

2010

Westgate Resorts v. Shaun S. Adel and Consumer Protection Group, LLC : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

WESTGATE RESORTS, LTD.,

Plaintiff/Appellee,

v.

SHAUN S. ADEL and CONSUMER
PROTECTION GROUP, LLC,

Defendants/Appellant.

No. 20101017-SC

On appeal from the Fourth
Judicial District Court, Utah
County, Honorable Lynn Davis,
District Court Case No. 020404068

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UTAH APPELLATE COURTS

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Jurisdiction

The court does not have jurisdiction for reasons explained in this brief.

Statement of the Issues

This appeal presents two distinct sets of issues. The first concerns a threshold jurisdictional issue as to whether CPG's failure to file a timely notice of appeal precludes appellate jurisdiction. The second concerns whether courts may vacate arbitration awards when a neutral arbitrator fails to disclose a first-cousin relationship with a partner at a law firm representing a party.

I.

The jurisdictional issue arises because CPG appeals from a combined order (i) denying its motion to confirm an arbitration award and (ii) granting Westgate's motion to vacate that award. Utah Code section 78B-11-129(1)(c) provides a statutory right to appeal an order denying a motion to confirm an arbitration award. Thus, if the district court had denied CPG's motion to confirm the award in a separate order, there is no question that CPG would have had an appeal of right. But the order also vacates the award and directs a rehearing, a type of order that is not listed as appealable under section 78B-11-129(1). In CPG's view, coupling the order vacating the award with the order denying confirmation strips CPG of its right to appeal the denial of its motion to confirm.

Issue 1: Whether an order denying a motion to confirm an arbitration award, but also granting a motion to vacate that same award with a rehearing, is an appealable order under the Utah Uniform Arbitration Act, where that Act

provides for an appeal of right from an order denying a motion to confirm an award but is silent on whether orders vacating awards with a rehearing may be appealed as a matter of right.

Standard of Review: The court reviews the interpretation of a statute for correctness. Rushton v. Salt Lake County, 1999 UT 36, ¶ 17, 977 P.2d 1201.

II.

Under Rule 4(a) of the Utah Rules of Appellate Procedure, a party exercising an appeal of right must file a notice of appeal in the district court within 30 days. Appellate courts cannot suspend that requirement. Utah R. App. P. 2. It is undisputed that CPG did not file a notice of appeal in the district court within 30 days. Instead, it filed a Rule 5 petition in this court, even though Utah law established a right to appeal from the type of combined order at issue here. Hicks v. UBS Fin. Servs., 2010 UT App 26, ¶¶ 15-17, 226 P.3d 762.

Issue 2: Whether a party satisfies Rule 4(a)'s jurisdictional requirement by filing a Rule 5 petition in an appellate court, where Utah law provides an appeal of right and the rules of appellate procedure do not allow suspension of Rule 4(a)'s requirement that a notice of appeal be filed in the district court within 30 days.

Standard of Review: Subject matter jurisdiction presents a question of law. Ameritemps, Inc. v. Utah Labor Comm'n, 2007 UT 8, ¶ 6, 152 P.3d 298.

III.

On the merits, the district court denied CPG's motion to confirm because arbitrator Richard Burbidge had failed to disclose his first-cousin relationship

with George Burbidge, a shareholder at Christensen & Jensen, the law firm representing CPG. Under section 78B-11-113(5), when a neutral arbitrator fails to disclose a “known, existing, and substantial relationship,” the arbitrator is presumed to have acted with partiality and the award must be vacated. The Manual for Commercial Arbitrators published by the AAA describes a second-cousin relationship as warranting vacatur. In the district court, CPG attempted to rebut that presumption with an affidavit from attorney Burbidge about the nature of his relationship with arbitrator Burbidge, but provided no evidence from arbitrator Burbidge concerning whether he acted with partiality.

Issue 3: Whether a statutory presumption that an arbitrator acted with partiality may be rebutted with evidence from a third party concerning the arbitrator’s relationship with counsel, where there is no evidence concerning whether the arbitrator acted with partiality.

Standard of Review: The court reviews the interpretation of a statute for correctness. Rushton v. Salt Lake County, 1999 UT 36, ¶ 17, 977 P.2d 1201.

Independent of the statutory presumption, section 78B-11-113(4) provides that a district court “may vacate an award” when an arbitrator fails to disclose an existing relationship with counsel, substantial or otherwise.

Issue 4: Whether district courts have discretion to vacate arbitration awards where a neutral arbitrator fails to disclose an existing first-cousin relationship with a shareholder at a law firm representing one of the parties.

Standard of Review: The district court's exercise of its permissive grant of authority to vacate an award is reviewed for an abuse of discretion. Paul deGroot Bldg. Servs., L.L.C. v. Gallacher, 2005 UT 20, ¶ 22, 112 P.3d 490 (“[B]y selecting the word ‘may’ to describe the authority of the trial court, the legislature clearly signaled an intention to yield discretion to courts.”).

V.

Westgate did not investigate the veracity of arbitrator Burbidge's disclosures and did not object to his relationship with attorney Burbidge until Westgate first learned of that relationship after the arbitration. Section 78B-11-113(1) does not impose a duty to disclose on potential arbitrators.

Issue 5: Whether a party waives the right to have an arbitration award vacated where the party raises the issue after the panel issues its award, but the party first learned of the panel member's substantial relationship with the other party's law firm only after the panel had issued its award.

Standard of Review: Waiver presents “mixed questions of law and fact and this court therefore grants broadened discretion to the trial court's findings.” Chen v. Stewart, 2004 UT 82, ¶ 23, 100 P.3d 1177.

Determinative Provisions

Determinative provisions are at Addendum B.

Statement of the Case

I. Nature of the Case, Course of Proceedings, and Disposition Below

On October 27, 2008, the district court compelled CPG to submit to arbitration its claims against Westgate arising under the Utah Pattern of Unlawful Activities Act (the “UPUAA”). (R. 4607, 4713-18.) While the district court case also involves other claims against Westgate, only those UPUAA claims sent to arbitration are relevant to this appeal.

The order compelling arbitration required each party to select an arbitrator and those two arbitrators to select a third arbitrator. (Id.) Westgate selected Judith Billings, CPG selected Richard Burbidge, and those two arbitrators selected Paul Felt. (R. 5954.) The panel held hearings in December and January 2009, after which the panel entered an award in favor of some claimants for \$65,500. (R. 5935-47.) CPG moved the arbitration panel for an award of attorney fees in the amount of \$1,195,174.07. (R. 5870.) CPG separately moved the district court to confirm the arbitration award. (R. 5797-66.)

After the panel entered its award in favor of CPG, Westgate became aware that arbitrator Burbidge had a first-cousin relationship with George Burbidge, a shareholder at Christensen & Jensen, the law firm representing CPG under a contingent fee agreement. (R. 5907, 6049-50.) Westgate moved to vacate the arbitration award based on that relationship. (R. 5909.) On December 13, 2010, the district court, in a single order, both granted Westgate’s motion to vacate and denied CPG’s motion to confirm the arbitration award. (R. 6157-58.) The parties

agree that the district court's order also directs a rehearing of CPG's claims. (Addendum C at 8; AOB at 13-14.)

CPG petitioned this court under Rule 5 of the Utah Rules of Appellate Procedure for review of the district court's order as though it were an interlocutory order. (Addendum D.) CPG did not file a notice of appeal in the district court. Nor did it file any other paper indicating it was exercising its right to appeal the order under the Utah Uniform Arbitration Act. (Addendum E.)

This court provisionally granted CPG's petition for interlocutory review and requested that the parties address two preliminary questions: (i) whether the order was subject to direct appeal pursuant to Utah Code section 78B-1-129 or otherwise constituted a final judgment for purposes of appeal; and (ii) whether this court has jurisdiction to review the order under Rule 5. (Addendum A.) Despite the court's expressed concerns over jurisdiction, CPG moved for summary reversal of the district court's order. (Addendum F.) The court deferred ruling on CPG's motion until plenary briefing on the merits. (Addendum G.) This is that briefing.

II. Statement of Facts

This case began in 2002 with Westgate's filing a claim against Shaun Adel, a former employee. Westgate alleged that Mr. Adel had misappropriated Westgate records for the purpose of contacting Westgate's potential customers and persuading them to assign to CPG consumer protection claims which CPG could collectively prosecute against Westgate. (R. 7-8.) CPG then filed various

counterclaims on behalf of prospective Westgate customers alleging, among other things, that Westgate fraudulently induced them to attend sales presentations by offering incentives (such as a gift certificate to a local mall or a certificate that could be exchanged for a trip) that allegedly were not as valuable as Westgate had represented. In March 2005, CPG amended its counterclaims to allege that the same conduct also violated the UPUAA. (R. 2755.)

Later, pursuant to a statutory arbitration provision, Westgate moved to compel arbitration of the UPUAA claims. On October 27, 2008, the district court granted Westgate's motion, while leaving CPG's other counterclaims in the district court. (R. 4713-18.) The order instructed each party to select one arbitrator and then required those two party-appointed arbitrators to select a third arbitrator. (R. 4718.) Westgate selected retired judge Judith Billings and CPG selected Richard D. Burbidge. Judge Billings and arbitrator Burbidge then selected Paul Felt as the third arbitrator. (R. 5954.)

After the arbitrators were selected, but prior to the arbitration hearing, the arbitration panel prepared an "Arbitration Fee Agreement" for the parties, which recited that all the arbitrators considered themselves neutral. (R. 5831.) On February 2, 2010, after a week-long arbitration proceeding, the panel entered its Findings of Fact, Conclusions of Law, and Award. (R. 5935-47.) In the award, the panel found Westgate's conduct to be in violation of the UPUAA and concluded that, of the 208 claims presented by CPG, 131 claimants had been injured by Westgate's conduct. The panel found that each of the injured

claimants had been damaged in the amount of \$500. (R. 5940.) The panel awarded CPG \$65,500 with interest at the legal rate from October 23, 2003. (R. 5937.) Following the panel's entry of the award, CPG moved the arbitration panel for an award of nearly \$1.2 million in attorney fees. (R. 5870.)

On March 30, 2010, Westgate learned that arbitrator Burbidge is a first cousin of attorney George W. Burbidge II, a shareholder of Christensen & Jensen, P.C. (the law firm representing CPG in this case). (R. 6048-50.) That familial relationship was not disclosed to the parties by arbitrator Burbidge at any time prior to or during the arbitration proceeding. (R. 5907.) Christensen & Jensen certainly was aware of the relationship but also neglected to disclose it to Westgate even though George Burbidge as a shareholder likely would benefit from any contingent fee recovery. (R. 5905-07.)

On December 13, 2010, the district court entered an order vacating the arbitration award. (R. 6157-58.) In its related ruling, the court concluded that the first-cousin relationship between arbitrator Burbidge and attorney Burbidge should have been disclosed to Westgate before the arbitration because a reasonable person would consider that relationship likely to affect the impartiality of the arbitrator. (R. 6134.) The court also concluded that, because arbitrator Burbidge acted as a neutral arbitrator, his failure to disclose this relationship gave rise to a presumption, under Utah Code section 78B-11-113(5), that he acted with evident partiality. (Id.)

