two attorneys who had referred him arbitration cases; (2) that he owned stock in a litigation services company that was pursuing business with the firm of those two attorneys; (3) that he served as president of the litigation services company's United States subsidiary; (4) that he conducted significant marketing for that company; (5) that he met with or contacted those same two attorneys of the party for the purpose of soliciting business directly from them; and (6) the he even went so far as to allow one of the two attorneys for the party to edit his disclosures in order to minimize his relationships with them or their firm, presumably to increase the likelihood that the arbitrator would be selected for the panel. *Mt. Holyoke Homes, L.P. v. Jeffer Mangels Butler Mitchell, LLP*, 162 Cal. Rptr. 3d 597 (Cal. Ct. App. 2013) involves CA Code § 1281.9's language requiring arbitrator disclosure, which is absent from the VUAA. *Beebe Medical Center, Inc. v. InSight Health Services Corp.*, 751 A.2d 426 (Del. Chancery 1999) involved an arbitrator's failure to disclose (1) that he had engaged in litigation as part of a class of employees in which counsel for a party was directly involved (by signing the complaint); (2) this litigation was initiated prior to the oral arguments at the arbitration proceedings; (3) during the course of the proceedings, the arbitrator contacted counsel for a party in writing; (4) the arbitrator did not alert the parties once he learned of the conflict during the proceedings; (5) a third party alerted counsel for the defendant of the conflict during the proceedings. *Municipal Workers Compensation Fund v. Morgan Keegan & Co.*, 190 So.3d 895, 924 (Ala. 2015) involved: (1) a present business relationship between the arbitrator and a party involving thirty-six different multi-million dollar issuances; (2) the arbitrator's firm and the party had been co-defendants in lawsuits; (3) the party and the arbitrator's firm both had the same counsel; and (4) the arbitrator failed to disclose that his firm has involved with the investment products at issue in the arbitration.

known contact between Arbitrator Glasser and the Petitioner was over five years before the commencement of the proceedings, not one year as in *Coatings*; (5) there is no evidence of a *close* financial relationship, extending for a period of years, between Arbitrator Glasser and the Petitioner; (6) the present case, given the difference in value between the dollar in 1968, when *Coates* was decided, and the dollar today, the financial interest that Old Point Entities and Lions Bridge had in one another was significantly less than in *Coates*. Lions Bridge was involved in business with Old Point Entities for only one year, resulting in $12,876.64 in commissions paid through LPL Financial, not paid through Old Point Trust.[28]

Having reviewed the authority provided by the parties, the Court **FINDS** that the applicable law is the four-factor analysis in *ANR*. The Court **FINDS** the analysis in *Coatings* to be distinguished from the case at bar. Accordingly, pursuant to the analysis of *ANR* as outlined above and pursuant to the plain reading of the statute, the Court **FINDS** that the Respondent has failed to demonstrate "evident partiality" on the part of Arbitrator Glasser.

§8.01-581.010(2): Misconduct Prejudicing the Rights of Any Party

The Respondent alleges that Arbitrator Glasser's failures to disclose rise to the level of "misconduct prejudicing the rights of any party," permitting vacatur of the arbitration award. "Misconduct" is "[a] dereliction of duty; unlawful, dishonest, or improper behavior, esp. by someone in a position of authority or trust."[29] "Prejudice" is "[d]amage or detriment to one's legal rights or claims."[30]

In *Lackman v. Long & Foster Real Estate, Inc.*, 266 Va. 20 (2003), the Court examined whether an instance where "arbitrators were not impartial, refused to hear material evidence, and refused to allow certain cross-examination" rose to the level of misconduct

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[28] Plaintiff's Brief, 4/26/23, pg. 4.

