Virginia:

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

WILLIAMS TRADING, LLC,	)	
	)	
Plaintiff-Claimant,	)	
	)	
v.	)	
	)	
MICHAEL AARON MANASTER,	)	
	)	**Case No: CL21-2706**
Defendant-Respondent,	)	
	)	
v.	)	
	)	
DAVID B. WILLIAMS,	)	
Plaintiff-Third-Party Respondent.	)	

ORDER

On January 12, 2023, this matter came before the Court on Defendant-Respondent's Demurrer. For the reasons set forth in the Court's February 24, 2023, Letter Opinion, the Court hereby **ORDERS** as follows:

1. Michael Aaron Manaster's Demurrer is **SUSTAINED**.
2. Williams Trading, LLC shall have 60 days from the entry of this Order to amend its First Amended Motion to Vacate Arbitration Award.
3. Defendant-Respondent and Plaintiff-Third-Party Respondent shall have 21 days from the filing of any amended pleading to file responsive pleadings.

Pursuant to Rule 1:13 of the Supreme Court of Virginia, the Court waives the parties' endorsements. The Clerk is directed to provide a copy of this Order to all parties.

It is **SO ORDERED**.

ENTER: February 24, 2023

Richard B. Campbell, Judge

Circuit Court

OF THE

City of Richmond

RICHARD BARTON CAMPBELL
JUDGE
13TH JUDICIAL CIRCUIT

JOHN MARSHALL COURTS BUILDING
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February 24, 2023

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RE: ***Williams Trading LLC v. Michael Aaron Manaster v. David B. Williams.***
CL21-2706

Letter Opinion

Dear Counsel:

On January 12, 2023, the parties appeared, by counsel, on Michael Aaron Manaster's ("Defendant's")[1] Demurrer. At the conclusion of the hearing, the Court took the matter under advisement. Having considered the parties' oral and written arguments, and for the reasons outlined below, the Court sustains the Demurrer and dismisses the case without prejudice.

I. BACKGROUND[2]

Plaintiff Williams Trading ("Plaintiff WT") is a financial trading firm based in Connecticut. Defendant was a trader at the firm who resigned to take a different job. Subsequently, Plaintiff WT sued him for breach of his confidentiality agreement. In response, Defendant asserted counterclaims against Plaintiff WT and another individual for breach of a compensation agreement with Plaintiff WT and violation of applicable wage statutes and unfair trade practices. He also asserted crossclaims against Plaintiff/Third-Party Respondent David Williams ("Plaintiff Williams").

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[1] Procedurally, Williams Trading, LLC is the "Plaintiff-Claimant," David B. Williams is "Plaintiff-Third Party Respondent," and Michael Aaron Manaster is "Defendant-Respondent." For simplicity, the Court will refer to Williams Trading and David Williams collectively as "Plaintiffs," and Michael Manaster as "Defendant."

[2] For the purposes of this Demurrer, the Court considers only the facts in the pleadings and views them in the light most favorable to Plaintiffs. Thus, the Court will outline the facts as alleged by Plaintiff in its First Amended Motion to Vacate Arbitration Award (the "Motion"). As the Court will discuss later, based on its April 12, 2022, ruling, the Court has incorporated a portion of a transcript from the Arbitration proceedings through a motion craving *oyer*. But while the Court can properly consider them within the scope of this Demurrer, these additional documents are unnecessary for the Court to reach its conclusion.

Pursuant to an arbitration agreement, the parties arbitrated this dispute through the Financial Industry Regulatory Authority ("FINRA"), a major arbitration forum. The arbitration process spanned three years, culminating in an eleven-day hearing in May 2021. At the conclusion of the proceedings, the arbitrators issued an award that denied Plaintiffs' claims and denied Defendant's counterclaims.[3]

Six weeks later, Plaintiffs filed a "Motion to Vacate Arbitration Award," asking this Court to vacate the outcome of FINRA Arbitration No. 18-02393 (the "Arbitration"). The parties filed various pre-trial motions, including Plaintiffs' Motion to Amend their Motion to Vacate—which the Court granted on December 1, 2021—and the instant Demurrer.

a. Forming the Arbitration

The Arbitration process formally began on June 28, 2018. On September 28, FINRA sent the parties a list of potential arbitrators and the arbitrators' disclosure reports and directed each party to rank the arbitrators in order of preference. On October 9, 2018, Plaintiffs submitted their rankings, which listed John Williams as their first choice. On October 26, FINRA informed the parties that the arbitration panel would consist of arbitrators Williams, David Upton, and Wesley Wilson. Subsequently, Upton resigned, and Richard Igou took his place as Chairman.

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[3] The award was as follows:

1. Claimants' claims are denied in their entirety.
2. Respondent is liable for and shall pay to Claimants the sum of $6,562.50 in attorney's fees and expenses pursuant to Rule 13212(a) of the Code.
3. Respondent's Counterclaims are denied.
4. Respondent's Crossclaims are denied.
5. Any and all claims for relief not specifically addressed herein, including any requests for punitive damages, are denied.

On November 11, 2018, Williams filed an "Oath of Arbitrator," which affirmed that he knew "of no existing or past financial business, professional, family or social relationship which would impair me from performing my duties." Mot. at 7. He also confirmed that he had nothing additional to disclose and that his Arbitrator Disclosure Report was accurate and complete. The oath also included additional disclosures, styled as an "Arbitrator Disclosure Checklist," which stated that "any doubts should be resolved in favor of making the disclosure." Mot. at 7. The checklist included the following question: "Have you had any professional, social, or other relationships or interactions with any of the parties or counsel in this arbitration?"—to which Arbitrator Williams responded, "NO". Mot. at 7. Thus, Plaintiffs claim, Williams confirmed for the second time that he had no conflicts to report. Mot. at 7.