Summary of the Argument

This court lacks jurisdiction to review the district court's combined order (i) denying CPG's motion to confirm an arbitration award and (ii) granting Westgate's motion to vacate that award. In February 2010, the Utah Court of Appeals held that a party has an appeal of right from such a combined order. Hicks v. UBS Fin. Servs., Inc., 2010 UT App 26, 226 F.3d 762. Yet 10 months later—in December 2010—CPG did not file a notice of appeal in the district court. Instead, it filed a Rule 5 petition in this court.

In the opening brief, CPG does not cite Hicks or address Hicks. Instead, CPG asserts that it had no appeal of right because the district court directed a rehearing. (AOB at 14.) CPG ignores both Hicks and the language in section 78B-11-129(1)(c) expressly providing an appeal of right from an order denying a motion to confirm an arbitration award. CPG focuses instead upon the negative implication of language in section 78B-11-129(1)(e) providing an appeal of right from orders vacating arbitration awards “without rehearing.” CPG provides no authority for reading into section 78B-11-129(1)(c) a limitation that does not exist. Section 78B-11-129(c) does not say that parties may appeal an order denying confirmation “unless the court also directs a rehearing.” This court should decline CPG's invitation to read that limitation into the statute.

CPG also invites this court to forgive its failure to file a notice of appeal. (AOB at 16-17.) This court should decline that invitation as well. First, Utah Rule of Appellate Procedure 2 permits the suspension of certain rules, but does not permit the suspension of Rule 4(a)'s jurisdictional requirement that a notice

of appeal be filed with the trial court within 30 days. Second, for jurisdictional purposes a Rule 5 petition is not a substitute for a Rule 4 notice of appeal: “It is not unreasonable to require attorneys to correctly apply clear and unambiguous procedural rules.” Clark v. Archer, 2010 UT 57, ¶ 13, 242 P.3d 758. At the time CPG filed its petition, Hicks was “clear and unambiguous” that parties have an appeal of right from the type of order at issue here. CPG’s failure to file a notice of appeal in the district court within 30 days precludes appellate jurisdiction.

If the court reaches the merits, it should affirm. Arbitrator Burbidge failed to disclose that his first cousin was a shareholder at the law firm representing CPG, a relationship the AAA considers substantial. Utah Code section 78B-11-113(5) provides that, if an arbitrator acting as a neutral fails to disclose a “known, existing, and substantial relationship with a party,” then the arbitrator is presumed to have acted with partiality and any award must be vacated. And under sections 78B-11-113(1)(b) and 113(4), where any arbitrator – neutral or otherwise – fails to disclose an “existing” relationship – substantial or otherwise – with a party or counsel, the court “may vacate an award.”

While either statutory provision provides ample basis to affirm, the opening brief addresses only section 78B-11-113(5)’s presumption. CPG asserts that the presumption is not dispositive because (i) arbitrator Burbidge was party appointed and not “neutral,” and (ii) CPG rebutted the presumption that arbitrator Burbidge acted with partiality with an affidavit of attorney Burbidge. (AOB at 20-28.) This court should reject both arguments.

The UPUAA's broad disclosure requirements reflect the fact that judicial review of the merits of arbitration awards is extremely narrow, so full disclosure is required to allow the parties to ensure the integrity of the arbitration process. Potential arbitrators who—like the arbitrators here—will act as neutrals must comply with the disclosure requirements, regardless of the selection mechanism. Failure to do so gives rise to section 78B-11-113(5)'s presumption that the arbitrator acted “with evident partiality.” CPG misunderstands section 78B-11-113(5) as creating a “presumption of substantial relationship” and attempts to rebut that presumption with the affidavit of attorney Burbidge describing his relationship with arbitrator Burbidge. But the relevant presumption is a “presumption of partiality,” something CPG does not address. CPG provided no evidence from arbitrator Burbidge concerning whether he acted with partiality.

Wholly apart from section 78B-11-113(5)'s presumption, section 78B-11-113(4) provides that a district court “may vacate an award” if any arbitrator fails to disclose any “existing” relationship with a party or its counsel. (AOB at 30.) CPG does not address this ground, which is an adequate basis to affirm.

Finally, CPG argues that Westgate waived its right to challenge arbitrator Burbidge's non-disclosure by failing to investigate the relationship and objecting only when it became aware of the relationship after the arbitration. (AOB at 30-34.) Yet under the UPUAA, the responsibility to inquire into and disclose the existence of biasing relationships rests with arbitrators, not with the parties. Utah Code Ann. § 78B-11-113(1). If this court reaches the merits, it should affirm.

Argument

This appeal presents a threshold jurisdictional issue and several merits issues concerning whether district courts may vacate arbitration awards when an arbitrator acting as a neutral fails to disclose a first-cousin relationship with a shareholder of the firm representing a party to the arbitration. Westgate will address the jurisdictional issue before addressing the merits.

I. The Court Should Dismiss CPG's Appeal For Lack of Jurisdiction

The court lacks jurisdiction over CPG's appeal because CPG did not file a timely notice of appeal in the district court required by Utah Rule of Appellate Procedure 4(a). Under section 78B-11-129(1), CPG had an appeal of right from the district court order at issue here. Yet CPG failed to file a notice of appeal within the 30-day jurisdictional limit. This court should dismiss CPG's appeal.

A. Utah Law Was "Clear and Unambiguous" That CPG Had an Appeal of Right from the District Court's Order But CPG Failed to File a Notice of Appeal Within the 30-Day Jurisdictional Limit

Under Rule 4(a) of the Utah Rules of Appellate Procedure, "[i]n a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from." Utah R. App. P 4(a) (emphasis added). And under Rule 2, while appellate courts may suspend most of the rules, they may not suspend the requirements in Rule 4(a): "In the interest of expediting a decision, the appellate court, on its own motion or for extraordinary cause shown, may, except

as to the provisions of Rules 4(a), 4(b), 4(e), 5(a), 48, 52, and 59, suspend the requirements or provisions of any of these rules in a particular case and may order proceedings in that case in accordance with its direction.” Utah R. App. P. 2 (emphasis added).

Thus, this court cannot forgive a failure to comply with Rule 4(a) where a party has an appeal of right. Saratoga Holdings, LLC v. Hall, 2011 UT App 166, ¶¶ 3-4 & n.1, 682 Utah Adv. Rep. 69 (court lacked authority to forgive an appellant’s failure to file a timely notice of appeal because rule 2 “specifically states that [the] court cannot suspend the requirements of rule 4(a).”); see also In re A.B., 2010 UT 55, ¶ 43, 245 P.3d 711 (dismissing appeal for lack of jurisdiction where notice of appeal was not signed by appealing party).

Here, CPG had an appeal of right. Section 78B-11-129(c) provides a statutory right to appeal an order “denying confirmation of an arbitration award.” The district court’s order denied CPG’s motion to confirm an arbitration award. (R. 6157.) Therefore, Rule 4(a) required CPG to file a notice of appeal in the district court within the 30-day deadline, which it failed to do. While the order denying the motion to confirm also vacated the same arbitration award and directed a rehearing, those additional mandates in the order do not change the analysis. (Id.) Indeed, just 10 months before CPG filed its Rule 5 petition, the Utah Court of Appeals held that parties have an appeal of right from the denial of a motion to confirm an award even where the same order also vacates the arbitration award and directs a rehearing. Hicks v. UBS Fin. Servs., 2010 UT App

26, ¶¶ 15-17, 226 P.3d 762. The Hicks court held that, by enacting the appealability provision of the UPUAA, “the legislature added to, rather than subtracted from, the situations where an appeal may be filed as a matter of right.” Id. ¶ 16 (quoting Amalgamated Transit Union, Local 382 v. Utah Transit Auth., 2004 UT App 310, ¶ 11, 99 P.3d 379).¹ Under Hicks, CPG’s statutory right to appeal was clear.

This court’s recent case law confirms that where a party has an appeal of right, its failure to file a notice of appeal in the district court in compliance with Rule 4(a) precludes appellate jurisdiction, even where the party files a timely Rule 5 petition in an appellate court. Clark v. Archer, 2010 UT 57, ¶ 14, 242 P.3d 758 (“It is axiomatic in this jurisdiction that failure to timely perfect an appeal is a jurisdictional failure requiring dismissal of the appeal.”); see also Utah R. App. P. 3(a) (“Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal.”) (emphasis added).

¹ The holding in Hicks also was premised on the court of appeals’ reasoning that orders compelling arbitration are final and therefore directly appealable under Utah Constitution article VII section 5, which guarantees an appeal of right in all cases. Hicks, 2010 UT App 26, ¶¶ 16-17. The Hicks court concluded that its prior decision holding that orders compelling arbitration are directly appealable bound it to hold that orders vacating an award and directing a rehearing also are directly appealable because such orders are at least as final, for constitutional purposes, as orders compelling arbitration. Id. Westgate expresses no opinion on the viability of this constitutional analysis and instead calls the court’s attention to the Hicks court’s conclusion that it “unquestionably” had jurisdiction over the order in that case by virtue of section 129. Id. ¶ 17 n.10; see also State v. Anderson, 701 P.2d 1099, 1103 (Utah 1985) (“It is a fundamental rule that this Court should avoid addressing constitutional issues unless required to do so.”).

As the court explained in Archer, “[i]t is not unreasonable to require attorneys to correctly apply clear and unambiguous procedural rules.” Id. CPG attempts to distinguish Archer by asserting that, in this case, CPG’s appeal of right was not “clear and unambiguous.” (AOB at 16-18.) But CPG fails to cite Hicks, which is clear and unambiguous on the point that parties have an appeal of right from combined orders such as the one issued by the district court here. Moreover, Archer confirms the straightforward implication of Rules 2 and 4(a): CPG’s failure to file a notice of appeal within 30 days precludes appellate jurisdiction.

As a fallback, CPG argues that its failure to file a notice of appeal in the district court should not be dispositive because it filed in this court a Rule 5 petition to review the order as interlocutory. In support, CPG cites Cedar Surgery Ctr., L.L.C. v. Bonelli, 2004 UT 58, 96 P.3d 911. Bonelli does not support CPG’s position. Bonelli held that a Rule 5 petition filed in an appellate court, and a timely “petition for permission to appeal” filed in the district court, satisfied the notice of appeal requirements of Rule 3 even though the “notice of appeal” filed in the district court was improperly captioned. Id., ¶¶ 11-12. Under Rule 2, a court may forgive the improper captioning of a timely district court filing. Thus, Bonelli does not support CPG’s position, as it did not involve a failure to make any district court filing under Rule 4(a)—a failure that cannot be forgiven under Rule 2. CPG filed nothing in the district court within the 30-day deadline specified in Rule 4(a), properly captioned or otherwise. In those circumstances, a

Rule 5 petition filed only in an appellate court cannot satisfy Rule 4(a)'s requirement that a notice of appeal be filed in the district court within 30 days. Clark v. Archer, 2010 UT 57, ¶ 13, 242 P.3d 758. In sum, CPG's failure to file in the district court a timely notice of appeal – or an improperly captioned equivalent – precludes appellate jurisdiction.