[29] *Black's Law Dictionary* (11th ed. 2019), misconduct. *Howerin Residential Sales Corp. v. Century Realty of Tidewater, Inc.*, 235 Va. 174 (1988) addresses what constituted "misbehavior" under a former version of the statute. As "misconduct" is defined, in part, as "improper behavior," which is analogous to misbehavior, the Court may draw some guidance from the case. The case even uses the term "misconduct" in interpreting the statute's use of the word "misbehavior." In *Howerin*, the Court examined whether it was misconduct for an arbitrator to threaten a party that if the party did not submit to arbitration, the party would be removed from the Board of Realtors or whether a plain, palpable mistake of law was misconduct. *Id.*, 179. The Court found that because it was a condition of membership that those on the Board of Realtors submit to arbitration, it was not misconduct. *Id.* The Court further found that a plain and palpable mistake of law, by itself, is insufficient to establish misconduct, but that such evidence may be received and considered by the courts. *Id.*

[30] *Black's Law Dictionary* (11th ed. 2019), prejudice.

supporting vacatur. *Id.*, 23-24. The court found that the record of the arbitration proceedings precluded the assertions of misconduct and request for vacatur. *Id.*, 24. The party moving for vacatur had acknowledged on the record of the arbitration proceedings that the proceedings had been conducted fairly and raised no objection to the chairperson's statement that "the claimant and the respondent have indicated that they have had an adequate opportunity to testify and present evidence and witnesses, and conduct cross-examination." *Id.* The record of the arbitration proceedings supported the trial court's determination that the party seeking vacatur "did not carry his burden to demonstrate that the arbitrators showed evident partiality or that he was precluded from presenting material evidence or engaging in cross-examination." *Id.* The "trial court did not err in rejecting Lackman's contention that the award should be vacated because…the arbitrators engaged in misconduct." *Id.*, 25.

Lackman indicates that the Court should look at the record of arbitration proceedings to determine misconduct. *Id.*, 24. If a party seeking vacatur acknowledged the proceedings had been fair or if they fail to object, they may be precluded from vacatur on the grounds of misconduct. *Id.*, 24-25. In the present case, the Respondent stated, through counsel, at the conclusion of the arbitration hearing that he "fully believe[d]" that he had received "a fair and complete and proper opportunity" to present his side, the law, and the facts.[31] The present case is distinguished from *Lackman* in that all of the issues raised in the motion to vacate in that matter were issues known to the parties at the time of the arbitration. In the present case, the Respondent did not become aware of the issues he raised under §8.01-581.010(2) until after the proceedings.[32]

There are two prongs necessary to vacate an arbitration award on this ground. First, there must be proof of misconduct by an arbitrator. Second, there must be resulting prejudice to the rights of a party. "Misconduct" is "[a] dereliction of duty; unlawful, dishonest, or improper behavior, esp. by someone in a position of authority or trust."[33] The

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[31] Dec. 14, 2021, FINRA Hearing Record.

[32] The Respondent should have been aware at the arbitration proceedings of his allegation that the panel ordered fees and costs that had been previously ordered by the courts. This is his allegation relating to §8.01-581.010(3).

[33] *Black's Law Dictionary* (11th ed. 2019), misconduct. *Howerin Residential Sales Corp. v. Century Realty of Tidewater, Inc.*, 235 Va. 174 (1988) addresses what constituted "misbehavior" under a former version of the statute. As "misconduct" is defined, in part, as "improper behavior," which is analogous to misbehavior, the Court may draw some guidance from the case. The case even uses the term "misconduct" in interpreting the

alleged misconduct in the present case stems from actions taken by Arbitrator Glasser in advance of the arbitration hearing. Any duties and any analysis of what might constitute improper behavior on the part of Arbitrator Glasser before the arbitration hearing, must have been created by the rules of arbitration as such pre-hearing conduct is not covered by law.

The Court has considered the FINRA Rule provided by the Respondent, Rule 13408.[34] It states there is an ongoing duty to disclose "(1) [a]ny direct or indirect financial or personal interest in the outcome of arbitration; (2) [a]ny existing or past financial, business, professional, family, social, or other relationships or circumstances with any party, any party's representative, or anyone who the arbitrator is told may be a witness in the proceeding, that are likely to affect impartiality or might reasonably create an appearance of partiality or bias; (3) [a]ny such relationship of circumstances involving members of the arbitrator's family or the arbitrator's current employers, partners, or business associates; and (4) [a]ny existing or past service as a mediator for any of the parties in the case for which the arbitrator has been selected."[35] The Court **FINDS** that the portion of this rule which arguably applies to the present case is contained in subsection (2).