On January 21, 2020, the parties gathered in Richmond to begin the Arbitration's formal evidentiary hearing. At this proceeding, Williams did not disclose any issue or conflict of interest. For reasons not indicated in the record, the evidentiary hearing was postponed. On February 21, 2020, Williams updated his arbitrator disclosure report to indicate that he was a member of RBC's Bank of Georgia Advisory Board and was a Charitable Advisor Board Member of the Virginia Museum of Fine Arts. He did not make any additional disclosures relating to the Arbitration.

Between January 2020 and March 2021, the full panel of three arbitrators engaged in five hearings with the parties to resolve various issues ahead of the evidentiary hearing.[4] During each hearing, when asked if he had any new disclosures to report, Williams did not disclose any other potential conflicts.

[4] These hearings occurred on January 24, 2020; June 3, 2020; August 17, 2020; February 9, 2021, and March 5, 2021.

Due to the worsening Covid-19 pandemic, the parties reckoned with the need to begin holding the proceedings over Zoom, a video conferencing platform. Plaintiffs objected to proceeding over Zoom and maintained that virtual proceedings would hamper their presentation of their case. On February 10, 2021, the arbitrators rejected Plaintiffs' request and ordered that the evidentiary hearing proceed over Zoom.

b. The Evidentiary Hearing

The evidentiary hearing commenced on March 29, 2021. On the first day of the hearing, Arbitrator Williams confirmed that he had nothing new to disclose. He also confirmed that he had executed his Oath of Arbitrator. Shortly thereafter, the parties began presenting evidence.

Four days later, on April 2, 2021—the fifth day of the Arbitration—Chairman Igou stated that the panel had some "administrative matters to cover before we get started with the actual hearing," including an issue Arbitrator Williams had raised with him. Mot. at 9. Plaintiffs aver that Williams then, for the first time, "disclosed that he had a prior professional and personal relationship with Defendant Manaster." Mot. at 9. Williams then "offer[ed] to recuse himself," but Chairman Igou interjected that Williams was "getting a little ahead of things" and that "it was up to the parties." Mot. at 9. He then asked Plaintiffs' counsel if they accepted Williams' disclosure. Plaintiffs then "agreed to go forward," and the parties proceeded with the evidentiary hearing. Mot. at 10.

c. Procedural History

On June 14, 2021, Plaintiffs filed a Motion to vacate the arbitration award based on claims that the arbitrators violated FINRA's rules. The Motion alleges the arbitration panel committed at least four FINRA rule violations relating to disclosure and disqualification. First, Arbitrator Williams did not properly investigate his potential conflicts. Second, Arbitrator Williams failed to timely disclose his prior relationship with Defendant. Third, once Arbitrator Williams disclosed his relationship with and knowledge of Defendant, the Arbitration's Chair, Richard Igou, mishandled that disclosure, minimizing it and failing to send the issue to the FINRA Director of Arbitration. Fourth, neither before nor after his disclosure did Arbitrator Williams update his FINRA Disclosure Report or make a formal filing to FINRA regarding the full extent of his conflict.

According to Plaintiffs, the Arbitration panel's handling of Williams' disclosure violated FINRA Rules 13408 and 13410, which set forth procedures for disclosing potential conflicts. Under this protocol, conflicts should be reported to designated FINRA personnel. FINRA should then contact the parties directly and give them a chance to object outside the presence of the arbitrators. Plaintiffs allege that by failing to disclose his "prior professional and personal relationship" with Manaster until five days into the evidentiary hearing, Williams violated FINRA's rules and deprived Plaintiffs of the ability to object anonymously. Mot. at 10. They further allege that once Arbitrator Williams disclosed the potential conflict, Chairman Igou also violated these rules by opting to address the issue immediately and directly with the parties, rather than by the manner FINRA prescribes. Rather, "[t]he correct process was for Arbitrator Williams to disclose his material conflict pursuant to FINRA Rule 13408 and for FINRA to act, either *sua sponte* or based on the motion of a party, pursuant to Rule 13410(b), to remove Arbitrator

Williams." Mot. at 11. By failing to follow this procedure, the arbitration panel put Plaintiffs in a bind, forcing them to either consent to Williams' continued participation or voice their objection in his presence, which may have prejudiced them had Williams ultimately remained on the panel.

Plaintiffs' Motion alleges that the panel "exceeded [its] power" by violating FINRA's rules and that, consequently, the Court should vacate the resulting arbitration award pursuant to the Virginia Uniform Arbitration Act ("VUAA") and the Federal Arbitration Act ("FAA").[5] Plaintiffs argue that Virginia's standard for vacatur of an arbitration award is set forth in Va. Code § 8.01-581.010, which provides that "upon application of a party, the court shall vacate an award where . . . [t]he arbitrators exceed their powers." Plaintiffs claim that by proceeding with the arbitration hearing after violating FINRA's rules, the arbitrators "exceeded their powers" granted to them in the parties' arbitration agreement.