B. Section 78B-11-129(1)(c) Grants the Right to Appeal from District Court Orders Denying Confirmation of Arbitration Awards

While CPG has not cited Hicks or argued it should be set aside, CPG has raised a number of arguments at odds with the holding in Hicks. For that reason, Westgate will address why the holding in Hicks is correct. Utah Code section 78B-11-129(1)(c) expressly provides that parties have an appeal of right from orders “denying confirmation of an award.” Hicks held that, because the legislature has permitted appeals from certain orders that may not otherwise constitute final judgments, including orders denying confirmation of the arbitration award – such orders are statutorily appealable regardless of whether the order also vacates the award and directs a rehearing. Hicks, 2010 UT App 26, ¶¶ 16-17. The plain language and purpose of the UPUAA confirm that the holding of Hicks is correct.

1. Under the Plain Language of Section 78B-11-129(1), CPG Had an Appeal of Right from the District Court's Order

Section 78B-11-129(1) identifies a number of orders from which parties have a statutory appeal of right: “An appeal may be taken from: (a) an order denying a motion to compel arbitration; (b) an order granting a motion to stay

arbitration; (c) an order confirming or denying confirmation of an award; (d) an order modifying or correcting an award; (e) an order vacating an award without directing a rehearing; or (f) a final judgment entered pursuant to this chapter.” (emphasis added). This court has held that, by enacting a virtually identical provision in a prior version of the UPUAA, which similarly designated certain orders as immediately appealable, the legislature “without qualification . . . conferred appellate jurisdiction” over those orders. Pledger v. Gillespie, 1999 UT 54, ¶ 17, 982 P.2d 572. This court should reaffirm that position here.

The order CPG attempts to appeal states: “Consumer Protection Group, LLC’s Combined Motion to Confirm Arbitration Award . . . is DENIED.” (R. 6157.) The order thus falls squarely under section 78B-11-129(1)(c)’s plain language: “An appeal may be taken from . . . an order . . . denying confirmation of an award.” CPG would have this court read additional limiting language into section 78B-11-129(1)(c) so that it reads, “An appeal may be taken from an order denying confirmation of an award, unless the court also vacates the award and directs a rehearing.” This reading is inconsistent with the linguistic structure of the statute. Section 78B-11-129(1) is a disjunctive list of orders from which a party has a statutory right to appeal. Because it is disjunctive, only one such order must be entered to trigger the right to appeal. This court should not read a limiting qualification into section 78B-11-129(1)(c). Bissland v. Bankhead, 2007 UT 86, ¶ 9, 171 P.3d 430 (plain language interpretation should govern).

CPG resists the plain language interpretation by arguing that the order was not appealable because it was not final, and it was not final because it required a rehearing. (AOB at 14.) But if the list of appealable orders in section 78B-11-129(1) also required a final judgment, then section 78B-11-129 would be entirely superfluous, as final judgments are appealable independent of section 78B-11-129. Again, there is no need to read a qualification into section 78B-11-129(1) where none exists. Robinson v. Mount Logan Clinic, 2008 UT 21, ¶ 9, 182 P.3d 333 (“[W]e construe a statute so ‘as to render all parts thereof relevant and meaningful’” (quoting Jackson v. Mateus, 2003 UT 18, ¶ 21, 70 P.3d 78)); Hall v. Dep’t of Corr., 2001 UT 34, ¶ 15, 24 P.3d 958 (“We . . . avoid interpretations that will render portions of a statute superfluous or inoperative.”).

CPG simply refuses to acknowledge the literal application of section 78B-11-129(1)(c) and argues that “[n]one of the bases for appeal listed in § 129 is applicable to this matter.” (AOB at 13.) To reach that conclusion, however, CPG ignores that the district court’s order denies confirmation of an award and focuses only upon the fact that the order also vacates the award and directs a rehearing. (Id.) Elsewhere, CPG asserts that the order only “technically” resulted in the district court denying CPG’s motion to confirm the award as a side effect of its granting Westgate’s motion. (AOB at 9.)

CPG’s assertions are inconsistent with the procedural history. The initial motion filed in the district court was CPG’s motion to confirm the award, a stand alone motion, to which Westgate responded not only by arguing that the award

should not be confirmed but also by moving the district court to vacate the award. (R. 5764-65; 5893-909.) The fact that the district court granted Westgate's motion does not change the fact that CPG's motion to confirm the award was denied.² The district court's order "denying confirmation" of the award expressly brings the order within section 78B-11-129(1)(c).

Finally, in an attempt to argue that section 78B-11-129(1) is not the exclusive avenue for obtaining appellate review, CPG argues that the word "may" in section 78B-11-129(1) — "An appeal may be taken" — means that an appeal of right is not the only way to obtain review of the orders listed in section 78B-11-129(1). (AOB at 15.) CPG asserts that the use of the word "may" leaves the door open for interlocutory appeals as well. This reading is illogical. The word "may" merely signifies that a party is not statutorily required to appeal the listed orders and indicates that parties have the choice of whether to use their resources appealing from the orders listed in section 78B-11-129(1). Section 78B-11-129(f) confirms Westgate's interpretation: "An appeal may be taken from a final judgment entered pursuant to this chapter." Id. Under CPG's interpretation, a party could file a Rule 5 petition in an appellate court to review a final judgment, an absurd result.

² Under the UPUAA, motions to confirm may be granted as a necessary consequence of denying a motion to vacate, but they cannot be "technically" denied. Under section 78B-11-124(4), where a "court denies a motion to vacate an award, it shall confirm the award unless a motion to modify or correct the award is pending." There is no corresponding mandate to deny confirmation if a motion to vacate is granted. In any event, the issue is beside the point here because CPG's stand alone motion to confirm was denied.

The plain language of section 78B-11-129(1)(c) provided CPG an appeal of right from the combined order denying CPG's motion to confirm and granting Westgate's motion to vacate while directing a rehearing. Because CPG had an appeal of right, its failure to file a notice of appeal within the 30-day deadline in Rule 4(a) precludes appellate jurisdiction. This court should dismiss this appeal.

2. The Better Reasoned Approach of Other Jurisdictions Confirms the Plain Language Interpretation of Section 78B-11-129(1)

Although the opening brief does not acknowledge it, among jurisdictions with similar language in their arbitration statutes, there is a split of authority regarding whether an order that both denies a motion to confirm an award and also vacates that award and directs a rehearing is appealable as a matter of right. The split of authority was noted in Hicks, but has since been analyzed thoroughly by the Texas Supreme Court in East Texas Salt Water Disposal Co. v. Werline, 307 S.W.3d 267 (Tex. 2010),³ an opinion that rejects the position

³ As Werline notes, "[i]n New York, where there is no statute governing appeals in arbitration cases specifically, an appeal would be allowed. One other state, West Virginia, has no specific statute. The Uniform Arbitration Act or the Revised Uniform Arbitration Act provision regarding appeals has been adopted in thirty-four other states and the District of Columbia, and two other states have similar provisions. But even in these thirty-seven jurisdictions with similar statutory language, the decisions directly addressing this issue fail to reach any sort of consensus. Courts in seven states – California, Kentucky, Maine, Nebraska, Nevada, North Carolina and South Dakota – and in the District of Columbia have dismissed appeals from orders similar to the order in this case providing both for vacatur and a rehearing. Courts in four states – Arizona, Massachusetts, Tennessee and Utah have not. Courts in at least two states – Minnesota and Missouri – have gone both ways. Six states have statutes more like the [Federal Arbitration Act]. Courts in one of those states – Ohio – appear to allow appeals when the federal courts would. Two other states have statutes more like the FAA but in limited contexts. Three states have statutes allowing

advanced by CPG here. As Werline noted, to adopt the position advanced by CPG the court must allow the negative implication of section 78B-11-129(1)(e), which allows appeals from orders vacating awards without directing a rehearing, to trump the plain meaning of section 78B-11-129(1)(c), which allows appeals from orders denying confirmation of an award without qualification. Werline, 307 S.W.3d at 271. Under Utah law, implications based on a statutory omission are not favored over an express grant of statutory authority.

Associated Gen. Contrs. v. Bd. of Oil, 2001 UT 112, ¶ 30, 38 P.3d 291 (“[W]e will not ‘infer substantive terms into the text that are not already there. Rather, the interpretation must be based on the language used, and we have no power to rewrite the statute to conform to an intention not expressed.’”). The UPUAA’s unambiguous grant of a right to appeal from some orders should not be found to be extinguished by a negative implication drawn from a separate grant of permission to appeal other orders.

The express language approach of the Werline court provides courts flexibility without authorizing needless appeals. As Werline notes, there is no statutory right to appeal where a court merely requests clarification of an arbitration award because such an order would be a “preface to determining confirmation.” Werline, 307 S.W. 3d at 270-71. Only where, as here, the order

appeals in arbitration cases as in other civil cases. Of these, one, Alabama, would apparently allow an appeal like the one before us. Thus, the seventeen jurisdictions, other than Texas, that have considered whether to allow appeal in a situation like the one in this case appear about evenly divided on the issue.” 307 S.W.3d at 272-74 (footnotes omitted).

constitutes a full adjudication of the confirmation issue does a court's vacating the award go hand-in-hand with an order denying confirmation and trigger a party's right to appeal.⁴

The plain express language approach to determining which orders are appealable also is consistent with Utah policy favoring arbitration and limiting the scope of district court review of arbitration awards. Softsolutions, Inc. v. Brigham Young Univ., 2000 UT 46, ¶ 14, 1 P.3d 1095 (“[G]iven the public policy and law in support of arbitration, judicial review of arbitration awards confirmed pursuant to the Act is limited to those grounds and procedures provided for under the Act.”). With no appeal of right from orders denying confirmation, district courts might exceed their limited authority. Werline, 307 S.W.3d at 271 (limitations on substantive review of arbitration awards “would be circumvented if [rehearing] could be ordered for [illegitimate] reasons . . . and appeal thereby delayed.”). The policy in favor of arbitration—providing “expeditious and less expensive” methods for dispute resolution—is better served by permitting appeals as a matter of right from those orders identified in section 78B-11-129(1). Docutel Olivetti Corp. v. Dick Brady Sys. Inc., 731 P.2d 475, 479 (Utah 1986).

⁴ Under the UPUAA, a court may vacate an award on the ground that the arbitrator's refusal to postpone the hearing without cause prejudiced a party. Utah Code Ann. § 78B-11-124(1)(c). A court could then direct a “rehearing” to provide the arbitrator an opportunity to provide an explanation for refusing to postpone the hearing. In such circumstances, section 78B-11-129(1)(e) operates to deny an appeal of right. The order would become appealable if, after the arbitrator provided an explanation, the district court confirms or refuses to confirm the award.

Under CPG's proposed interpretation, the default standard in similar future cases will be that parties must re-arbitrate claims without first obtaining appellate court review, even if the district court erred in vacating the award. That is, a party who obtains a favorable arbitration award and then has that award vacated could be required to wait until the rehearing of the arbitration is complete before an appellate court may review the original vacatur, assuming it is not moot. And even then, the prevailing (for the second time) party may not be able to obtain appellate review if the district court again vacates the award and directs yet another rehearing. In contrast, interpreting section 78B-11-129(1) to mean what it says – that a party may appeal from an order denying confirmation of an arbitration award – gives the parties the right to ensure that the court-ordered “do over” is necessary. This is more consistent with the role of arbitration as an expeditious method for dispute resolution.

