IN THE UNITED STATES DISTRICT COURT
OF APPEALS FOR THE THIRD CIRCUIT

No. 12-2026

JAMES D. FREEMAN,

Appellants,

v.

Pittsburgh Glass Works, LLC and PPG Auto Glass, LLC,

Appellee.

On Appeal from the United States District Court
For the Western District of Pennsylvania
Case No. 10-1515

APPELLANTS' BRIEF AND APPENDIX VOLUME I

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STATEMENT OF JURISDICTION

This action arises under the Age Discrimination in Employment Act ("ADEA"), 42 U.S.C. §621, *et seq*. Appellant alleged in this action that he was terminated by his former employer, Appellee PPG Auto Glass, LLC (hereinafter "Appellee PPG"), because of his age. **Pp5b-c.**The District Court had jurisdiction over Appellant's claims pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a). The case was referred to arbitration by the Honorable Arthur J. Schwab on August 4, 2011 and the parties consented to former Pennsylvania Superior Court Judge Maureen Lally-Green serving as Arbitrator. **P3a.** On December 12, 2011, the Arbitrator found no evidence of age discrimination and ruled in favor of Appellees. **P3b.** On March 9, 2012, Appellant moved to vacate, correct or modify the arbitration decision based upon the Arbitrator's failure to make material disclosures regarding her relationship with PPG and its agents. **Pp3b-c, 5a-s, 9a-f.** The motion was denied by the District Court on April 9, 2012. **P3a.** This Court has jurisdiction to hear this appeal pursuant to 28 U.S.C. §1291. Appellants timely appealed from the District Court's ruling by filing a Notice of Appeal on April 9, 2012. **Pp1a-b.**

STATEMENT OF ISSUES

A. Whether the District Court erred in ignoring the governing AAA Employment Dispute Resolution Rules to which the parties agreed as a condition to arbitration;

B. Whether the District Court erred in denying the Appellant's motion to vacate, correct or modify the arbitration decision, in applying an elevated level of proof, requiring Appellant to prove actual "evident partiality," rather than "the appearance of evident partiality;"

C. Whether the District Court erred in concluding that the Arbitrator's failure to disclose cash payments to her judicial campaign attributable to a party to the arbitration and professional ties with in-house counsel did not demonstrate any "bias or appearance of bias" sufficient to vacate the arbitration decision;

D. Whether the District Court erred in upholding the validity of an arbitration agreement procured by fraudulent nondisclosures and misleading partial representations.

These issues were raised and preserved by the Appellant in his Motion to Vacate, Correct or Modify the Arbitration Decision and supporting briefs. **Pp5a-s, 9a-f.** The District Court denied the Motion and ruled upon these issues in its Order and Opinion, dated April 9, 2012. **Pp3a, 3g.**

STATEMENT OF THE CASE

In November 11, 2010, Appellant James D. Freeman filed claims for unlawful termination pursuant to the Age Discrimination in Employment Act (ADEA) arising out of his termination by Appellee PPG on July 19, 2008. Appellee PPG employed Mr. Freeman prior to the establishment of Appellee Pittsburgh Glass Works, LLC (hereinafter, "Appellee PGW") and the latter party has assumed responsibility for all preexisting liabilities of PPG, including

Appellant's claim in this action.[1] Appellant sought all available remedies under the statute for his unlawful termination, including, but not limited to, back pay, front pay, liquidated damages, attorneys' fees and costs.

This action was referred to arbitration by the District Court and on December 12, 2011, the Arbitrator found in favor of Appellees, finding no evidence of age discrimination, despite the presentation of considerable evidence of age discrimination at the arbitration hearing. **Pp3a, 5b-e.** Appellant later learned that the Arbitrator had failed to disclose to the parties large contributions to her judicial campaign from constituents of the Appellee PPG, as well as professional ties to senior in-house employment counsel of PPG Industries, Inc., Appellee PPG's parent company. **Pp5e-g, 7b.** Appellant therefore moved to vacate, correct, or modify the arbitration decision. **Pp5a-s, 9a-f.** The District Court denied the motion on April 9, 2012. **Pp3a-g.** This is an appeal from that ruling.

STATEMENT OF RELATED CASES

The present case has not been before this Court previously, and there are no related cases or proceedings currently pending in this or any other jurisdiction.

[1] Appellant refers to Appellees as "PPG" at various times herein, because at all times relevant hereto, Appellant was employed by the Automotive Glass Division of PPG Industries, Inc., Appellee PGW Autoglass, LLC. Appellee PGW Autoglass, LLC was wholly owned by PPG Industries, Inc. at the time of Appellant's termination. Appellee Pittsburgh Glass Works, LLC, was formed after Plaintiff's termination, after his direct employer, PGW Autoglass, LLC was acquired by Kohlberg & Company in October 2008. PPG Industries, Inc., however, retained a forty percent interest in the company even after the acquisition. Thus, PPG and PGW have closely intertwined connections and share a common stake in this case. P5b.