In response, Defendant filed a Demurrer, which advances five arguments for dismissing Plaintiffs' Motion. First, he argues that Plaintiffs have not carried their "heavy burden" to show they are entitled to judicial review. Second, Defendant maintains the Panel did not violate any FINRA rules. Third, he argues that FINRA rule violations do not cause an arbitrator to "exceed his power" within the meaning of the VUAA, and thus, would not justify vacatur. Fourth,

[5] As discussed *infra*, Plaintiffs advance a second argument in subsequent court filings: that the arbitration was tainted by "evident partiality." Pls.' Br. in Opp. to Dem. at 11-12. Because this argument does not appear in the pleading the instant demurrer is testing, it holds no bearing on the Court's analysis. However, the viability of this argument is relevant to whether Plaintiffs would be able to amend their Motion to survive a second demurrer, should the Court grant them leave to amend. Thus, the Court will address this argument to the extent it provides an avenue for Plaintiffs to survive a second demurrer.

Defendant argues that Plaintiffs waived their right to seek vacatur by failing to object during arbitration proceedings.

Finally, Defendant argues that even if the panel made the disclosure in a manner so procedurally deficient as to warrant vacatur, Plaintiffs waived any objection by consenting to Arbitrator Williams' continued service on the panel for several more days after the disclosure. Ultimately, Plaintiffs waited to raise an objection until six weeks after they received an adverse arbitration award. Thus, Defendant argues, Plaintiffs waived their right to challenge the award now.

Defendant raised an additional argument at the Demurrer hearing. Addressing Plaintiffs' "evident partiality" claim, Defendant argued that Plaintiffs failed to include this ground in their Motion. Moreover, even if Plaintiffs had advanced such an argument in their pleadings, Defendant argues, Arbitrator Williams' connection to Manaster is too attenuated to expose the Arbitration award to vacatur. Relying on the Arbitration hearing transcript, Defendant noted that Arbitrator Williams disclosed that he remembered that he knew of someone with the last name Manaster who worked with him at the same large financial institution in New York thirty-five years before the arbitration but had not had any contact since then. Consequently, Defendant insisted that as a matter of law, this potential, unconfirmed, and limited contact does not create an actual conflict of interest sufficient to trigger vacatur under the VUAA.

II. STANDARD OF REVIEW

Demurrers test whether a complaint states a cause of action upon which relief can be granted. *Glazebrook v. Bd. of Supervisors of Spotsylvania Cnty.*, 266 Va. 550, 554 (2003). The Court may not evaluate the merits of a plaintiff's allegations and must only "determine whether

the factual allegations . . . are sufficient to state a cause of action." *Francis v. Nat'l Accrediting Comm'n of Career Arts & Scis., Inc.*, 293 Va. 167, 171 (2017) (internal quotation marks omitted). The Court accepts as true all material facts alleged in or reasonably inferable from a plaintiff's pleadings and does not evaluate the merits of the claim. *Luckett v. Jennings*, 246 Va. 303, 307 (1993). A complaint survives demurrer if it alleges "sufficient facts to constitute a foundation in law for the judgment sought, and not merely conclusions of law." *Dunn, McCormack & MacPherson v. Connolly*, 281 Va. 553, 558 (2011).

Additionally, the Court may consider not only the parties' pleadings but also exhibits, including those incorporated into the record through a motion craving *oyer*. *Flippo v. F & L Land Co.*, 241 Va. 15, 16 (1991). When a document is made a part of the record through *oyer*, "the court in ruling on the demurrer may properly consider the facts alleged as amplified by any written agreement added to the record on the motion." *Wards Equip., Inc. v. New Holland N. America, Inc.*, 254 Va. 379, 382 (1997). Lastly, the Court "may ignore a party's factual allegations contradicted by the terms of authentic, unambiguous documents that properly are a part of the pleadings." *Id.*

A demurrer that introduces new facts is an impermissible "speaking demurrer," and the Court must strike such facts from the record. *See Pittman v. Walter*, 100 Va. Cir. 57, 61 (2018); *Landes v. Erie Ins. Exch.*, 48 Va. Cir. 298, 298 (1999); *see generally* W. HAMILTON BRYSON, BRYSON ON VIRGINIA CIVIL PROCEDURE § 6.03(5)(a) (5th ed. 2017). Although documents incorporated through *oyer* may supplement a pleading's factual assertions, parties may not advance new issues at the demurrer stage. *See Pittman*, 100 Va. Cir. at 61. Under Va. Code § 8.01-273, "[n]o grounds other than those stated specifically in the demurrer shall be considered by the court."

Here, the Court granted Defendants' Motion Craving *Oyer* on April 12, 2022, thereby incorporating into the record a portion of the transcript of the arbitration proceedings.[6] Thus, the Court considers the factual assertions contained within the four corners of Plaintiff's Motion as well as the portions of the Arbitration transcript brought into the record through *oyer*.

III. WAIVER

Defendant argues that Plaintiffs waived their right to challenge the arbitration award when they failed object to Arbitrator Williams' participation in the Arbitration immediately after discovering the potential conflict of interest and stated they were "happy to proceed." Def.'s Answer, Cross-Pet., and Dem., Ex. A at 9.