The court should hold that section 78B-11-129(1) provides the right to appeal whenever a court denies confirmation of an arbitration award. That interpretation is consistent with the statutory plain language, renders each provision in that section meaningful, does not create exceptions-by-implication, and is in harmony with Utah policy favoring arbitration. CPG had the right to appeal but mistakenly elected instead to petition for interlocutory review. Because CPG did not file a notice of appeal in the district court within the 30-day deadline in Rule 4(a), this court lacks jurisdiction. This court should dismiss this appeal without reaching the merits.

II. Should the Court Reach the Merits, It Should Affirm Because Vacatur Was the Appropriate Remedy for Arbitrator Burbidge's Nondisclosure of His First-Cousin Relationship with Counsel for CPG

If the court reaches the merits, it should affirm. The district court properly concluded that arbitrator Burbidge had an obligation to inform the parties of his first-cousin relationship with attorney Burbidge and that his failure to make that relationship known to Westgate requires vacatur of the award. The UPUAA sets forth two different standards for vacatur relevant to this appeal. Under one standard, the court reviewing an arbitration award must vacate the award if a neutral arbitrator fails to disclose a "known, existing, and substantial relationship with a party." Utah Code Ann. §§ 78B-11-113(5), -124(1)(b)(i).

Under the second standard, a court has discretion to vacate an award entered by an arbitrator who failed to disclose any "existing or past relationship with any of the parties to . . . the arbitration proceeding, their counsel or representatives, a witness, or another arbitrator." *Id.* §§ 78B-11-113(1)(b), -113(4).

Here, the district court's order can be affirmed under either standard. The district court concluded that vacatur was mandatory because arbitrator Burbidge's relationship with attorney Burbidge was substantial and, therefore, arbitrator Burbidge was statutorily presumed to have acted with partiality. Alternatively, even if arbitrator Burbidge's relationship with attorney Burbidge was not a "substantial relationship with a party" such that the UPUAA mandated vacatur, the district court nevertheless did not abuse its discretion when it vacated the award.

Before addressing the two standards for vacatur under the UPUAA, it is important to discuss the critical role that disclosure plays in the process of appointing arbitrators. Only in light of that background can the policy implications of this case be fully appreciated. In the following pages, Westgate will show that the UPUAA neutrality and disclosure requirements are central to the effectiveness and integrity of the arbitration.

To begin, disclosure requirements play a critical role in arbitrator appointment because arbitrators function as private judicial officers. Yet unlike state paid and trained judges, arbitrators are drawn from the legal and commercial communities on a case-by-case basis. And unlike judges, until their appointment, arbitrators are not bound by canons of ethics to be circumspect in their relations with members of the legal or professional community. The preamble to the American Arbitration Association's Code of Ethics for Arbitrators in Commercial Disputes acknowledges that fact, stating that "[a]rbitrators, like judges, have the power to decide cases. However, unlike full-time judges, arbitrators are usually engaged in other occupations before, during, and after the time that they serve as arbitrators." The Code of Ethics for Arbitrators in Commercial Disputes preamble (American Arbitration Association 2004) ("AAA Canons").

It is well known that maintaining impartiality is a challenge because parties pick arbitrators with specialized knowledge. Arbitrators are often "purposely chosen from the same trade or industry as the parties in order to

bring special knowledge to the task of deciding.” Id. The comments to the model Uniform Arbitration Act note that “[t]he problem of arbitrator partiality . . . involves a tension between abstract concepts of impartial justice and the notion that parties are entitled to a decision maker of their own choosing, including an expert with the biases and prejudices inherent in particular worldly experience.” Uniform Arbitration Act § 12 cmt. 1 (National Conference of Commissioners of Uniform State Laws 2000) (“Model Act”). Thus, arbitrators with relevant worldly experience are also likely to have many relationships with individuals in their professional community because “[a]rbitrating parties frequently choose arbitrators on the basis of prior professional or business associations, or pertinent commercial expertise.” Id. Expecting those who might be asked to be arbitrators to anticipatorily take on a diminished role in their respective communities is unrealistic. Potential arbitrators who sequester themselves might well be less likely to be chosen as arbitrators. For these and other reasons, arbitrators, unlike judges, are not expected to conduct themselves in a manner that will minimize the risk of potential future conflicts.⁵

To account for the potential for conflicts, the UPUAA, like the rules promulgated by the AAA, sets forth disclosure requirements. The comment to

⁵ The expectations for judges are sharply different than those for arbitrators. The Utah Code of Judicial Conduct provides “when engaging in extrajudicial activities, a judge shall not participate in activities that will lead to unreasonably frequent disqualification of the judge [or] participate in activities that would appear to . . . undermine the judge’s independence, integrity, or impartiality.” Utah Code of Judicial Conduct, Canon III, Rule 3.1 (internal numbering omitted).

section 12 of the Model Act⁶ states: “[i]n view of the critical importance of arbitrator disclosure to party choice and perceptions of fairness . . . Section 12 sets forth affirmative requirements to assure that parties should [have] access to all information that might reasonably affect the potential arbitrator’s neutrality.” Model Act § 12, cmt. 2. Rather than requiring parties to undertake unseemly and onerous investigations into the potential biases of every prospective arbitrator, the UPUAA places the burden on prospective arbitrators. They must undertake a reasonable inquiry into their own relationships and disclose known relationships to the parties before the arbitration begins.⁷ Utah Code Ann. § 78B-11-113(1); Model Act § 12, cmt. 3 (“Section 12(a) requires an arbitrator to make a ‘reasonable inquiry’ . . .”). Importantly, relevant relationships also must be disclosed to fellow arbitrators on a multi-member panel so that if the arbitrator’s interests do not result in disqualification, the other arbitrators may evaluate the motives that underlie the potentially biased arbitrator’s actions during the deliberative process. Model Act § 12, cmt. 5.

⁶ Section 12 of the Model Act is substantively identical to Utah Code section 78B-11-113.

⁷ CPG raises the specter of parties, suffering from “post arbitration ‘sour grapes,’” digging into an arbitrator’s past to find, ex post, relationships that would justify disqualification. (AOB at 22-23.) This untoward result, CPG contends, requires that the Court not permit challenges like the one made here. CPG’s argument is a red herring – unless the relationship could have been discovered through a “reasonable inquiry” and unless the arbitrator knowingly failed to disclose the relationship, CPG’s “sour grapes” hypothetical would never apply. Utah Code Ann. § 78B-11-113(1).

Under the UPUAA, an arbitrator with a “known, existing, and substantial relationship with a party may not serve.” Utah Code Ann. § 78B-11-113(5). Given arbitrator Burbidge’s relationship to attorney Burbidge, he should not have served here. However, under the UPUAA, there is no mechanism for enforcing the mandate of section 112(5). Section 78B-11-113(3) specifically notes that arbitrators may continue to serve even though a party objects to their involvement. Unlike judges, arbitrators are not bound by the canons of judicial ethics to disqualify themselves when their impartiality is suspect. Utah Code of Judicial Conduct, Canon II, Rule 2.11 (“A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned . . .”). Indeed, an arbitrator may have an incentive not to disclose the existence of potentially biasing relationships because, if a party has the arbitrator disqualified, the disclosure of the relationship will have cost the arbitrator a job. Thus, imposing consequences for nondisclosure is critically important to maintain the integrity of the arbitrator selection process and, ultimately, the arbitral institution.

To this end, the legislature selected vacatur as the appropriate consequence for nondisclosure. When an arbitrator – acting as a neutral or not – fails to disclose an “existing or past relationship with any of the parties to the . . . arbitration proceeding, their counsel or representatives, a witness, or another arbitrator,” the reviewing court may vacate the award. Utah Code Ann. § 78B-11-113(1)(b), -113(4). And given the importance of arbitrator neutrality, where an

arbitrator acting as a neutral fails to disclose a “substantial relationship,” the UPUAA mandates vacatur of the award. Id. § 78B-11-113(5).

These consequences, while they may appear harsh, are central to assuring full disclosure by potential arbitrators and maintaining the integrity of the system of arbitration. Out of respect for the parties’ choice to submit their dispute to a non-judicial decision-maker, and to ensure that arbitration remains expeditious and flexible, the decisions of arbitrators are insulated from judicial review to a much greater degree than are the decisions of district courts.⁸ The grounds for modifying or vacating an arbitration award – once entered – are very limited. Utah Code Ann. § 78B-11-124(1). Thus, voluntary disclosure of potentially biasing relationships is critical to ensuring the integrity of the process. Model Act, § 12, cmt 1 (disclosure is a “basic tenet of procedural fairness” that “assumes even greater significance in light of the strict limits on judicial review of arbitration awards.”).

Without broad disclosure requirements and meaningful mechanisms for enforcing those requirements, parties have no basis for believing that individuals

⁸ Buzas Baseball v. Salt Lake Trappers Inc., 925 P.2d 941, 947 (Utah 1996) (“It is well settled, both in Utah and in the federal courts, that the trial court may not substitute its judgment for that of the arbitrator, nor may it modify or vacate an award because it disagrees with the arbitrator’s assessment.”); Allred v. Educators Mut. Ins. Ass’n, 909 P.2d 1263, 1265 (Utah 1996) (“Given the public policy and law in support of arbitration, judicial review of arbitration awards confirmed pursuant to the Act is limited to those grounds and procedures provided for under the Act.”); id. (“[A]wards will not be disturbed on account of irregularities or informalities, or because the court does not agree with the award, so long as the proceeding has been fair and honest and the substantial rights of the parties have been respected.” (emphasis added) (quoting Utility Trailer Sales v. Fake, 740 P.2d 1327, 1329 (Utah 1987))).

considered for appointment as arbitrators are acting in the interest of an impartial dispute resolution process. With that in mind, Westgate will address the two different bases for vacatur that apply in this case. Specifically, Westgate will demonstrate that (i) the district court correctly concluded that the UPUAA mandates vacatur of an arbitration award when an arbitrator fails to disclose a first-cousin relationship with a partner at the firm representing a party to the arbitration; and (ii) even if vacatur under the UPUAA were not mandatory, the district court's decision to vacate the arbitration award in the circumstances presented here was not an abuse of discretion.

A. The UPUAA Mandates Vacatur of Arbitration Awards When a Neutral Arbitrator Fails to Disclose a First-Cousin Relationship with Counsel for a Party to the Arbitration Proceeding

The district court correctly concluded that vacatur is the necessary consequence of arbitrator Burbidge's failure to disclose his first-cousin relationship with attorney Burbidge. During the arbitration, Burbidge declared that he was acting as a neutral. Under the UPUAA, disclosure requirements, neutrality requirements, and vacatur standards all operate interdependently to safeguard the integrity of arbitration proceedings. That is, unless the parties consent to his involvement, an arbitrator is disqualified from serving if he has a "known, existing, and substantial relationship with a party." *Id.* § 78B-11-112(2). Second, if an arbitrator serves without disclosing such a "substantial relationship" – as opposed to the "existing or past" relationships that all arbitrators must disclose under section 78B-11-113(1) – then the arbitrator acting

as a neutral is presumed to act with “evident partiality.” Id. § 78B-11-113(5). Under the UPUAA, when a neutral arbitrator acts with evident partiality, an award entered by that arbitrator must be vacated. Id. § 78B-11-124(1)(b)(i) (“[T]he court shall vacate an award made in the arbitration proceeding if . . . there was evident partiality by an arbitrator appointed as a neutral arbitrator.”).