STATEMENT OF FACTS

This employment discrimination action was filed in the District Court for the Western District of Pennsylvania on November 12, 2010 after the filing of EEOC charges on May 27, 2009. At a status conference on August 4, 2011, with the strong encouragement from the District Court, the parties agreed to arbitrate this matter and to select one of three candidates endorsed by the Court, including former state Superior Court Judge Maureen Lally-Green. **Pp5e-f, 7b.** The parties thereafter reached tentative agreement on Lally-Green, and on August 22, 2011 their counsel participated in an initial conference with her. At that time she made the partial disclosure that "you all know that it's a small legal community here" and that she "knew some people at PPG," seeking the parties' consent to retain her as Arbitrator. **Pp5e-f, 7a-b.** However, that was all Lally-Green said about her relationship with PPG. **Pp5e-f, 7a-b.**

Mr. Freeman and his counsel relied upon her partial disclosure, believing that a former appellate court judge and candidate for the Pennsylvania Supreme Court would have disclosed any further material facts regarding her relationship with the parties. **Pp5f, 5l.** In reliance upon that partial disclosure, Freeman and his counsel decided to retain Lally-Green, reasonably assuming that she would act as an unbiased neutral. **Pp5f, 5l.** They reasonably believed that, given her background, she was intimately aware of her fundamental disclosure obligations

about any ties with the parties. **Pp5f, 5l.** Freeman accepted her representation that she merely "knew some people at PPG", and later executed the Agreement to Arbitrate on October 31, 2011, not knowing that there was more to it than that which Lally-Green had represented. **Pp5f, 5l.**

Only after the arbitration decision was rendered did Mr. Freeman and his counsel learn that the Arbitrator had failed entirely to disclose a substantial volume of contributions to her judicial campaign made by PPG, its lawyers, and its executives. **Pp5f, 7a.** Specifically, for the Arbitrator's 2007 Pennsylvania Supreme Court election campaign, Lally-Green received the following contributions from PPG Industries, Inc. and its various constituents:

- A $2,000 contribution by PPG Industries, Inc.
- Two contributions of $500 each by Joseph Mack, PPG's Senior Employment Counsel.
- $500 by James Diggs, PPG's Senior Vice President and General Counsel at the time.
- $500 by Lynne Schmidt, PPG's Vice President of Government and Community Affairs.
- $500 by William Sheehan Ries, PPG's Director of Governmental Affairs. *See* Fox Declaration.

Pp5f, 7b.

It is undisputed that Lally-Green received the contributions and that she failed to disclose them. **P8b.** It is further undisputed that Mr. Freeman and his

counsel found out only after the arbitration proceeding about the various PPG contributions. **Pp8b-c, 9b.** The Appellant also learned that the Arbitrator had undisclosed professional ties to PPG's in-house senior employment counsel, Joseph Mack, and that they had in fact regularly taught employment law seminars together.[2] **Pp5f-5g, 7b.** Such information is clearly relevant to the neutrality of the Arbitrator, and should have been fully disclosed to Mr. Freeman. Those transactions and entanglements between a party to the arbitration and the Arbitrator far exceed the scope of mere familiarity suggested by her representation to the parties—that she merely "knew some people at PPG". **Pp5g, 5p-q.**

The Arbitrator inexplicably omitted to inform Mr. Freeman that she had accepted thousands of dollars in campaign contributions from PPG, its in-house employment lawyers, its general counsel, and its senior executives, and that she also had other professional ties with PPG's employment counsel. **Pp5f-g, 7a-b.** Instead, she seemingly trivialized and concealed her conflict of interest arising from those entanglements. **Pp5f-g.** No intimation was made of her actual, apparently close relationship with PPG. **Pp5f-g, 7b.** Had Appellant or his counsel been aware of such important facts, they would never have consented to her appointment as arbitrator. **Pp5f-g.**

[2] The nondisclosures were even more significant because Appellant's counsel had engaged in past adversarial employment litigation over which PPG senior employment counsel presided, and had even deposed its General Counsel in past adversarial employment litigation.

Appellant therefore moved to vacate the arbitration award under the controlling provision of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10(a), because the Arbitrator was "evidently partial" in rendering the arbitration decision, based upon her deceptive partial representations and her failure to disclose to the parties her actual entanglements with PPG. **Pp5e-j, 5m-s, 9b-d.** Appellant also asserted that the nondisclosures invalidate the underlying Arbitration Agreement, because it was induced by the partial representations and fraudulent omissions. **Pp5j-m, 9d-e.**

However, the District Court summarily denied the Appellant's Motion to Vacate, holding that he had not sufficiently demonstrated evident partiality or the elements of fraudulent inducement, and essentially adopted the arguments made by Appellees in their opposition papers. **Pp3a-g.** This appeal followed.

STANDARD OF REVIEW

The District Court's denial of a motion to vacate an arbitration award is subject to *de novo* review by this Court. *Dluhos v. Strasberg*, 321 F.3d 365, 369 (3d Cir. 2003); *Kaplan v. First Options*, 19 F.3d 1503, 1509 (3d Cir.1994). When deciding questions of law *de novo*, the Panel should not apply an "abuse of discretion" standard. *Id.*

The existence of a valid arbitration agreement is a basic condition precedent for an arbitration decision to be upheld under the Federal Arbitration Act ("FAA").