This Court considered whether failure to object during an arbitration precludes a party from seeking vacatur in *Howard v. Whitlow Chevrolet, Inc.*, 2005 WL 4229240 (Va. Cir. Ct. Jan. 26, 2005). There, the plaintiff brought an action in the Richmond Circuit Court challenging an arbitration award on several grounds, including *ex parte* communications between an arbitrator and counsel, failure to comply with the arbitration's discovery, and the existence of partiality. *Id.* at *2. However, the plaintiff failed to raise these issues during the arbitration. *Id.* at *2-*3. The Court rejected the plaintiff's claims because "the suggestion of partiality on the part of one of the arbitrators [was] waived," as the plaintiff "did not lodge an objection and participated to the end" of the arbitration. *Id.* at *3. In reaching this conclusion, the Court further explained, "Howard is seeking judicial review of an agreed upon arbitration proceeding where the pleadings provide ample support that it was contractually agreed upon and the method was engaged by Howard

[6] The Court's April 12, 2022, Order also granted "the Plaintiff-Claimant the same opportunity to submit any portion of the transcript that is relevant to the issue before the Court." *See* Order, April 12, 2022, at 1.

himself without objection, until the end, and after he became merely dissatisfied with the outcome." *Id.* at *4.

This Court's discussion in *Howard* harmonizes with federal courts' treatment of waiver under the FAA. In *Remmey v. PaineWebber, Inc.*, the Fourth Circuit found that even if the appellant could establish that an arbitrator failed to be impartial, she had to provide "a reason why this objection was not raised prior to the arbitration." 32 F.3d 143, 148 (4th Cir. 1994). The court further explained:

> By raising this claim only after obtaining an adverse decision, Remmey's actions appear to constitute the ultimate attempt at a second bite. If this challenge were sustained, nothing would stop future parties to arbitration from obtaining allegedly disqualifying information, going through with the proceedings, and then coming forward with the information only if disappointed by the decision.

Id.

Similarly, in *Rsch. & Dev. Ctr. "Teploenergetika," LLC v. EP Int'l, LLC*, the federal district court explained that "[n]o matter the basis for a party's defense at arbitration, he 'cannot remain silent, raising no objection during the course of the arbitration proceeding, and when an award adverse to him has been handed down complain of a situation of which he had knowledge from the first.'" 182 F. Supp. 3d 556, 567 (E.D. Va. 2016) (quoting *Cook Indus., Inc. v. C. Itoh & Co. (Am.) Inc.*, 449 F.2d 106, 107-08 (2d Cir. 1971)). The court further cautioned that "[p]ermitting parties to keep silent during arbitration and raise arguments in enforcement proceedings would undermine the purpose of arbitration which is to provide a fast and inexpensive method for resolution of disputes." *Id.* (internal quotation marks omitted).

Beyond the Fourth Circuit, other federal courts demonstrate a strong reluctance to entertain challenges to arbitrated claims based on objections never brought to the arbitrators' attention. *See*

Slaney v. The Int'l Amateur Athletic Fed'n, 244 F.3d 580, 591 (7th Cir. 2001) ("If a party willingly and without reservation allows an issue to be submitted to arbitration, he cannot await the outcome and then later argue that the arbitrator lacked authority to decide the matter."); *Goldman, Sachs & Co. v. Athena Venture Partners, L.P.*, 803 F.3d 144, 150 (3d Cir. 2015) ("A party should not be permitted to game the system by rolling the dice on whether to raise the challenge to an arbitrator's qualification to sit during the proceedings or wait until it loses to seek vacatur on the issue."); *Garfield 4 Co. v. Wiest*, 432 F.2d 849, 853 (2d Cir. 1970), *cert. denied*, 410 U.S. 940 (1971) ("It is well settled that disgruntled losers cannot first raise their objection after an award has been made."); *Wellman v. Writers Guild of America, West, Inc.*, 146 F.3d 666, 673 (9th Cir. 1998) ("It is well settled that a party may not sit idle through an arbitration proceeding and then collaterally attack that procedure on grounds not raised before the arbitrators when the result turns out to be adverse."); *Light-Age, Inc. v. Ashcroft-Smith*, 922 F.3d 320, 322-23 (5th Cir. 2019) (holding that the plaintiff waived its objection to an arbitrator's participation when it failed to object during the arbitration proceedings); *AAOT Foreign Econ. Ass'n (VO) Technostroyexport v. Int'l Dev. & Trade Servs., Inc.*, 139 F.3d 980, 982 (2d Cir. 1998) ("The settled law of this circuit precludes attacks on the qualifications of arbitrators on grounds previously known but not raised until after an award has been rendered."); *Gibbons v. United Transp. Union*, 462 F. Supp. 838, 842 (N.D. Ill. 1978) (holding that defects in proceedings prior to or during an arbitration may be waived if a party acquiesces with knowledge of such defects).

Here, Plaintiffs do not allege in their Motion that they made a timely objection during the Arbitration proceedings. In fact, they acknowledge that Plaintiffs' "counsel agreed to go forward." Mot. at 10. Thus, even ignoring the transcript that *oyer* brought within the scope of the demurrer

analysis, there is no dispute that Plaintiffs declined to object to Arbitrator Williams' participation in the proceedings, even after learning of his potential conflict of interest.

Plaintiffs insist that their reason for declining to object during the Arbitration was to avoid turning Arbitrator Williams against them in the event he remained on the panel. They feared that openly accusing Arbitrator Williams of bias would, in turn, create further bias or irretrievably chill the Arbitration. Faced with an unexpected disclosure that should have been communicated earlier through the proper channels, Plaintiffs claim they were in no position to voice an objection. Thus, instead of seeking to remove Arbitrator Williams, Plaintiffs said they were "happy to proceed."