Though section 78B-11-113(5) reaches “substantial relationship[s] with a party,” it should be interpreted to include relationships with a party’s counsel. Id. § 78B-11-113(5). First, CPG does not argue here, and did not argue below, that section 78B-11-113(5) is inapplicable to the Burbidges’ relationship because it reaches only an arbitrator’s relationships with literal parties-in-interest.⁹ Further, attorney Burbidge’s interests in this litigation warrant treating him as a party within the meaning of section 78B-11-113(5): the arbitration award will be shared with counsel on a contingent fee basis and the panel will be determining whether to award more than \$1 million in fees directly to counsel. Given those interests, all of the reasons for disclosing a relationship with a party that underlie the UPUAA requirements apply equally in the circumstances at hand.

Here, the district court correctly vacated the award. A first-cousin relationship between an arbitrator and counsel is substantial enough that a

⁹ And CPG cannot raise that new argument for the first time in its reply brief. Coleman ex rel. Schefski v. Stevens, 2000 UT 98, ¶ 9, 17 P.3d 1122 (“we will not consider matters raised for the first time in the reply brief”). Regardless, where a law firm prosecutes a case under a contingent fee arrangement and the primary money judgment issue concerns attorney fees – the \$1.2 million in attorney fees award sought by CPG is nearly 20 times the \$65,500 compensatory damages award – the law firm is a party-in-interest.

neutral arbitrator's failure to disclose that relationship gives rise to the presumption that the arbitrator acted with partiality. Based on the presumption of evident partiality that arose as a result of arbitrator Burbidge's nondisclosure, the district court correctly concluded that vacatur was required. In this section, Westgate will show that (i) a first-cousin relationship between an arbitrator and counsel for a party is substantial within the meaning of the UPUAA; (ii) the district court correctly applied to arbitrator Burbidge the standards for neutral arbitrators because the arbitrators here designated themselves as neutral; and (iii) the presumption of evident partiality arising under the UPUAA mandated vacatur in this case.

1. Familial Relationships Are Substantial Within the Meaning of the UPUAA

The district court correctly concluded that the familial relationship here was "substantial" within the meaning of section 78B-11-113(5). The UPUAA requires arbitrators acting as neutrals to disclose a "known, existing, and substantial relationship with a party." *Id.* CPG has conceded that the relationship between arbitrator Burbidge and attorney Burbidge was "known and existing." (AOB at 20 n.5.) Accordingly, the dispute here hinges on whether the district court correctly concluded that this relationship is "substantial." Although the UPUAA does not define the word "substantial," the AAA Canons provide guidance. Those canons were drafted and approved and are

recommended by both the AAA and the American Bar Association,¹⁰ which makes them a particularly relevant source of guidance for ethical issues not directly addressed by the UPUAA. Indeed, the arbitrators here intended to be bound by the AAA Canons. (R. 5937.)

Under those canons, arbitrators are expected to disclose “direct or indirect financial or personal interest[s] in the outcome of the arbitration” as well as “existing or past, financial, business, professional, family, or social relationships.” AAA Canons, Canon II. These include relationships that an arbitrator has “with any party or its lawyer” and “any such relationships involving their families . . . or their current employers, partners, or professional or business associates.” Id. Those disclosure requirements are consistent with the UPUAA standards for disclosure.

To determine what relationships are legally **substantial** so that a failure to disclose them can be anticipated to expose an award to vacatur, it is useful to note the types of relationships that have led to vacatur under the AAA Canons. In its training materials for arbitrators, the AAA lists categories of relationships the nondisclosure of which have led to vacatur, a list which includes second cousins:

¹⁰ Introduction to the AAA Canons (“The Code of Ethics for Arbitrators . . . was originally prepared in 1977 by a joint committee consisting of a special committee of the American Arbitration Association and a special committee of the American Bar Association. The Code was revised in 2003 by an ABA Task force and special committee of the AAA.”). Both the original 1977 code and the 2003 Revision have been approved and recommended by both organizations.

1. Present or recent attorney-client relationship;
2. Relationship of consanguinity within six[th] degree (e.g. second cousins);
3. Business dealings which are significant, ongoing, or regularly conducted;
4. Close social relationships or friendships;
5. Arbitrator had a case in which the arbitrator was a party or counsel before one who is now a party or counsel.

Fundamentals of the Arbitration Process: Manual for Commercial Arbitrators 137 (American Arbitration Association 2000) (emphasis added). While Westgate recognizes the difficulty of drawing bright lines in this area, the enumeration of relationships by the AAA is helpful to parties to arbitrations and to potential arbitrators. It creates a meaningful distinction between mere “existing” relationships – the nondisclosure of which does not give rise to a presumption of partiality – and “substantial” relationships, which lead to such a presumption. It provides guidance to arbitrators acting pursuant to the UPUAA. In this particular case, looking to the AAA list gives effect to the arbitrators’ decision to be bound by the AAA Canons.

In challenging the district court’s decision, CPG contends that the relationship was not substantial because it was not similar to the sort of close personal relationship that would lead to disqualification of a judge. (AOB at 21.) The comparison is inappropriate. As discussed, the standards for disqualifying impartial judicial officers and the standards for requiring pre-appointment disclosures from potential arbitrators serve entirely different purposes and are

associated with entirely different remedial mechanisms. A better analogy lies in the comparison between arbitrators and jurors, both of whom are members of the general public who are called on to operate as presumptively independent adjudicators. Jurors are often dismissed for relationships like the one at issue in this case.¹¹ Utah R. Civ. P. 47(f)(2); Utah R. Crim. P. 18(e)(3).

CPG next argues that a first-cousin relationship should not be considered “substantial” because in DeVore v. IHC Hosps., Inc., 884 P.2d 1246, 1253-55 (Utah 1994), this court declined to adopt the rule that a failure to disclose a relationship which presented “even the appearance of partiality” required an award be vacated under the then-current arbitration statute. CPG contends the first-cousin relationship here at most creates only an appearance of impropriety. (AOB at 21.) CPG’s reliance on DeVore is puzzling. In that case, the court did reject a mandatory vacatur rule to be triggered only by the appearance of impropriety. But the court also concluded that vacatur shall be ordered when an arbitrator neglects to disclose facts that would lead a reasonable person to believe that a neutral arbitrator showed partiality or facts that would suggest conduct that “prejudiced the rights of [a] party.” Id. at 1256. Under the current

¹¹ State v. Davis, 10 P.3d 977, 1010-11 (Wash. 2000) (challenge for cause appropriate when the juror is related within four degrees of consanguinity to a party); Idaho R. Civ. P. 47(h) (challenge for cause appropriate when the juror is related within four degrees of consanguinity or affinity to a party); Gray v. Commonwealth, 311 S.E.2d 409, 410 (Va. 1984) (explaining the absolute rule that a potential juror is disqualified if related within the ninth degree of consanguinity or affinity to a party); Wilmore v. State, 602 S.E.2d 343, 345 (Ga. Ct. App. 2004) (jurors are often disqualified if they “are related by consanguinity or affinity to any party interested in the result of the case or matter within the sixth degree”).

version of the UPUAA, “existing or past” relationships with a party’s counsel are deemed to satisfy that standard. Utah Code Ann. § 78B-11-113(1)(b) (“facts that a reasonable person would consider likely to affect the impartiality of the arbitrator . . . includ[e] . . . an existing or past relationship” (internal numbering omitted)). If anything, the legislature’s choice to classify existing or past relationships as the sort of facts that would lead to vacatur under DeVore supports the conclusion that vacatur is appropriate here.

Not only does DeVore’s substantive discussion not support CPG, but its facts presented a far less compelling case for vacatur than the facts of this case. In DeVore, the court considered whether an arbitrator should have disclosed a fact unknown until the matter was well underway – that, more than ten years before the arbitration, the arbitrator had a church-based relationship with a man who was tangentially involved with a party to the arbitration. Id. at 1257. The tangentially involved individual was not a witness, a party, or counsel, or an employee or agent of either party. Id. at 1250. In fact, he had nothing to do with the dispute in question and no interest in its outcome. Id. The same cannot be said here – arbitrator Burbidge and attorney Burbidge are first cousins, and always will be. Attorney Burbidge, through his firm, is a representative of CPG, and a favorable award here will benefit attorney Burbidge because attorney fees are paid directly to his firm, as is a portion of the underlying award on which the attorney fees are premised. In short, DeVore does not support CPG’s position legally or factually.

CPG is also incorrect that a first-cousin relationship is not substantial. That conclusion is inconsistent with the UPUAA, the structures it puts in place for ensuring the integrity of the arbitration process, and the ethical standards the arbitrators here adopted for themselves.

2. The District Court Correctly Found That Arbitrator Burbidge Acted as a Neutral

An arbitrator who designates himself as neutral is bound under the UPUAA to act as a neutral. Again, the AAA Canons provide useful guidance. Those rules acknowledge that arbitration panels may legitimately be neutral or non-neutral. Sometimes “parties . . . may prefer that party-appointed arbitrators be non-neutral and governed by special ethical considerations.” AAA Canons, preamble. But unless the parties so expressly elect, the Canons express a preference for neutrality: “[I]t is preferable for all arbitrators including any party-appointed arbitrators to be neutral.” Id. The AAA Canons, therefore, “establish[] a presumption of neutrality for all arbitrators, including party-appointed arbitrators, which applies unless the parties’ agreement, the arbitration rules agreed to by the parties or applicable laws provide otherwise.” Id. Thus, even party-appointed arbitrators may be bound to follow the ethical rules for neutral arbitrators.

CPG concedes that the arbitrators designated themselves as neutral but argues that the arbitrators were powerless, post-appointment, to modify their party-appointment status. (AOB at 26-27.) Under the AAA Canons that is

incorrect. The Canons presume party-appointed arbitrators will designate themselves as neutrals. The fact that CPG selected arbitrator Burbidge is not determinative of his neutral or non-neutral status; the express designation by all three arbitrators as neutrals is determinative. CPG's contention that "no party could reasonably claim" otherwise is inaccurate. (AOB at 27.)

CPG also argues that the arbitrators, in fact, acted as non-neutral arbitrators. (Id.) CPG seeks to have it both ways. On the one hand, CPG attempts to reassure the court that the award here was legitimate by stating that the "appointees in this matter acted in an objective, professional manner throughout the arbitration." (Id.) On the other hand, CPG calls the court's attention to the fact that arbitrator Billings (Westgate's party-appointed arbitrator) received ex parte communications from Westgate as indicative of her non-neutrality. (Id.) CPG's waffling illustrates exactly the reason why disclosure requirements are so important—when relevant information is not disclosed, after-the-fact reassurances, such as attorney Burbidge's assertion that his relationship with arbitrator Burbidge was not a close one, are inadequate to ensure the integrity of the process. The declaration of neutrality sets the standard by which the arbitrator disclosures are to be judged, it does not obviate the need for full disclosure. Further, if CPG in fact believes that arbitrator Billings violated her obligations as a neutral arbitrator, such violation would provide support for vacating the award, assuming CPG could make out the

violation and had sought such a ruling.¹² Nothing in the UPUAA suggests that multiple errors lend integrity to an arbitration award.