9 U.S.C.A. §§ 1 et seq. Arbitration agreements may be found unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C.A. § 2; *see Rent-A–Center, West, Inc. v. Jackson*, 130 S.Ct. 2772, 2776 (2010). In deciding whether there was a valid arbitration agreement between Mr. Freeman and PGW, under controlling Supreme Court authority, the court "should apply ordinary state-law principles governing contract formation in deciding whether such an agreement exists." *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 939 (1995). As the Supreme Court noted in *First Options* "arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes--but only those Even assuming, *arguendo*, that a valid arbitration agreement exists, courts are "neither entitled nor encouraged simply to 'rubber stamp' the interpretations and decisions of arbitrators," as did the District Court in this matter. *Metromedia Energy, Inc. v. Enserch Energy Services.*, 409 F.3d 574, 579 (3d Cir. 2006). *See also, Matteson v. Ryder Sys., Inc.*, 99 F.3d 108, 113 (3d Cir. 1996) (acknowledging that "[c]ourts still maintain a significant role in the . . . arbitration process; they have not been relegated to the status of merely offering post-hoc sanction for the actions of arbitrators)." Under the FAA, an arbitration decision may be vacated if there was "any evident partiality or corruption in the arbitrators, or either of them . . . ." 9 U.S.C. § 10(a).

SUMMARY OF THE ARGUMENT

The simple premise of this appeal is that the Arbitrator not only failed to disclose her ties to and campaign contributions from a party, but that she affirmatively misled Appellant and his counsel about the nature and importance of those ties. The District Court thus erred in denying Appellant's Motion to Vacate because the governing AAA Employment Dispute Resolution Rules to which the parties agreed as a condition of arbitration preclude such conduct, the agreement to arbitrate that led to the award was fraudulently induced, and the award itself is defective because of the Arbitrator's evident partiality. The District Court erred in effectively requiring Appellant to prove actual bias rather than a mere appearance of bias, the test established by the Supreme Court for instances where an arbitrator fails to disclose dealings that might create an impression of possible bias. Furthermore, even if Appellant was required to prove actual bias, which he was not, he proffered sufficient evidence of bias to meet this more stringent standard. Lastly, the trial court improperly framed the issue, weighing evidence of possible bias for both parties against each other. The fact that the Arbitrator also failed to disclose campaign contributions from Appellant's counsel's law firm compounds–not negates–the appearance of impartiality. The award therefore must be vacated.

ARGUMENT

Impartiality and the appearance of impartiality in a judicial officer are the sine qua non *of the American legal system.*

—Lewis v. Curtis, 671 F.2d 779 (3d Cir. 1982)

We should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free reign to decide the law as well as the facts and are not subject to appellate review.

— *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 149 (1968)

I. The District Court erred in ignoring the governing AAA Employment Dispute Resolution Rules to which the parties agreed as a condition to arbitration.

Pursuant to the parties' Arbitration Agreement and the court order regarding the Arbitration, the AAA Employment Dispute Resolution Rules govern the arbitration procedure in this case and are controlling of the issues on appeal. **Pp5q, 6a.** AAA Employment Arbitration Rules and Mediation Procedures, § 12b(ii) requires as follows: "[n]eutral arbitrators serving under these rules shall have no personal or financial interest in the results of the proceeding in which they are appointed and shall have no relation to the underlying dispute or to the parties or their counsel that may create an appearance of bias." **Pp5q-5r.** Such a violation in itself is sufficient to create an appearance of bias to vacate the arbitration decision. *See, e.g., Forest Elec. Corp. v. HCB Contractors*, 1994 WL 37586, *3 (E.D. Pa. 1995); *Schmitz v. Zilveti*, 20 F.3d 1043, 1047 (9th Cir. 1994) (vacating arbitration award where arbitrator failed to disclose that his law firm had represented the

parent company of a party in multiple cases); *Burlington Northern Railroad Co. v. TUCO, Inc*., 960 S.W.2d 629, 636 (Tex.1997) ("evident partiality is established from the nondisclosure itself, regardless of whether the undisclosed information necessarily establishes partiality or bias"); *Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 51 F.3d 157 (8th Cir. 1995) (vacating arbitration award where arbitrator failed to disclose business relationship between his company and respondent investment firm). **Pp5q-5s.**

The parties freely contracted to the AAA Employment Dispute Resolution Rules as a condition to arbitration and are thus bound by them. An individual cannot be compelled to arbitrate unless "'he or she is bound by that agreement under traditional principles of contract and agency law.'" *E.I. DuPont de Nemours and Co. v. Rhone Poulenc Fiber and Resin Intermediates, S.A.S.*, 269 F.3d 187, 194–95 (3d Cir.2001). **P5j.** "(A)rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960); *Granite Rock Co. v. International Broth. of Teamsters*,130 S.Ct. 2847, 2856 (2010). **P5j.** The District Court unaccountably failed to even address the impact of Judge Lally-Green's failure to make the disclosures required by § 12b(ii) of the AAA Rules. Arbitrators were required by AAA rules to disclose any "personal or financial interest in the results of the proceeding in which they are

appointed and shall have no relation to the underlying dispute or to the parties or their counsel that *may create an appearance of bias*." AAA Employment Arbitration Rules and Mediation Procedures, §§ 9, 12b(ii) (emphasis added); *see also* Cannon II of the AAA's Code of Ethics for Commercial Arbitrators (an arbitrator must disclose "*any* existing or past financial, business, professional …relationships which are *likely to affect partiality or which might reasonably create an appearance of partiality or bias*")(emphasis added). The District Court's refusal to vacate the award must therefore be reversed on this simple contractual basis alone. While this Court need look no further than § 12b(ii) in order to grant Appellant the requested relief, the arguments which follow represent additional independent challenges to the District Court's ruling.