While the decision not to protest Arbitrator Williams' continued involvement in the proceedings may have had tactical value, it does not excuse Plaintiffs' failure to preserve their objection. After all, "arbitration remains an adversarial event, and parties must insist upon the enforcement of their contractual rights before the arbitrators as they do in court." *Brook v. Peak Int'l, Ltd.*, 294 F.3d 668, 673-74 (5th Cir. 2002). Parties in traditional litigation must object in open court to preserve the issue on appeal, even when doing so may irk the trial judge. *Martin v. Ziherl*, 269 Va. 35, 39 (2005) ("A basic principle of appellate review is that, with few exceptions not relevant here, arguments made for the first time on appeal will not be considered."). Likewise, parties in arbitration proceedings cannot "remain[] silent until an adverse award [is] rendered" and expect to preserve the issue for the purposes of vacatur. *AAOT*, 139 F.3d at 981. Consequently, Plaintiffs' failure to object during the evidentiary hearing—not to mention their unequivocal affirmative agreement to proceed—precludes them from attacking the Arbitration award on those grounds now.

IV. VACATUR

Beyond the issue of waiver, this case turns on whether the facts pleaded, viewed in Plaintiffs' favor, can establish that Arbitrator Williams "exceeded his power" as an arbitrator. This Court's "review of an arbitration award is limited to the specific statutory criteria contained in" the VUAA. *SIGNAL Corp. v. Keane Fed. Sys., Inc.*, 265 Va. 38, 45 (2003). In their Motion, Plaintiffs argue that by violating FINRA's rules regarding conflict disclosure, Arbitrator Williams and Chairman Igou "exceeded their power" as arbitrators within the meaning of the VUAA, thereby exposing the resulting award to vacatur.

In recent filings, Plaintiffs also advance an argument for vacatur based on the existence of "evident partiality." *See* Pls.' Br. in Opp. to Dem. at 11-12. They did not raise this argument in their Motion, even as amended. *See generally* Mot. Since the Court looks only within the four corners of the relevant pleading—in this case, the Motion—the existence of "evident partiality" will not buttress the Motion's viability at the demurrer stage. Nonetheless, the Court will discuss this argument later in this Opinion to evaluate whether the Court should grant Plaintiffs leave to amend their Motion to include facts to support "evident partiality."

On both arguments, Plaintiffs fight an uphill battle. Courts seldom vacate an arbitration award based on "evident partiality" or "exceeded their power" grounds. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) (noting that courts may vacate an arbitration award "only in very unusual circumstances"); *cf. Mission Residential, LLC v. Triple Net Properties, LLC*, 275 Va. 157, 161 (2008) ("We adhere to the view that the public policy of Virginia favors arbitration."). The scope of courts' review of arbitration awards is "among the narrowest known at law." *Apex Plumbing Supply, Inc. v. U.S. Supply Co.*, 142 F.3d 188, 193 (4th

Cir. 1998). As Justice Sandra Day O'Connor warned, "the courts of this country should not be places where resolutions of disputes begin. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried."[7] Ultimately, Plaintiffs must allege facts which, if proven, would justify vacatur. *See generally Apex*, 142 F.3d 188.

a. "Exceeded His Powers"

The Court first examines Plaintiffs' "exceeded his powers" argument, which rests on the well-established principle that "arbitration is a creature of contract." *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 585 (2008). An arbitration agreement represents the parties' mutual intentions to settle their disputes in a place and manner of their choosing. Accordingly, arbitrators enjoy only the powers the parties' agreement gives them.[8] When an arbitrator exceeds the scope of the authority the parties agreed he would wield, the outcome of the arbitration no longer results from the parties' agreement. The VUAA and FAA have codified this principle by authorizing courts to vacate an arbitration award when the arbitrator "exceeds his power." Va. Code § 8.01-581.010; 9 U.S.C. § 10.

Parties seeking relief under the "exceeded his powers" provision "bear[] a heavy burden." *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 (2013). An arbitration decision "'even arguably construing or applying the contract' must stand, regardless of a court's view of its (de)merits." *Id.* (quoting *Eastern Associated Coal Corp. v. Mine Workers*, 531 U.S. 57, 62 (2000));

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[7] Address by Justice Sandra Day O'Connor, at "Consumer Dispute Resolution, Exploring the Alternatives" (Jan. 21, 1983).

[8] *See* Patrick Sweeney, *Exceeding Their Powers: A Critique of* Stolt-Nielsen *and Manifest Disregard, and A Proposal for Substantive Arbitral Award Review*, 71 WASH. & LEE L. REV. 1571, 1604-05 (2014).

see also Paperworkers v. Misco, Inc., 484 U.S. 29, 37-38 (1987) (discussing courts' "decided preference for private settlement of labor disputes").

Virginia courts approach the VUAA's "exceeded his power" provision with hesitance. *See, e.g., Meuse v. Henry*, 296 Va. 164, 180 (2018) ("We have vacated an arbitration award under Code § 8.01-581.010(3) only once."). "In determining whether the arbitrators exceeded their authority pursuant to Code § 8.01-581.010(3), the issue [courts] decide is not whether the award is legally correct." *BBF, Inc. v. Alstom Power, Inc.*, 274 Va. 326, 330 (2007). Instead, the Court asks "only whether the arbitrators had the power to decide the parties' claims." *Id.* The Supreme Court of the United States has noted in the FAA context that "[i]t is not enough for petitioners to show that the panel committed an error—or *even a serious error*." *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662, 671 (2010) (emphasis added). Rather, the "exceeded his power" provision exists as a safeguard against "extreme arbitral conduct" resulting in "egregious departures from the parties' agreed-upon arbitration." *Hall St. Assocs.*, 552 U.S. at 586. Virginia courts have echoed this principle when construing the VUAA. *See Lloyd v. Nomikos*, 68 Va. Cir. 27, 2005 WL 3579024 at *3 (2005) ("Awards are not to be vacated solely on the ground of procedural or evidentiary errors.") (citing *Basset v. Cunningham*, 50 Va. 684 (1853)). Accordingly, an arbitration award will generally survive judicial review even when an arbitrator failed to follow proper procedures.[9]