The arbitrators' choice to designate themselves as neutrals was binding and the presumption that arises under section 78B-11-113(5) for neutral arbitrators who do not make full disclosure applied to arbitrator Burbidge.

3. Vacatur of the Award Was a Mandatory Consequence of Arbitrator Burbidge's Nondisclosure

The district court correctly concluded that the presumption of evident partiality that arose as a result of arbitrator Burbidge's nondisclosure mandated vacatur in this case. As discussed, when an arbitrator acting as a neutral fails to disclose a substantial relationship under section 78B-11-113(5), the arbitrator is presumed to have acted with evident partiality. And under section 78B-11-124(1)(b), when there is evident partiality by a party designated as a neutral, the "court shall vacate" the arbitration award. These two provisions, acting in tandem, mandate that the award in this case be vacated.

¹² CPG's claim that arbitrator Billings violated her ethical obligations also cannot be sustained. The arbitrators' self-designation as neutrals occurred in March, 2009. (R. 6013-14.) But the allegedly improper communication – which consisted of Westgate forwarding parts of the district court record to arbitrator Billings – happened in late January or early February of that year, before the third arbitrator was selected and before the arbitrators had reached a decision on how they would arbitrate the case. (R. 5924.) Further, under the AAA Canons, the obligation of a neutral arbitrator who receives ex parte communications is to cause the information to be sent to the other parties. AAA Canons, Canon III(C). Here, arbitrator Billings informed arbitrator Burbidge of the communications, which prompted counsel for Westgate to forward the documents to the other arbitrators. (R. 5923.) This is entirely consistent with the ethical obligation of a neutral arbitrator.

CPG argues that, at least in this case, vacatur was not mandatory because the presumption of partiality was effectively rebutted. The sole basis for that rebuttal was an affidavit filed by attorney Burbidge attesting that his relationship with his cousin was not particularly close. (AOB at 24.) Such a self-serving declaration is hardly evident of arbitrator Burbidge's state of mind. CPG's argument that vacatur was not mandatory fails because it ignores the plain language of the relevant provisions of the UPUAA and Utah precedent concerning the standard for vacating arbitration awards.

To reconcile the various provisions of the UPUAA, vacatur is mandatory once the presumption of evident partiality applies. The distinction between the words "may" and "shall" in the UPUAA suggests this result. Specifically, the Utah Legislature has used the word "may" in some provisions of the UPUAA to signal that vacatur is not mandatory. Utah Code Ann. § 78B-11-113(4). And the Utah Legislature has used the word "shall" to signal that vacatur is mandatory where an arbitrator designated as a neutral acts with "evident partiality." *Id.* § 7B-11-124(1)(b)(i).

Had the legislature intended the vacatur to be discretionary when the presumption applies, then it would have used a discretionary "may" rather than "shall." It did not. Due South, Inc. v. Dep't of Alcoholic Bev. Control, 2008 UT 71, ¶ 33, 197 P.3d 82 ("Our principles of statutory construction direct us to 'assume that the legislature used each term in the statute advisedly' and to 'interpret statutes to give meaning to all parts, and avoid rendering portions of

the statute superfluous.” (quoting Olsen v. Samuel McIntyre Inv. Co., 956 P.2d 257, 259 (Utah 1998); LKL Assocs., Inc. v. Farley, 2004 UT 51, ¶ 7, 94 P.3d 279).

Moreover, the type of evidence provided by CPG is legally and factually insufficient to rebut that presumption. The presumption at issue is a presumption that the arbitrator “act[ed] with evident partiality.” Utah Code Ann. § 78B-11-113(5). But the affidavit filed by attorney Burbidge addresses a different question – whether the cousins’ relationship was substantial. It wholly fails to address whether partiality motivated arbitrator Burbidge’s actions. (AOB at 8.) CPG provided no evidence addressing arbitrator Burbidge’s motives in not making a required disclosure or in making a merits determination. Rather, attorney Burbidge sought to undermine the substantiality of the relationship by stating that the cousins rarely see each other and interact infrequently. It was not the substantiality of the first-cousin relationship that was presumed under the statute. As the district court noted, “[t]he first cousin relationship is an uncontroverted fact.” (R. 6134.) What CPG needed to rebut, but did not address, was whether arbitrator Burbidge acted impartially.

The difficulty of showing actual bias after the fact and the few grounds available for courts entertaining challenges to arbitration awards all demonstrate why the UPUAA and the relevant ethical rules for arbitrators support full pre-appointment disclosure.¹³ And to create the appropriate incentive for full

¹³ As this court stated in DeVore, actual bias may be impossible to prove and invites a spectacle that, on the whole, would do more harm than good to the integrity of the arbitration process:

disclosure, breaches of the duty to disclose must be penalized by vacatur of an award rendered by a nondisclosing arbitrator.

In sum, the district court properly vacated the award as a remedy for arbitrator Burbidge's nondisclosure. The UPAAA establishes mandatory vacatur as the consequence for a neutral arbitrator's failure to disclose a substantial relationship with a party. CPG's arguments attempting to defeat the district court's determination that a first-cousin relationship is substantial, and the determination that the party-appointed arbitrators were neutrals, are contrary to the standards controlling arbitration proceedings.

B. Alternatively, the District Court Did Not Abuse Its Discretion in Vacating the Award In this Case

Even if this court concludes that the district court erred in ruling that evident partiality was presumed and that vacatur was mandatory under section 78B-11-113(5), the court should affirm on the alternative ground that the district court did not abuse its discretion in vacating the award under section 78B-11-113(4). Wholly apart from section 78B-11-113(5)'s requirement to disclose

[W]e cannot countenance the promulgation of a standard for partiality as insurmountable as 'proof of actual bias' Bias is always difficult, and indeed often impossible, to 'prove.' Unless an arbitrator publicly announces his partiality, or is overhead in a moment of private admission, it is difficult to imagine how 'proof' would be obtained. Such a standard, we fear, occasionally would require that we enforce awards that are clearly repugnant to our sense of fairness, yet do not yield 'proof' of anything.

DeVore, 884 P.2d at 1255-56 (alteration in original) (quoting Morelite Const. Corp. v. N.Y.C. Dist. Council of Carpenters Benefit Funds, 748 F.2d 79, 84 (2d Cir. 1984)).

substantial relationship or trigger a mandatory vacatur, section 78B-11-113(1) requires disclosure by all prospective arbitrators of “any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator,” including expressly “an existing or past relationship with any of the parties . . . to the arbitration proceeding, their counsel or representatives, a witness, or another arbitrator.” Id. § 78B-11-113(1)(b). Thus, even if the first-cousin relationship at issue is not a “substantial relationship with a party” under section 78B-11-113(5), it still should have been disclosed. And whenever required information is not disclosed as required under section 78B-11-113(1), a court reviewing an arbitration award “may vacate an award.” Utah Code Ann. § 78B-11-113(4). Because arbitrator Burbidge failed to disclose an “existing or past” relationship with CPG’s counsel, the district court had discretion to vacate the award. Id. §§ 78B-11-113(1)(b), -113(4).

CPG concedes that courts reviewing arbitration awards under the UPUAA have this discretionary authority, stating that “failure to disclose under § 78B-11-113(1) leaves vacatur to the court’s discretion.” (AOB at 29.) Nevertheless, CPG argues, the district court’s right to exercise its discretion was never triggered in this case because the UPUAA does not require any disclosure of the Burbidges’ relationship. CPG contends that “[t]he statute places the duty to evaluate all the facts surrounding the situation on ‘an arbitrator, after making a reasonable inquiry.’” (AOB at 30.) On CPG’s reading, the arbitrator is required to disclose the relationship only if, after evaluating for himself “all the facts associated with

[the] connection,” the arbitrator concludes the relationship meets the statutory standard for disclosure. (*Id.*) CPG’s argument turns the relevant statutory language, and the purpose of disclosure, on its head.

The relevant UPUAA provision regarding disclosure states that an arbitrator “after making a reasonable inquiry, shall disclose . . . any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator . . . including . . . an existing or past relationship with any of the parties to . . . the arbitration proceeding [or] their counsel.” Utah Code Ann. § 78B-11-113(1). That language is mandatory and inclusive, and it provides district courts nearly complete discretion to determine whether an existing relationship must be disclosed. The “reasonable inquiry” required of this section excuses the arbitrator from having to disclose facts that limits what the arbitrator might be expected to know, but it does not allow the arbitrator to withhold facts known to him. Once the arbitrator makes the “reasonable inquiry,” he “shall disclose” the facts of the relationship.

CPG’s reading of this statute fails to account for related statutory provisions and for the purpose underlying mandatory disclosure prior to selection of an arbitrator. The UPUAA disclosure requirements are broad, designed to enable the parties to meaningfully consider, and meaningfully object to, an arbitrator’s involvement. For example, section 78B-11-113(3) contemplates that arbitrators will disclose information so that parties may object to arbitrators based on the information disclosed. An arbitrator who serves despite a party’s

objection does so knowing he risks the possibility that any award he enters will later be vacated. The party appointing that arbitrator is also aware of that risk. And, of course, under section 78B-11-113(4), if the arbitrator fails to disclose his relationships, he risks the possibility of vacatur. These mechanisms cannot function if the statute is construed to give the arbitrator the discretion to choose whether to withhold information known to him about an existing relationship. Section 78B-11-113(1)(b) required arbitrator Burbidge to disclose his “existing” relationship with attorney Burbidge, a member of the firm which is “counsel” for a party. Violation of that requirement gave the district court discretion to vacate the award under subsection 113(4).

CPG offers no persuasive argument as to why the district court should be held to have abused its discretion. CPG simply argues that the district court abused its discretion because attorney Burbidge’s affidavit showed that the cousins were not close and, therefore, “it would have been an abuse of discretion for the district court to vacate the award under the standard applicable to party appointees.” (AOB at 30.) That reasoning is unsound. While the presumption of partiality applies only to arbitrators acting as neutrals, the broader disclosure requirements of section 78B-11-113(1)(b) apply to all arbitrators. Even if arbitrator Burbidge was, by virtue of his party-appointment, not neutral, he was still bound by the section 78B-11-113(1)(b) disclosure requirements.

Finally, the district court’s exercise of its discretion should be upheld, for all of the reasons discussed above. The first-cousin relationship between

arbitrator Burbidge and a shareholder at Christensen & Jensen was substantial and it was certainly a fact a reasonable person would consider was likely to affect arbitrator Burbidge's partiality. At the very least, the district court acted within its discretion when it found the relationship to qualify as one that triggered the statute's mandatory disclosure provision. Attorney Burbidge will benefit from the recovery of any award by virtue of a contingency fee arrangement and any award of attorney fees. As a result of arbitrator Burbidge's nondisclosure, Westgate lost its ability to object to arbitrator Burbidge's appointment. A lynchpin of the process established by the UPUAA is giving the parties the right and the information needed to weigh the interests of potential arbitrators and their relationships to the parties and the subject of the dispute. If disclosure requirements are not enforced, those requirements are meaningless and the provisions for objecting to arbitrator appointment are hollow. Where a relationship like the one in this case is not disclosed, vacatur is within the sound discretion of the district court. This court should affirm.