II. The District Court erred in applying an elevated level of proof to require Appellant to prove actual "evident partiality," rather than the appearance of "evident partiality".

The District Court also erred as a matter of law in effectively requiring the Appellant to prove "actual bias" to vacate the arbitration decision under the "evident partiality" standard. The appropriate standard in determining whether an arbitration decision should be vacated in a failure to disclose case is the "appearance of bias" standard. **Pp5m-q.** As the Supreme Court admonished the lower court in *Commonwealth Coatings Corp. v. Continental Casualty Co.,* 393 U.S. 145 (1968), an arbitration decision should be vacated whenever an arbitrator

fails to "disclose to the parties any dealings that *might* create an *impression* of *possible* bias." *Id. at 149* (emphasis added). **Pp5m- 5n.** The Supreme Court has not retreated from this position in any subsequent rulings involving the FAA and it remains controlling law. Judge Lally-Green's conduct clearly fell short of meeting this standard.

However, the District Court found that in order to establish "evident partiality" in a failure to disclose case, the movant must demonstrate that "a reasonable person would have concluded that the arbitrator *was* partial to the opposing party at the arbitration." **Pp3c-d.** The District Court, giving only lip service to the appearance of bias standard, denied the Appellant's motion to vacate simply because it was "confident that no bias or appearance of bias existed in favor of either party." **P3g.**

The District Court's recitation of the standard implies that a showing of actual partiality is required, and is not reconcilable with the test established by the Supreme Court in *Commonwealth Coatings*, which requires only a determination that the undisclosed prior dealings "*might* create an *impression* of *possible* bias." *Commmonwealth Coatings*, 393 U.S. at 149 (emphasis supplied). *Commonwealth*

Coatings plainly espoused an appearance of bias test for evident partiality in any failure to disclose case.[3] **Pp5m- 5n.**

Therefore, the "actual bias" standard only applies if the alleged bias stems from something other than non-disclosure. In discussing §10(a)(2), the *Commonwealth Coatings* Court stated:

> [A]ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias. We cannot believe that it was the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another.
> *Commmonwealth Coatings*, 393 U.S. at 149.

P5m. An arbitrator has a duty "to disclose to the parties any dealings that might create an impression of possible bias." *Id.* at 146. As the Court held in

[3] See also *Crow Constr. v. Jeffrey M. Brown Assoc. Inc.*, 264 F. Supp. 2d 217, 220-24 (E.D. Pa. 2003) (endorsing the "appearance of bias" standard in failure to disclose cases); *Colavito v. Hockmeyer Equipment Corp.*, 605 F. Supp. 1482, 1488 (S.D.N.Y. 1985) (holding that no actual bias is required; rather, "evident partiality" can be found where a "reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration."); *Morelite Constr. Corp. v. New York City District Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984) (proof of actual bias not required; "evident partiality" is found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration).

In *Crow Construction Co.*, the court found that an arbitrator's failure to disclose her role in a mediation with one of the parties created the appearance of bias. In addition, the court also found that an arbitrator's failure to disclose that he had previously been a private, paid arbitrator for one of the parties' law firms created the appearance of bias. *Crow Constr.*, 264 F. Supp. 2d at 220-224. *See also New Regency Productions, Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101 (9th Cir. 2007) (holding that the arbitrator's failure to disclose the conflict of interest as executive officer of film group doing more than trivial business of negotiating to finance film developed by party to arbitration demonstrated "evident partiality"); *Morelite Constr. Corp.*, 748 F.2d at 84 (vacated arbitration award because the arbitrator failed to disclose that he was the son of the vice president of the international union to which the local union involved in the arbitration belonged).

Commonwealth Coatings, a failure to disclose case, “we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free reign to decide the law as well as the facts and are not subject to appellate review.” *Id.* at 149. **Pp5m-n.** The Court found that despite the relationship between the arbitrator and one of the parties being "sporadic" in that the arbitrator's services were used only from time to time at irregular intervals, and that "there had been no dealing between them for about a year immediately preceding the arbitration," the Supreme Court vacated the award because the arbitrator failed to disclose its relationship with one of the parties. *Id.* at 146. **Pp5m-n.** The court acknowledged that while one could not expect arbitrators to sever all ties with the business world, those ties should be disclosed, and stated "we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the laws as well as the facts and are not subject to appellate review." *Id.* at 148-49. **Pp5m-n.** The arbitrators must “not only must be unbiased but also must avoid even the appearance of bias.” *Id.* at 150. **Pp5m-n.**