"Misconduct" is "[a] dereliction of duty; unlawful, dishonest, or improper behavior, esp. by someone in a position of authority or trust."[36] The arbitration rule did create a duty

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statute's use of the word "misbehavior." In *Howerin*, the Court examined whether it was misconduct for an arbitrator to threaten a party that if the party did not submit to arbitration, the party would be removed from the Board of Realtors or whether a plain, palpable mistake of law was misconduct. *Id.*, 179. The Court found that because it was a condition of membership that those on the Board of Realtors submit to arbitration, it was not misconduct. *Id.* The Court further found that a plain and palpable mistake of law, by itself, is insufficient to establish misconduct, but that such evidence may be received and considered by the courts. *Id.*

[34] The Respondent requested the Court analyze Arbitrator Glasser's compliance with FINRA Rule 13408 as evidence of both "evident partiality" and "misconduct affecting the right of any party." In analyzing whether breaking an arbitration rule would constitute "evident partiality," the test is the four-factor analysis in *ANR*, none of which factors are applicable to the failure to follow a rule. All four factors focus on the relationship between the arbitrator and a party or the arbitrator's interest in the proceeding. Accordingly, the failure to follow a rule of arbitration cannot be the basis for vacatur on the grounds of "evident partiality."

[35] Emphasis added.

[36] *Black's Law Dictionary* (11th ed. 2019), misconduct. *Howerin Residential Sales Corp. v. Century Realty of Tidewater, Inc.*, 235 Va. 174 (1988) addresses what constituted "misbehavior" under a former version of the statute. As "misconduct" is defined, in part, as "improper behavior," which is analogous to misbehavior, the Court may draw some guidance from the case. The case even uses the term "misconduct" in interpreting the statute's use of the word "misbehavior." In *Howerin*, the Court examined whether it was misconduct for an arbitrator to threaten a party that if the party did not submit to arbitration, the party would be removed from the Board of Realtors or whether a plain, palpable mistake of law was misconduct. *Id.*, 179. The Court found that because it was a condition of membership that those on the Board of Realtors submit to arbitration, it was not

to disclose. Arbitrator Glasser was required to disclose "[a]ny existing or past financial, business, professional, family, social, or other relationships or circumstances with any party, any party's representative, or anyone who the arbitrator is told may be a witness in the proceeding, **that are likely to affect impartiality or might reasonably create an appearance of partiality or bias.**"[37] The Court **FINDS** that the past tenuous connection and minor relationship between Arbitrator Glasser and the Petitioner was not "likely to affect impartiality"[38] and that it would not "reasonably create an appearance of partiality or bias."[39] Accordingly, it appears this failure to disclose did not violate the explicit terms of FINRA Rule 13408 and, therefore, this failure did not constitute a dereliction of duty which would be misconduct.[40]

Even if this Court were to find that the rule had been violated, resulting in the potential for misconduct by dereliction of duty, it is uncontroverted that Arbitrator Glasser unintentionally failed to disclose. "Dereliction" is defined as "an intentional abandonment" and "dereliction of duty" as an "intentional or conscious neglect."[41] The evidence is insufficient to show either an intentional abandonment of duty or an intentional or conscious neglect of duty on the part of Arbitrator Glasser. In fact, the evidence shows that Arbitrator Glasser disclosed his involvement with Old Point Financial Corporation and with Old Point Bank and that Arbitrator Glasser performed conflicts checks at his law practice.

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misconduct. *Id.* The Court further found that a plain and palpable mistake of law, by itself, is insufficient to establish misconduct, but that such evidence may be received and considered by the courts. *Id.*

[37] FINRA Rule 13408

[38] This part of the rule addresses actual bias and not the perception thereof.

[39] This part of the rule addresses the appearance of bias. The analysis turns, in the present case, on whether the potential perception of partiality which may have been created by the indirect involvement, five years before, between Arbitrator Glasser and the Petitioner would be a reasonable perception. The plain reading of the rule does not reach all possible perceptions of partiality. The rule explicitly does not say that the requirement is to avoid any potential appearance of impropriety, which would be a higher standard.

[40] The Respondent asserts that Arbitrator Glasser's opinions are dispositive. Arbitrator Glasser would have disclosed his contact with Petitioner if he had known about them at the time and might not have agreed to serve as an arbitrator in this matter according to his testimony at the depositions held in this matter. At the hearing, Arbitrator Glasser appeared to express doubt that his tenuous connection with the Petitioner would have been sufficient to cause him to decline to serve as an arbitrator. The personal opinions of Arbitrator Glasser or the personal standard to which he chooses to hold himself above any requirements of law are irrelevant to the decision to confirm or vacate the award. "Code §8.01-581.010 provides the exclusive means for setting aside an arbitration award." *Lackman*, 26.