[9] The only case in which a Virginia court vacated an award due to procedural defects did not involve the "exceeded his powers" provision. *Bates v. McQueen*, 270 Va. 95, 100 (2005). In *Bates*, the Supreme Court vacated an arbitration award because "the arbitrators did not conduct a hearing; did not give any notice of a hearing to Bates or his counsel; and did not afford Bates an opportunity to be heard, to present evidence, or to cross-examine witnesses." *Id.* The Court found that because the VUAA refers to "the hearing," an arbitration award arrived at without giving the parties an opportunity to be heard violated the statute and warranted vacatur. *Id.* Importantly, the Court grounded its reasoning in the text of the VUAA, rather than the parties' arbitration agreement. *Id.*

In the few instances when courts have vacated awards based on claims that the arbitrators exceeded their authority, it is because the arbitrator decided an issue the parties did not put before the arbitrator, not because the arbitrator failed to observe the panel's internal procedures. *See Trustees of Asbury United Methodist Church v. Taylor & Parrish, Inc.*, 249 Va. 144 (1995). In *Asbury*, an arbitrator decided a claim arising out of a "written change order" document that was not among the identified files. *Id.* at 154. The Supreme Court of Virginia explained that "[a]rbitrators derive their authority solely from the parties' contractual agreement to arbitrate disputes arising under the contract. Thus, arbitrators exceed the scope of their authority when they purport to act beyond the terms of the contract from which they draw their authority." *Id.* at 153. The Court found that the arbitrator exceeded his powers by deciding a claim that was not within the scope of the parties' agreement to arbitrate. *Id.* at 154.

The Supreme Court further clarified the VUAA's "exceeded their powers" provision in *BBF, Inc. v. Alstom Power, Inc.*, 274 Va. 326 (2007). There, the Court considered whether arbitrators exceeded their powers by awarding liquidated damages that, according to BBF, were "a violation of 'clear public policy.'" *Id.* at 329. The Court rejected BBF's argument, finding that by agreeing to arbitrate their contract dispute, the parties "empowered the arbitrators to award liquidated damages." *Id.* at 331. In explaining its holding, the Court reiterated that the scope of an arbitrator's power concerns the claims he may hear, rather than the procedures he must observe. *Id.* at 330 ("We decide only whether the arbitrators had the power to decide the parties' contract claims.").

Plaintiffs insist that the arbitrators' alleged failure to observe FINRA's internal rules exceeded their powers. They argue that because the parties agreed that the Arbitration would "be conducted in accordance with the FINRA Code of Arbitration Procedure," the arbitrators' failure

to observe those procedures put them outside the scope of the parties' contract. Mot. at 23. Yet this argument is difficult to reconcile with the foregoing cases. Virginia courts have never interpreted the VUAA's "exceeded his powers" provision to include failures to observe an arbitration panel's internal procedures. Uniformly, courts read this provision to refer to the scope of the issues the parties agreed to arbitrate, not the procedures an arbitrator does or does not follow.

At the demurrer hearing, Plaintiffs' counsel assured the Court that not every FINRA rule violation would warrant vacatur. Yet the argument presented in their Motion is not so forgiving. There, Plaintiffs argued that "[c]ourts must strictly enforce parties' contractual terms," including FINRA's rules, and that "[t]o the extent that the Arbitration panel deviated from the FINRA Code, prejudice is presumed." Mot. at 18. Moreover, Plaintiffs' argument presents a line-drawing problem, as it is unclear at what point a FINRA rule violation would justify vacatur. Suppose Arbitrator Williams had disclosed his potential conflict of interest to the designated FINRA representative but did so after the rules required it, or that he made the disclosure well before the proceedings commenced, but informed the parties directly, rather than communicating it to FINRA's Director of Arbitration.

A growing body of cases suggests that these concerns are irrelevant to the "exceeded his powers" analysis. In conducting their limited review of an arbitration award, courts do not 'look under the hood' to gauge how perfectly (or imperfectly) the arbitrators followed every internal procedure. *See, e.g., UBS Fin. Sers., Inc. v. Padussis*, 842 F.3d 336, 340 (4th Cir. 2016) ("[P]rocedural questions which grow out of the dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator, to decide.") (internal quotation marks omitted). Nor do they speculate about how any deviation from that procedure impacted the outcome of the arbitration. On the contrary, courts routinely confirm arbitration awards despite

allegations of the panel's procedural failings. *See id.*; *ANR Coal Co. v. Cogentrix of N. Carolina, Inc.*, 173 F.3d 493, 498-99 (4th Cir. 1999); *Wolak v. Gerber*, 56 Va. Cir. 203, 2001 WL 637481 at *2 (2001).

As Judge Ledbetter opined in *Wolak*, "it is probable that most arbitration proceedings are somehow flawed with minor procedural oversights .... After all, many arbitrators are lay persons." 2001 WL 637481 at *2. If courts granted vacatur whenever an arbitrator failed to observe every formality, "arbitration would become 'merely a prelude to a more cumbersome and time-consuming judicial review process.'" *Sutter*, 569 U.S. at 568-69.