The “actual bias” standard evolved from cases where nondisclosure was not at issue. *Crow Constr.*, 264 F. Supp. 2d at 220-224. Rather, in the line of cases applying an “actual bias” standard, the parties had little or no input into the arbitrator selection process, and focused on challenging the performance of the

arbitrators during the arbitration process. *Id.* For example, *Kaplan* did not involve nondisclosure as the basis for a finding of evident partiality. Rather, the parties in *Kaplan* based their showing of evident partiality on the performance of the arbitrators during the arbitration process. The Third Circuit rejected this argument–citing to the actual bias standard in a footnote at the end of its opinion without any explanation, and relying exclusively on a single sentence taken from the Sixth Circuit's decision in *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1358 (6th Cir. 1989). *Apperson* in turn directly cites the Second Circuit's decision in *Morelite Constr. Corp. v. New York City District Counsel Carpenters Benefit Funds*, 748 F.2d 79 (2d Cir. 1984). *Morelite* is not a nondisclosure case. In *Morelite*, the facts giving rise to the alleged impropriety were fully disclosed to all parties involved at the outset of the arbitration. 748 F.2d at 81. In *Morelite* the parties did not really have a selective choice of arbitrator, because the selection was based on a collective bargaining agreement, which designated a single neutral arbitrator without participation of the parties.

By contrast, the less burdensome "appearance of bias" standard should be applied in the present case–which involves a failure to disclose as well as a partial disclosure–where the arbitrator failed to disclose information which might create a reasonable impression of the arbitrator's partiality. Courts in this district, the Eighth and Ninth Circuits, and the Supreme Court of Texas have found the

Commonwealth Coatings appearance of bias standard to be persuasive and applicable. *See, e.g., Crow Constr.*, 264 F. Supp. 2d at 222-223, *Forest Elec. Corp. v. HCB Contractors*, 1994 WL 37586, *3 (E.D. Pa. 1995); *Schmitz v. Zilveti*, 20 F.3d 1043, 1047 (9th Cir. 1994) (vacating arbitration award where arbitrator failed to disclose that his law firm had represented the parent company of a party in multiple cases); *Burlington Northern Railroad Co. v. TUCO, Inc.*, 960 S.W.2d 629, 636 (Tex.1997) ("evident partiality is established from the nondisclosure itself, regardless of whether the undisclosed information necessarily establishes partiality or bias"); *Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 51 F.3d 157 (8th Cir. 1995) (vacating arbitration award where arbitrator failed to disclose business relationship between his company and respondent investment firm).

For example, in *Crow Constr.*, supra, another non-disclosure case, the plaintiff petitioned to vacate an arbitration award where one member of a an arbitration tribunal failed to disclose her role as a mediator in a case involving the respondent, and a second arbitrator failed to disclose his private dealings with respondent's counsel, who had hired him as an arbitrator in the past. See *Crow Constr.*, 264 F. Supp. 2d at 224. The district court found that the arbitrator were required by the governing American Arbitration Association rules to disclose "any existing or past financial, business, professional …relationships which are likely to affect partiality or which might reasonably create an appearance of partiality or

bias." *Id.* (citing Cannon II of the AAA's Code of Ethics for Commercial Arbitrators) ("Certainly any time money changes hands directly between an arbitrator and a representative of one of the parties involved in a pending arbitration before that arbitrator, disclosure must take place") (emphasis added). The *Crow* decision, along with the Supreme Court's opinion in Commonwealth Coatings, emphasizes that:

> The parties are the best judge of bias and in order to be able to choose intelligently they must be made aware of all the facts showing potential partiality. *Commonwealth Coatings*, 393 U.S. at 148. Thus, when an arbitrator is selected by the parties after having failed to disclose a fact which may create the appearance of bias, the selection process is prone to failure.
>
> *Crow Constr*., 264 F. Supp. 2d at 222 (emphasis added).

See also Schmitz, 20 F.3d at 1047 ("In an actual bias case, a court must find actual bias. Finding a 'reasonable impression' of partiality is not equivalent to, nor does it imply, a finding of actual bias. Otherwise, the *Commonwealth Coatings* court could not have held that a reasonable impression of partiality was present when no actual bias was shown.").

Therefore, the district court erred as a matter of a law in applying an elevated level of proof to require Appellant to prove actual "evident partiality," rather than the appearance of "evident partiality" in this non-disclosure/partial disclosure case. The lower court's opinion that the Arbitrator's bias was offset by the campaign contributions of the Appellant's law firm entirely missed the point,

as will be dealt with more fully later herein. The arbitrator has the duty to disclose all the possible connections, not only her contributions by PPG, as well as the contributions by the Appellant's law firm, so that the parties would be afforded the actual opportunity to make an informed decision on her selection to serve as the arbitrator. Her failure to do so renders her decision void, and the District Court's decision should be reversed.

III. The District Court erred in concluding that the Arbitrator's failure to disclose does not demonstrate "any bias or appearance of bias" sufficient to vacate the arbitration decision.