[41] *Merriam-Webster Dictionary*, "dereliction" https://www.merriam-webster.com/dictionary/dereliction; the term "dereliction" is defined under 1(a), while "dereliction of duty" is defined under 3(a).

Even if the Respondent had established proof of misconduct by Arbitrator Glasser, misconduct alone would be insufficient for vacatur. For vacatur, there must be "misconduct prejudicing the rights of any party." See §8.01-581.010(2). The Respondent argues that the alleged misconduct in the inadvertent failure to disclose causes the Respondent concern regarding the mechanisms of the process, that the process is somehow tainted or unfair. The Respondent has pointed to no specific right that has been prejudiced. The Respondent enjoyed the right to have a neutral and impartial arbitrator. The Respondent does not argue that Arbitrator Glasser was biased against him[42] or that Arbitrator Glasser did not act in a neutral manner in determining the award. Even if the Respondent did make such an argument, it would not be supported by the evidence or the record in this case.

The Court **FINDS** that the Respondent has failed to carry his burden of showing misconduct by Arbitrator Glasser. The Court further **FINDS** that the Respondent has failed to carry his burden of showing that any alleged misconduct of Arbitrator Glasser affected his own rights or that of any party. The Court has already made findings regarding the Respondent's allegations under §8.01-581.010(2) regarding "evident partiality." Accordingly, the Court **FINDS** that the Respondent is not entitled to vacatur pursuant to §8.01-581.010(2).

§8.01-581.010(3): Arbitrators Exceeded Their Powers

The Cross-Petition requests vacatur on the grounds that the arbitrators exceeded their authority in ordering attorney's fees already ordered by a court.[43] The Court received no evidence that the arbitration panel awarded attorney's fees that had been previously ordered by a court. Accordingly, the Court **FINDS** that the Respondent has failed to carry his burden of showing the arbitrators exceeded their powers. Accordingly, the Court **FINDS** that the Respondent is not entitled to vacatur pursuant to §8.01-581.010(3).

§8.01-581.09: Confirmation of an Award

The Petitioner, pursuant to §8.01-581.09, applied to the Court, after the arbitration award was granted, for an order confirming the arbitration award. The statute requires the Court to confirm an award upon request if no motions to vacate or modify are timely

[42] The Respondent maintains that it is the appearance of things that is dispositive in this matter.
[43] Cross-Petition, pg. 7-8.

filed. If, as in the present case, there is a timely motion to vacate, the Court must proceed as directed in §8.01-581.010. Pursuant to §8.01-581.010, "[i]f the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award." The Court **NOTES** that there is no pending motion to modify or correct the award.

RULING

The Court **FINDS** that the four factors in *ANR* weigh against a finding of evident partiality. The Court further **FINDS** that the facts in the present case are insufficient to indicate "improper motives on the part of the arbitrator," as required by *ANR*. The Court **FINDS** that the Respondent has failed to put forward facts that *objectively* demonstrate such a degree of partiality that a reasonable person could assume that the arbitrator had improper motives. The Court **FINDS** that the Respondent has failed to carry his burden of showing misconduct by Arbitrator Glasser or resulting prejudice to the rights of a party. The Court **FINDS** that the Respondent failed to carry his burden of showing that the arbitrators exceeded their powers. The Court, accordingly, **FINDS** that the Respondent is not entitled to vacatur pursuant to §8.01-581.010 and **DENIES** the Cross-Petition to Vacate.

As the Court has **DENIED** the Cross-Petition to Vacate, pursuant to §§8.01-581.09 and 8.01-581.010 the Court **CONFIRMS** the arbitration award granted on March 3, 2022 styled as *Jayne Di Vincenzo v. Devin J. Garofalo, et. al.*, Case No. 20-03366.

Pursuant to the Court's Order of May 11, 2023, and the extension Order of May 31, 2023, the Plaintiff is directed to submit her application for attorneys fees and costs, and the Respondent is directed to provide his response pursuant to those orders.

It is further **ORDERED** that the Clerk shall forward a certified copy of this order to both parties.

Endorsements are dispensed with by the Court pursuant to Rule 1:13.

ENTER: 6/8/2023

Jacqueline S. McClenney, Judge