Ultimately, FINRA rule enforcement lies beyond the purview of this Court's authority. Even accepting Plaintiffs' allegation that the arbitrators violated FINRA's rules, these violations did not cause the arbitrators to "exceed their powers" within the meaning of the VUAA or FAA. As Plaintiffs' Motion relies entirely on the "exceeded his powers" provision to justify vacatur, Plaintiffs fail to state a claim upon which the Court may grant relief. Accordingly, the Court will sustain Defendant's Demurrer.

b. "Evident Partiality"

Upon sustaining a demurrer, the Court has discretion to dismiss with prejudice or grant leave to amend. *Kole v. City of Chesapeake*, 247 Va. 51, 57 (1994). Rule 1:8 counsels that "[l]eave to amend shall be liberally granted in furtherance of the ends of justice." Sup. Ct. R. 1:8. As discussed *supra*, Plaintiffs' "exceeded his powers" argument fails as a matter of law. In written and oral arguments, albeit not in their Motion, Plaintiffs separately argue that Arbitrator Williams' alleged conflict of interest constitutes "evident partiality" and thus warrants vacatur. *See* Pls.' Br. in Opp. to Dem. at 11-12. This theory is not advanced in Plaintiff's Motion, and therefore, it lies

beyond the scope of this Demurrer, and it cannot cure the pleading's defects. *See Ted Landing Supply Co. v. Royal Aluminum and Constr. Corp.*, 221 Va. 1139, 1141 (1981) ("[N]o relief should be granted that does not substantially accord with the case as made in the pleading."). Thus, the Court will consider the "evident partiality" argument only inasmuch as it provides Plaintiffs an avenue to survive another demurrer should the Court grant leave to amend their Motion.[10]

Both the VUAA and FAA permit courts to vacate an arbitration award when "[t]here was evident partiality by an arbitrator appointed as a neutral." Va. Code § 8.01-581.010(2); 9 U.S.C. § 10(a)(2) (permitting vacatur when "there was evident partiality or corruption in the arbitrators"). As the Fourth Circuit explained, "[t]he material and relevant facts an arbitrator fails to disclose may demonstrate his 'evident partiality' under [the FAA]." *ANR*, 173 F.3d at 499. Based on this, Plaintiffs argue that Arbitrator Williams' failure to follow FINRA's disclosure rules shows "at best, that he did not properly consider or investigate that conflict," and ultimately, demonstrated "evident partiality." Br. in Opp. to Dem. at 11.

In addressing Plaintiffs' "evident partiality" argument, Defendant relies heavily on two Fourth Circuit decisions: *MCI Constructors, LLC v. City Of Greensboro*, 610 F.3d 849 (4th Cir. 2010) and *ANR*, 173 F.3d 493. Notably, these cases were decided in the context of the FAA, not the VUAA. However, given the similarity of the two statutes, Virginia courts often cite FAA cases when construing the VUAA. *See Tucker v. Ford Motor Co.*, 72 Va. Cir. 420, 2007 WL 6005306 at *2 n.4 (2007) ("Virginia Courts have found the federal courts' consideration of the Federal

[10] Both parties provided considerable written and oral argument on this issue. Thus, the Court is well positioned to determine whether the argument would enable Plaintiffs to survive a second demurrer.

Arbitration Act, 9 U.S.C. § 1 *et seq.*, to be instructive."); *see also McMullin v. Union Land & Mgmt. Co.*, 242 Va. 337, 342 (1991) (citing and discussing FAA cases).[11]

Factually, *ANR* provides the closest analogue to the case at bar. 173 F.3d 493. *ANR* involved an arbitrator who worked for a law firm that performed sporadic work for a third-party beneficiary of the contract at the center of the arbitration. *Id.* at 496. Although the arbitrator never personally represented the third-party beneficiary, ANR requested that the arbitrator be stricken from the list of potential arbitrators. *Id.* When the request was denied, ANR declined to use its preemptory strikes to remove the arbitrator at issue, and he was ultimately placed on the arbitration panel. *Id.* After the arbitration concluded, ANR learned that the extent of the arbitrator's relationship with the third party was more extensive than originally revealed, and ANR filed a civil complaint seeking vacatur, proceeding on two grounds: (1) that the failure to disclose the full extent of the relationship in and of itself warranted vacating the award; and (2) that the failure to disclose was proof of evident partiality and merited vacatur under the FAA. *Id.* at 497, 500.

The Fourth Circuit rejected both arguments. *Id.* at 499-500. With respect to the first argument, the court concluded that a "[f]ailure to disclose the sort of attenuated, non-substantial relationships at issue here" did not justify vacatur. *Id.* at 499. Addressing the second argument, the

[11] It is worth noting that some cases suggest that the VUAA sets forth a narrower path to vacatur than the FAA as applied in other federal and state jurisdictions. *See, e.g., SIGNAL Corp. v. Keane Federal Systems, Inc.*, 265 Va. 38, 41 (2003) ("Even though courts in other jurisdictions have vacated arbitration awards when there has been a 'manifest disregard of the law,' we refuse to adopt that standard in this case because to do so would require that this Court add words to Code § 8.01-581.010 which enumerates the bases on which a court shall vacate an arbitration award.").

court fashioned a four-factor test to determine when allegations of an arbitrator's partiality justify vacatur. *Id.* at 500. Under this test, the court examined:

> (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.