Even assuming, *arguendo*, that "actual bias" is the correct standard for application in a failure to disclose case, Appellant has produced sufficient evidence demonstrating actual bias. The pervasive contributions from PPG and its agents clearly compromised the appearance of the neutrality of the Arbitrator. The fact that the Arbitrator, who was an appellate court judge for many years, failed to disclose the fact that she received significant political contributions from PPG, its senior counsel and its management, is sufficient grounds for vacating the award, especially when considered with her downplaying of her ties to PPG, representing to Mr. Freeman's counsel that she merely "knew some people" at PPG. **Pp5n-q.** A reasonable person could clearly determine from such omissions that the Arbitrator was partial to PPG. *Oran v. Stafford*, 226 F.3d 275, 285-86 (3d Cir. 2000) (duty to disclose may arise when there is an inaccurate, incomplete or misleading prior

disclosure); *See also Glazer v. Formica Corp.*, 964 F.2d 149, 157 (2d Cir.1992) (same); *Backman v. Polaroid Corp.*, 910 F.2d 10, 12 (1st Cir.1990) (en banc) (same); *In re General Motors Class E Stock Buyout Sec. Litig*., 694 F.Supp. 1119, 1129 (D.Del.1988) (same).

Moreover, the Arbitrator is a former appellate judge and Pennsylvania Supreme Court candidate–not the typical practicing lawyer who is selected to be an arbitrator–and is someone that a reasonable person would expect to be cognizant of the rules of judicial ethics and who would adhere to them. **Pp9a-b.** These circumstances are "powerfully suggestive of bias" and create a reasonable impression of partiality, under a "reasonable person" standard, requiring vacatur. *See Schmitz v. Zilvetti, 20 F.3d 1043, 1046 (9th Cir. 1994; Sheet Metal Workers Int'l Assoc. v. Kinney Air Cond. Co*., 756 F.2d 742, 746 (9th Cir. 1985); *Morelite Construction v. New York City District Council Carpenter's Benefit Funds*, 748 F.2d 79, 82-84 (2d Cir. 1984).

IV. The District Court erred in upholding the validity of an arbitration agreement procured by fraudulent nondisclosure.

Under a contract governed by the Federal Arbitration Act (FAA), a district court is authorized to determine the validity of an arbitration agreement if a claim is made of fraud in the inducement of the arbitration clause itself (an issue which goes to the "making" of the agreement to arbitrate). **P5i.** As the Supreme Court has pronounced, while Congress intended to make arbitration agreements as

enforceable as other contracts, it did not intend to make them any more so. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). **P5i.** To immunize an arbitration agreement from judicial challenge on the ground of fraud in the inducement would be to elevate it over other forms of contract—an outcome entirely inconsistent with the intention of Congress. *Id.*[4] **P5i.**

Courts have long recognized fraudulent inducement as a separate, stand-alone basis for invalidation of a contract. **Pp5j-l.** As "an agreement to arbitrate a gateway issue is simply an additional antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this

[4] The existence of a valid arbitration agreement is a basic requirement of and condition precedent for an arbitration decision to be held valid under the FAA. 9 U.S.C.A. §§ 1 et seq. Arbitration provisions may be denied enforcement "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C.A. § 2 (emphasis added); *see Rent-A–Center, West, Inc. v. Jackson*, 130 S.Ct. 2772, 2776 (2010). While courts generally give deference to arbitration decisions, the Supreme Court has made clear, nonetheless, that there is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate. *See Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989)). Indeed, the FAA does not require parties to arbitrate where they have not agreed to do so, nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement; rather, the Act simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms. *Id.* Therefore, the existence of an agreement to arbitrate is a condition precedent to enforcement. An individual cannot be compelled to arbitrate unless "'he or she is bound by that agreement under traditional principles of contract and agency law.'" *E.I. DuPont de Nemours and Co. v. Rhone Poulenc Fiber and Resin Intermediates, S.A.S.*, 269 F.3d 187, 194–95 (3d Cir.2001). "(A)rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960); *Granite Rock Co. v. International Broth. of Teamsters*,130 S.Ct. 2847, 2856 (2010). Generally applicable contract defenses, such as fraud, duress or unconscionability may be applied to invalidate arbitration agreements. Doctor's *Assocs., Inc. v. Casarotto*, 517 US 681, 687 (1996).

additional arbitration agreement just as it does on any other," an arbitration agreement is valid "save upon such grounds as exist at law or in equity for the revocation of any contract." *Rent-A-Center, West, Inc.*,130 S.Ct. at 2776. If the arbitration contract was induced by fraud, there can be no arbitration, and if the party charging fraud shows there is substance to the charge, there must be a judicial trial. *Robert Lawrence Company v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959); *Dougherty v. Mieczkowski*, 661 F. Supp. 267 (D. Del. 1987); *Coleman v. National Movie-Dine, Inc.*, 449 F. Supp. 945 (E.D. Pa. 1978). **Pp5j-l.**

Fraudulent inducement occurs when there are false representations or omissions of a material fact which have been communicated to the aggrieved party during the negotiations leading up to a contractual agreement, the false representations have been made knowingly and recklessly by deceiving the other party, and the aggrieved party reasonably relied upon the false representations or omissions in agreeing to the contract. *See e.g., Taylor Woodrow Homes Florida, Inc. v. 4/46-A Corp.*, 850 So. 2d 536 (Fla. 2003); *In re Enron Corp. Securities, Derivative & ERISA Litigation*, 761 F. Supp. 2d 504 (S.D. Tex. 2011). **Pp5j-l.** A contract based on fraudulent inducement is voidable and unenforceable. *See Frank Lloyd Wright Foundation v. Kroeter*, 697 F. Supp. 2d 1118 (D. Ariz. 2010) (a misrepresentation renders a contract voidable if it induces the other party to enter into the contract and the induced party is justified in relying on it); *NPS, LLC v.*