III. Westgate Did Not Waive Its Right to Seek Vacatur

Westgate did not waive its right to move for vacatur of the arbitration award. Westgate timely filed its motion to vacate after learning of arbitrator Burbidge's nondisclosure and well within the statutory ninety-day time frame for moving to vacate an award. Utah Code Ann. § 78B-11-124(2). Despite the district court's finding that Westgate timely filed its motion to vacate the award, CPG argues that Westgate is foreclosed from challenging the award on the basis

of arbitrator Burbidge's relationship with counsel for CPG. These arguments rest on two premises. First, CPG claims that Westgate should have divined the existence of the relationship between Christensen & Jensen and arbitrator Burbidge because Westgate must have seen the Burbidge family name on Christensen & Jensen's letterhead. (AOB at 33-34.) Second, CPG claims that Westgate is therefore barred by the doctrine of waiver from objecting to arbitrator Burbidge's role here because Westgate failed to object within a reasonable time after it should have become aware of that relationship. (AOB at 34.) CPG's arguments are legally and factually incorrect.

First, CPG ignores several provisions of the UPUAA. The UPUAA places the responsibility for inquiring into the arbitrator's relationships on the arbitrator, not the parties. Utah Code Ann. § 78B-11-113(1) (The arbitrator must disclose all relevant relationships "after making a reasonable inquiry."). Further, the UPUAA expects the arbitrator to remain vigilant about these relationships and imposes an ongoing duty of disclosure. *Id.* § 78B-11-113(2). And the UPUAA contemplates that parties might learn of relevant relationships after the arbitration award is entered, even though they are never disclosed by the arbitrator. That explains the provision for vacatur when an arbitrator fails to disclose relevant relationships. It also explains a party's right to move for vacatur for up to ninety days from the entry of an arbitration award. *Id.* §§ 78B-11-113(4), -124(2). Westgate reasonably relied on arbitrator Burbidge's nondisclosure as an affirmative representation that no relationship required to be

disclosed existed. Westgate should not be penalized for failing to second guess the arbitrator's diligence. The elements necessary for waiver – an existing right, knowledge of its existence, and a distinctly made relinquishment of that right – are not present.¹⁴ Soter's, Inc. v. Deseret Fed. Sav. & Loan Ass'n, 857 P.2d 935, 938 (Utah 1993).

Second, CPG's factual contention – that counsel for Westgate should have been able to piece together the conflict in this case because the Burbidge name appeared on the Christensen & Jensen letterhead – is belied by CPG's own arguments. After all, CPG claims that the Burbidge name in Utah is the functional equivalent of the 'Smith' family name in other places and that it would "be hard to find a law firm in town that does not have a Christensen, Jensen, Snow, Burbidge, etc." (AOB at 21.) Assuming that is true, then it was perfectly reasonable for Westgate not to undertake additional inquiry into the potential existence of a relevant relationship, as arbitrator Burbidge and Christensen & Jensen both knew of, and should have disclosed, any such relationship. In other words, if the name is so common, then Westgate would

¹⁴ CPG also contends that no remand is necessary on this issue because its argument is based on largely undisputed facts. (AOB at 32.) This is also inaccurate. This court's precedent makes clear that "a fact finder should assess the totality of the circumstances to determine whether the relinquishment is clearly intended." Soter's, 857 P.2d at 941. Here, the district court made no such findings regarding Westgate's intent to relinquish its rights or whether Westgate reasonably could have known of arbitrator Burbidge's relationship with attorney Burbidge before Westgate, in fact, raised the issue. (R. 6134.) Of course, in rejecting CPG's waiver argument, the district court impliedly found that the facts necessary to support waiver are not present here. But should this court conclude that the district court erred, the court nevertheless should remand for factual findings regarding the issue of waiver.


have no reason to know an actual family relationship existed here. The district court was correct in rejecting CPG's arguments regarding waiver.

IV. Request for Attorney Fees

If this court dismisses CPG's appeal for lack of jurisdiction or affirms the district court's order, Westgate requests that the court award Westgate, as the prevailing party, reasonable attorney fees and other litigation expenses under Utah Code section 78B-11-126.

DATED this 19th day of August, 2011.

Zimmerman Jones Booher L.L.C.

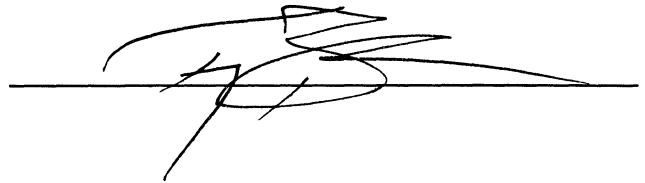


Troy L. Booher
Attorneys for Appellee Westgate Resorts, Ltd.

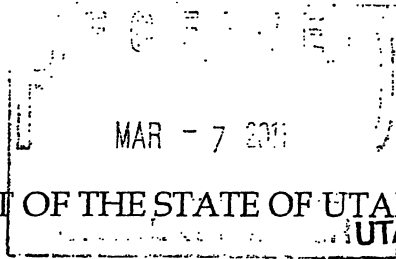
Certificate of Service

This is to certify that on the 19th day of August, 2011, two true and correct copies of Response Brief of Appellee were served via first-class mail, postage prepaid, on:

L. Rich Humpherys
Karra J. Porter
Scot A. Boyd
Alain C. Balmanno
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Salt Lake City, UT 84101-1572

A handwritten signature in black ink, appearing to be "L. Rich Humpherys", written over a horizontal line.

Tab A



FILED
UTAH APPELLATE COURTS
MAR 2 - 2011

IN THE SUPREME COURT OF THE STATE OF UTAH

—oo0oo—

Westgate Resorts, Ltd.,

Respondent,

v.

Case No. 20101017-SC

Shaun S. Adel and Consumer
Protection Group, LLC,

Petitioner.

ORDER

This matter is before the Court on petition for interlocutory appeal filed on December 22, 2010. The petition is provisionally granted. In connection with briefing on the merits, the parties are requested to address the following threshold issues: (1) whether the order from which the petition is brought is subject to direct appeal pursuant to Utah Code Ann. § 78B-11-129 or otherwise constitutes a final judgment for purposes of appeal; and (2) whether this Court has jurisdiction to review the order pursuant to rule 5 of the Rules of Appellate Procedure.

FOR THE COURT:

3-2-11

Date

Matthew B. Durrant
Associate Chief Justice

Tab B

West's Utah Code Annotated

Title 78B. Judicial Code

Chapter 11. Utah Uniform Arbitration Act (Refs & Annos)

U.C.A. 1953 § 78B-11-113
Formerly cited as UT ST § 78-31a-113

§ 78B-11-113. Disclosure by arbitrator

Currentness

(1) Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including:

(a) a financial or personal interest in the outcome of the arbitration proceeding; and

(b) an existing or past relationship with any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or representatives, a witness, or another arbitrator.

(2) An arbitrator has a continuing obligation to disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any facts that the arbitrator learns after accepting appointment which a reasonable person would consider likely to affect the impartiality of the arbitrator.

(3) If an arbitrator discloses a fact required by Subsection (1) or (2) to be disclosed and a party timely objects to the appointment or continued service of the arbitrator based upon the fact disclosed, the objection may be a ground under Subsection 78B-11-124(1)(b) for vacating an award made by the arbitrator.

(4) If the arbitrator did not disclose a fact as required by Subsection (1) or (2), upon timely objection by a party, the court under Subsection 78B-11-124(1)(b) may vacate an award.

(5) An arbitrator appointed as a neutral arbitrator who does not disclose a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party is presumed to act with evident partiality under Subsection 78B-11-124(1)(b).

(6) If the parties to an arbitration proceeding agree to the procedures of an arbitration organization or any other procedures for challenges to arbitrators before an award is made, substantial compliance with those procedures is a condition precedent to a motion to vacate an award on that ground under Subsection 78B-11-124(1)(b).

Credits

Laws 2008, c. 3, § 1207, eff. Feb. 7, 2008.

Current through 2011 General Session and First Special Session

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West's Utah Code Annotated

Title 78B. Judicial Code

Chapter 11. Utah Uniform Arbitration Act (Refs & Annos)

U.C.A. 1953 § 78B-11-124
Formerly cited as UT ST § 78-31a-124

§ 78B-11-124. Vacating an award

Currentness

(1) Upon motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

(a) the award was procured by corruption, fraud, or other undue means;

(b) there was:

(i) evident partiality by an arbitrator appointed as a neutral arbitrator;

(ii) corruption by an arbitrator; or

(iii) misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

(c) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to Section 78B-11-116, so as to substantially prejudice the rights of a party to the arbitration proceeding;

(d) an arbitrator exceeded the arbitrator's authority;

(e) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising an objection under Subsection 78B-11-116(3) not later than the beginning of the arbitration hearing; or

(f) the arbitration was conducted without proper notice of the initiation of an arbitration as required in Section 78B-11-110 so as to substantially prejudice the rights of a party to the arbitration proceeding.

(2) A motion under this section must be filed within 90 days after the movant receives notice of the award pursuant to Section 78B-11-120 or within 90 days after the movant receives notice of a modified or corrected award pursuant to Section 78B-11-121, unless the movant alleges that the award was procured by corruption, fraud, or other undue means, in which case the motion must be made within 90 days after the ground is known or by the exercise of reasonable care would have been known by the movant.

(3) If the court vacates an award on a ground other than that set forth in Subsection (1)(e), it may order a rehearing. If the award is vacated on a ground stated in Subsection (1)(a) or (b), the rehearing must be before a new arbitrator. If the award is vacated on a ground stated in Subsection (1)(c), (d), or (f), the rehearing may be before the arbitrator who made the award or the arbitrator's successor. The arbitrator must render the decision in the rehearing within the same time as that provided in Subsection 78B-11-120(2) for an award.

(4) If the court denies a motion to vacate an award, it shall confirm the award unless a motion to modify or correct the award is pending.

West's Utah Code Annotated

Title 78B. Judicial Code

Chapter 11. Utah Uniform Arbitration Act (Refs & Annos)

U.C.A. 1953 § 78B-11-126
Formerly cited as UT ST § 78-31a-126

§ 78B-11-126. Judgment on award--Attorney fees and litigation expenses

Currentness

(1) Upon granting an order confirming, vacating without directing a rehearing, modifying, or correcting an award, the court shall enter a judgment conforming to the award. The judgment may be recorded, docketed, and enforced as any other judgment in a civil action.

(2) A court may allow reasonable costs of the motion and subsequent judicial proceedings.

(3) On application of a prevailing party to a contested judicial proceeding under Section 78B-11-123, 78B-11-124, or 78B-11-125, the court may add reasonable attorney fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made to a judgment confirming, vacating without directing a rehearing, modifying, or correcting an award.