Id. The court further noted that "[w]hen considering each factor, the court should determine whether the asserted bias is direct, definite and capable of demonstration rather than remote, uncertain or speculative." *Id.*

The Fourth Circuit's approach addresses the concern that vacating arbitration awards "simply because of an impression of bias would encourage parties to bring potentially frivolous challenges and jeopardize the finality of arbitral awards." RESTATEMENT (THIRD) U.S. LAW OF INT'L COMM. ARB. § 4.18 PFD (2019) (discussing *ANR* and the various concerns courts balance in vacating awards based on allegations of "evident partiality"). In essence, the *ANR* test weighs courts' historic deference toward arbitration awards against the risk that an actual conflict of interest truly tainted the arbitration process.

Virginia courts have not yet adopted a test to evaluate "evident partiality," and thus, the Court borrows *ANR*'s framework. Applying this test to the case at bar, the Court finds that Plaintiffs have not alleged "evident partiality." For one thing, they have not included that argument in their Motion as a ground to justify vacatur. *See generally* Mot. Even if they had made this argument properly, the record lacks facts which, viewed in Plaintiffs' favor, could establish evident

partiality. The Motion alleges that Arbitrator Williams "had a prior professional and personal relationship with Respondent Manaster." Mot. at 9. However, *ANR* and its progeny require more than a bare allegation of a conflict of interest. *See ANR*, 173 F.3d at 502 ("The movant carries a 'heavy' burden in order to meet this 'onerous' standard"); *see also People's Sec. Life. Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141, 146 (4th Cir. 1993) ("It is well established that a mere appearance of bias is insufficient to demonstrate evident partiality.").

Furthermore, the Arbitration transcript brought into the record via *oyer* shows, at best, a possible faint connection between Arbitrator Williams and Defendant Manaster. There is no indication that the two had a close personal relationship. Rather, the transcript suggests only that they may have worked at the same firm thirty-five years ago and that they have had no contact since. Such an attenuated connection cannot, as a matter of law, evince "evident partiality." *Id.* at 145-46; *see also Hammad v. Lewis*, 638 F. Supp. 2d 70, 75 (D.D.C. 2009) (explaining that, given the lack "of any factually-based allegations of evident partiality, even the most liberal of constructions cannot fathom a set of facts which would entitle [Plaintiffs] to relief on these grounds").

In short, Plaintiffs have not pled facts which "objectively demonstrate such a degree of partiality that a reasonable person could assume that the arbitrator had improper motives." *ANR*, 173 F.3d at 501. Federal courts routinely grant motions to dismiss under Federal Rule of Civil Procedure 12(b)(6) when a plaintiff is too vague in their allegations of "evident partiality." *See Sisti v. Merrill, Lynch, Pierce, Fenner & Smith*, No. CIV.A. 91-00102-R, 1991 WL 575874, at *3 (E.D. Va. Apr. 22, 1991); *see also U.S. Care, Inc. v. Pioneer Life Ins. Co. of Illinois*, 244 F. Supp. 2d 1057, 1064 (C.D. Cal. 2002); *Hammad*, 638 F. Supp. 2d at 75; *Crim v. Pepperidge Farm, Inc.*, 32 F. Supp. 2d 326, 331 (D. Md. 1999).

Viewed in the light most favorable to Plaintiffs, the allegations in Plaintiffs' Motion and the materials incorporated into the record through *oyer* show only a potential faint connection between Arbitrator Williams and Defendant. There is no indication that the two had a close personal relationship. Rather, they merely may have worked at the same firm thirty-five years ago and have not spoken since then. Unless Plaintiffs can produce and plead additional facts to allege a closer actual connection between Defendant and Arbitrator Williams that would raise legitimate issues of partiality, they would be unable to survive demurrer on this point.

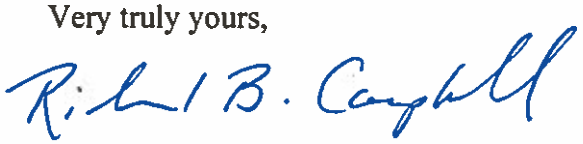
At the demurrer hearing, the Court asked Plaintiffs whether they anticipated further investigation might uncover a closer connection between Arbitrator Williams and Defendant than the record currently indicates. Plaintiffs' counsel answered affirmatively. Accordingly, in the event further investigation enables Plaintiffs to plead, in good faith, facts which they did not know during the Arbitration, and which reveal a considerably stronger connection between Arbitrator Williams and Defendant than the record presently suggests, the Court will grant Plaintiffs leave to amend their Motion.

V. CONCLUSION

For the foregoing reasons, the Court sustains the Defendant's demurrer. In its current form, Plaintiffs' Motion fails to allege facts which, if proven, could establish that the arbitrators "exceeded their power," showed "evident partiality," or any other facts to warrant vacatur. Moreover, their Motion indicates that far from voicing their objection to Arbitrator Williams' continued participation on the panel, Plaintiffs agreed "happ[ily] to proceed," thereby precluding this Court from reviewing any objection they might have brought to the arbitrators' attention but declined to do so. Therefore, Plaintiffs' Motion fails as a matter of law. The Court dismisses the

case without prejudice and grants Plaintiffs leave to amend their Motion in the event they can remedy its defects. The Court will enter an appropriate order to memorialize its ruling as outlined herein.

Very truly yours,



Richard B. Campbell, Judge