Ambac Assur. Corp., 706 F. Supp. 2d 162 (D. Mass. 2010) (the contract is voidable if a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying). **Pp5j-l.** The law does not favor the enforcement of any contract induced by deceit, and since there cannot be said to have been a meeting of the minds where one of the minds was clouded by fraudulent representations or omissions, the aggrieved party may avoid the contract. *Id.* **Pp5j-l.**

The Arbitration Agreement in the present action is void and unenforceable because it was based on the false and misleading representations and omissions of the Arbitrator prior to the parties' agreement to arbitrate this case, as discussed above. Therefore, the Arbitration Agreement is based on fraudulent inducement and the arbitration decision should be vacated.

V. The District Court erred in its conclusion that contributions by Appellant's law firm "offset" the effect of the Arbitrator's nondisclosures of her contributions by PPG.

The District Court improperly focused on the relative amounts of contributions to the Arbitrator's Pennsylvania Supreme Court campaign by PPG parties, on the one hand, and by Appellant's counsel's law firm, Obermayer Rebmann Maxwell & Hippel, LLP, and certain of its partners, on the other, holding that the latter payments somehow are "competing contributions" which "offset" the

effect of her nondisclosure of the PPG contributions.[5] **P3d.** This line of reasoning wholly misses the point, as the Arbitrator's failure to disclose the Obermayer contributions compounds the problem, rather than negates it. A failure to disclose evident partiality cannot be cured by the existence of apparent ties to both parties to an arbitration. Instead, the Arbitrator had an affirmative obligation to disclose any ties she had to *either* party that could lead a reasonable person to question her impartiality. **Pp5q-r.** Her failure to disclose the PPG campaign contributions, as well as her apparent close relationship with PPG's agents, could lead a reasonable person to the conclusion that she was not acting as an impartial neutral sufficient to permit vacating the award. **Pp5r-s.** Likewise, had the Arbitrator found for Appellant, Appellees might well have had an argument for vacating the award based on her failure to disclose the Obermayer contributions.

Moreover, a critical distinction is that Obermayer is not a party to this action, but merely counsel for the Appellant. **Pp9c-d.** The District Court's reasoning is flawed because the PPG contributions came directly from a party, while Obermayer's contributions came not from Appellant Freeman, but from his law firm and certain of its lawyers. Freeman himself never contributed any amount to Judge Lally-Green's campaigns. Additionally, Obermayer also generously contributed to Judge Lally-Green's opponents, and it is hardly

surprising that a law firm with over 100 lawyers practicing in Pennsylvania would make a substantial donation to the campaign of a candidate running for Justice of the Supreme Court of that Commonwealth. Such contributions by law firms are common place. By contrast, the facts are powerfully suggestive of a close relationship between Lally-Green and the PPG constituents. Campaign contribution records show that among all candidates who were running for the Pennsylvania Supreme Court campaign in 2007, PPG and its agents made targeted contributions based on their actual alliances with the Arbitrator, as demonstrated by the fact there is no record of any contributions by them to any of the other competing candidates.[6] **Pp9c-d.** In contrast, Obermayer made large symmetrical contributions to the competing candidates running in the same campaign who opposed the Arbitrator. The District Court's dismissal of this evidence and weighing of the relative level of contributions by Obermayer and the PPG constituents compounds its error.

CONCLUSION

For the reasons set forth herein, Appellant respectfully requests that this Court reverse the Order of the District Court, vacate the underlying arbitration decision, and remand this matter for further proceedings.

[6] These contributions included $10,000 to Debra Todd, the Democratic candidate who won, and $5,000 to Seamus McCaffrey, another Democratic Candidate who also won a seat on the Pennsylvania Supreme Court, as well as another $15,500 to the remaining candidates in both parties. *Id.*

Respectfully submitted,

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Dated: August 1, 2012

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am admitted to practice before both the United States District Court for the Western District of Pennsylvania and the United States Court of Appeals for the Third Circuit.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

This brief complies with the type-volume limitation of Fed. R. App. P 28.1(e)(2)(B)(i) because this brief contains less than 30 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typefaced requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word Version 2010 in Times New Roman, Font 14.

Date: August 1, 2012

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CERTIFICATE OF IDENTICAL COMPLIANCE OF BRIEFS

Bruce C. Fox, Attorney for Appellants, hereby certifies that the text of the electronically filed Brief and hard copies of Appellants' Brief served upon the Court are identical.

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CERTIFICATE OF VIRUS CHECK

Bruce C. Fox, Attorney for Appellants, hereby certifies that he has performed a virus check of the electronically filed Brief, using Symantec Endpoint Protection 11.0.5002.333.

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I hereby certify that I have on this 1st day of August, 2012, electronically filed the herein *Appellants' Brief and Appendix Volume I* with the Court and Federal Express on 08/01/2012. I have also served counsel via electronic mail (on 08/01/2012), addressed as follows:

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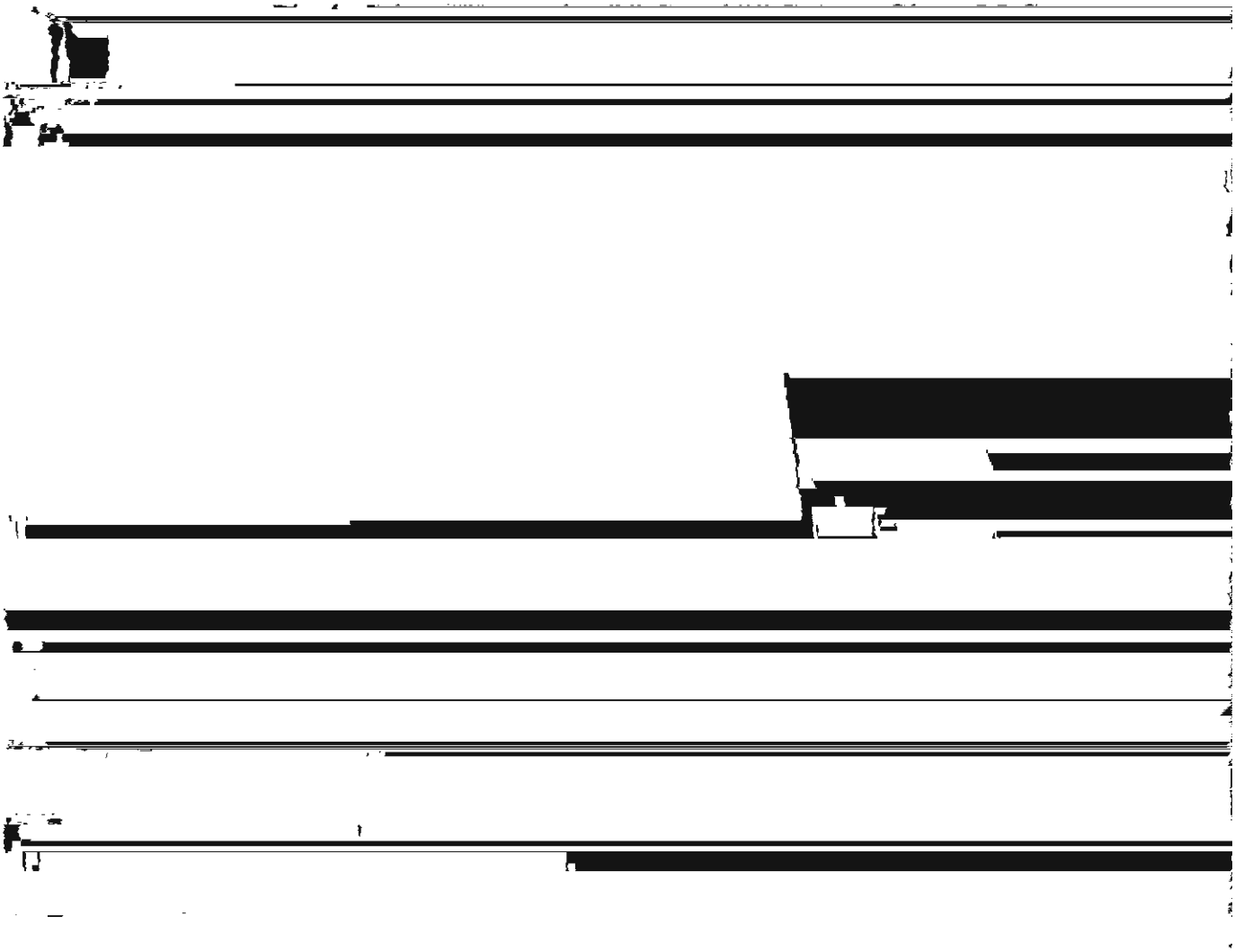
IN THE UNITED STATES DISTRICT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 12-2026

JAMES D. FREEMAN,

Appellants,

v.



On Appeal from the United States District Court
For the Western District of Pennsylvania
Case No. 10-1515

APPELLANTS' APPENDIX

JOINT APPENDIX
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Volume I

IN UNITED STATES DISTRICT COURT
FOR WESTERN DISTRICT OF PENNSYLVANIA

JAMES D. FREEMAN,	)	
	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 10-1515**
	)	
PGW AUTO GLASS, LLC, and PITTSBURGH GLASS WORKS, LLC,	)	
	)	**NOTICE OF APPEAL**
	)	
	)	
Defendants.	)	
	)	

NOTICE OF APPEAL

Notice is hereby given that James D. Freeman ("Freeman"), Plaintiff in the above-captioned case, hereby appeals to the United States Court of Appeals for the Third Circuit from an order entered in this action on the 9th day of April, 2012, denying Plaintiff's Motion to Vacate, Modify, or Correct Arbitration Decision.

Respectfully Submitted,

OBERMAYER REBMANN MAXWELL & HIPPEL LLP

Date: April 9, 2012

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

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	)	
	)	
Defendants.	)	
	)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 4th day of April, 2012, a copy of this *Notice of Appeal* was served via electronic mail as follows:

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