Credits

Laws 2008, c. 3, § 1220, eff. Feb. 7, 2008.

Notes of Decisions (12)

Current through 2011 General Session and First Special Session

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West's Utah Code Annotated

Title 78B. Judicial Code

Chapter 11. Utah Uniform Arbitration Act (Refs & Annos)

U.C.A. 1953 § 78B-11-129
Formerly cited as UT ST §78-31a-129

§ 78B-11-129. Appeals

Currentness

(1) An appeal may be taken from:

- (a) an order denying a motion to compel arbitration;
- (b) an order granting a motion to stay arbitration;
- (c) an order confirming or denying confirmation of an award;
- (d) an order modifying or correcting an award;
- (e) an order vacating an award without directing a rehearing; or
- (f) a final judgment entered pursuant to this chapter.

(2) An appeal under this section must be taken as from an order or a judgment in a civil action.

Credits

Laws 2008, c. 3, § 1223, eff. Feb. 7, 2008.

Notes of Decisions (9)

Current through 2011 General Session and First Special Session

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West's Utah Code Annotated

State Court Rules

Utah Rules of Appellate Procedure (Refs & Annos)

Title I. Applicability of Rules

Rules App.Proc., Rule 2

RULE 2. SUSPENSION OF RULES

Currentness

In the interest of expediting a decision, the appellate court, on its own motion or for extraordinary cause shown, may, except as to the provisions of Rules 4(a), 4(b), 4(e), 5(a), 48, 52, and 59, suspend the requirements or provisions of any of these rules in a particular case and may order proceedings in that case in accordance with its direction.

Credits

[Emergency amendment effective May 3, 2004.]

West's Utah Code Annotated

State Court Rules

Utah Rules of Appellate Procedure (Refs & Annos)

Title II. Appeals from Judgments and Orders of Trial Courts

Rules App.Proc., Rule 3

RULE 3. APPEAL AS OF RIGHT: HOW TAKEN

Currentness

(a) Filing appeal from final orders and judgments. An appeal may be taken from a district or juvenile court to the appellate court with jurisdiction over the appeal from all final orders and judgments, except as otherwise provided by law, by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal or other sanctions short of dismissal, as well as the award of attorney fees.

(b) Joint or consolidated appeals. If two or more parties are entitled to appeal from a judgment or order and their interests are such as to make joinder practicable, they may file a joint notice of appeal or may join in an appeal of another party after filing separate timely notices of appeal. Joint appeals may proceed as a single appeal with a single appellant. Individual appeals may be consolidated by order of the appellate court upon its own motion or upon motion of a party, or by stipulation of the parties to the separate appeals.

(c) Designation of parties. The party taking the appeal shall be known as the appellant and the adverse party as the appellee. The title of the action or proceeding shall not be changed in consequence of the appeal, except where otherwise directed by the appellate court. In original proceedings in the appellate court, the party making the original application shall be known as the petitioner and any other party as the respondent.

(d) Content of notice of appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment or order, or part thereof, appealed from; shall designate the court from which the appeal is taken; and shall designate the court to which the appeal is taken.

(e) Service of notice of appeal. The party taking the appeal shall give notice of the filing of a notice of appeal by serving personally or mailing a copy thereof to counsel of record of each party to the judgment or order; or, if the party is not represented by counsel, then on the party at the party's last known address. A certificate evidencing such service shall be filed with the notice of appeal. If counsel of record is served, the certificate of service shall designate the name of the party represented by that counsel.

(f) Filing fee in civil appeals. At the time of filing any notice of separate, joint, or cross appeal in a civil case, the party taking the appeal shall pay to the clerk of the trial court the filing fee established by law. The clerk of the trial court shall not accept a notice of appeal regardless of whether the filing fee has been paid. Failure to pay the filing fee within a reasonable time may result in dismissal.

(g) Docketing of appeal. Upon the filing of the notice of appeal, the clerk of the trial court shall immediately transmit a certified copy of the notice of appeal, showing the date of its filing, and a statement by the clerk indicating whether the filing fee was paid and whether the cost bond required by Rule 6 was filed. Upon receipt of the copy of the notice of appeal, the clerk of the appellate court shall enter the appeal upon the docket. An appeal shall be docketed under the title given to the action

in the trial court, with the appellant identified as such, but if the title does not contain the name of the appellant, such name shall be added to the title.

Credits

[Amended effective October 1, 1992; November 1, 1996; November 1, 1999; November 1, 2008.]

West's Utah Code Annotated

State Court Rules

Utah Rules of Appellate Procedure (Refs & Annos)

Title II. Appeals from Judgments and Orders of Trial Courts

Rules App.Proc., Rule 4

RULE 4. APPEAL AS OF RIGHT: WHEN TAKEN

Currentness

(a) Appeal from final judgment and order. In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. However, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 10 days after the date of entry of the judgment or order appealed from.

(b) Time for appeal extended by certain motions.

(b)(1) If a party timely files in the trial court any of the following motions, the time for all parties to appeal from the judgment runs from the entry of the order disposing of the motion:

(b)(1)(A) a motion for judgment under Rule 50(b) of the Utah Rules of Civil Procedure;

(b)(1)(B) a motion to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted, under Rule 52(b) of the Utah Rules of Civil Procedure;

(b)(1)(C) a motion to alter or amend the judgment under Rule 59 of the Utah Rules of Civil Procedure;

(b)(1)(D) a motion for a new trial under Rule 59 of the Utah Rules of Civil Procedure; or

(b)(1)(E) a motion for a new trial under Rule 24 of the Utah Rules of Criminal Procedure.

(b)(2) A notice of appeal filed after announcement or entry of judgment, but before entry of an order disposing of any motion listed in Rule 4(b), shall be treated as filed after entry of the order and on the day thereof, except that such a notice of appeal is effective to appeal only from the underlying judgment. To appeal from a final order disposing of any motion listed in Rule 4(b), a party must file a notice of appeal or an amended notice of appeal within the prescribed time measured from the entry of the order.

(c) Filing prior to entry of judgment or order. A notice of appeal filed after the announcement of a decision, judgment, or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

(d) Additional or cross-appeal. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by paragraphs (a) and (b) of this rule, whichever period last expires.

(e) Extension of time to appeal. The trial court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by paragraphs (a) and (b) of this rule. A motion filed before expiration of the prescribed time may be ex parte unless the trial court otherwise requires. Notice of a motion filed after expiration of the prescribed time shall be given to the other parties in accordance with

the rules of practice of the trial court. No extension shall exceed 30 days past the prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(f) Motion to reinstate period for filing a direct appeal in criminal cases. Upon a showing that a criminal defendant was deprived of the right to appeal, the trial court shall reinstate the thirty-day period for filing a direct appeal. A defendant seeking such reinstatement shall file a written motion in the sentencing court and serve the prosecuting entity. If the defendant is not represented and is indigent, the court shall appoint counsel. The prosecutor shall have 30 days after service of the motion to file a written response. If the prosecutor opposes the motion, the trial court shall set a hearing at which the parties may present evidence. If the trial court finds by a preponderance of the evidence that the defendant has demonstrated that he was deprived of his right to appeal, it shall enter an order reinstating the time for appeal. The defendant's notice of appeal must be filed with the clerk of the trial court within 30 days after the date of entry of the order.

(g) Appeal by an Inmate Confined in an Institution. If an inmate confined in an institution files a notice of appeal in either a civil or criminal case, the notice of appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a notarized statement or written declaration setting forth the date of deposit and stating that first-class postage has been prepaid. If a notice of appeal is filed in the manner provided in this paragraph (g), the 14-day period provided in paragraph (d) runs from the date when the trial court receives the first notice of appeal.

Credits

[Amended effective November 1, 1998; April 1, 1999; November 1, 2002; November 1, 2005; November 1, 2006.]

West's Utah Code Annotated

State Court Rules

Utah Rules of Appellate Procedure (Refs & Annos)

Title II. Appeals from Judgments and Orders of Trial Courts

Rules App.Proc., Rule 5

RULE 5. DISCRETIONARY APPEALS FROM INTERLOCUTORY ORDERS

Currentness

(a) Petition for permission to appeal. An appeal from an interlocutory order may be sought by any party by filing a petition for permission to appeal from the interlocutory order with the clerk of the appellate court with jurisdiction over the case within 20 days after the entry of the order of the trial court, with proof of service on all other parties to the action. A timely appeal from an order certified under Rule 54(b), Utah Rules of Civil Procedure, that the appellate court determines is not final may, in the discretion of the appellate court, be considered by the appellate court as a petition for permission to appeal an interlocutory order. The appellate court may direct the appellant to file a petition that conforms to the requirements of paragraph (c) of this rule.

(b) Fees and copies of petition. For a petition presented to the Supreme Court, the petitioner shall file with the Clerk of the Supreme Court an original and five copies of the petition, together with the fee required by statute. For a petition presented to the Court of Appeals, the petitioner shall file with the Clerk of the Court of Appeals an original and four copies of the petition, together with the fee required by statute. The petitioner shall serve the petition on the opposing party and notice of the filing of the petition on the trial court. If an order is issued authorizing the appeal, the clerk of the appellate court shall immediately give notice of the order by mail to the respective parties and shall transmit a certified copy of the order, together with a copy of the petition, to the trial court where the petition and order shall be filed in lieu of a notice of appeal.

(c) Content of petition.

(c)(1) The petition shall contain:

(c)(1)(A) A concise statement of facts material to a consideration of the issue presented and the order sought to be reviewed;

(c)(1)(B) The issue presented expressed in the terms and circumstances of the case but without unnecessary detail, and a demonstration that the issue was preserved in the trial court. Petitioner must state the applicable standard of appellate review and cite supporting authority;

(c)(1)(C) A statement of the reasons why an immediate interlocutory appeal should be permitted, including a concise analysis of the statutes, rules or cases believed to be determinative of the issue stated; and

(c)(1)(D) A statement of the reason why the appeal may materially advance the termination of the litigation.

(c)(2) If the appeal is subject to assignment by the Supreme Court to the Court of Appeals, the phrase "Subject to assignment to the Court of Appeals" shall appear immediately under the title of the document, i.e. Petition for Permission to Appeal. Appellant may then set forth in the petition a concise statement why the Supreme Court should decide the case in light of the relevant factors listed in Rule 9(c)(9).

(c)(3) The petitioner shall attach a copy of the order of the trial court from which an appeal is sought and any related findings of fact and conclusions of law and opinion.

(d) Service in criminal and juvenile delinquency cases. Any petition filed by a defendant in a criminal case originally charged as a felony or by a juvenile in a delinquency proceeding shall be served on the Criminal Appeals Division of the Office of the Utah Attorney General.

(e) Answer. Within 10 days after service of the petition, any other party may file an answer in opposition or concurrence. If the appeal is subject to assignment by the Supreme Court to the Court of Appeals, the answer may contain a concise response to the petitioner's contentions under Rule 5(c). An original and five copies of the answer shall be filed in the Supreme Court. An original and four copies shall be filed in the Court of Appeals. The respondent shall serve the answer on the petitioner. The petition and any answer shall be submitted without oral argument unless otherwise ordered.

(f) Grant of permission. An appeal from an interlocutory order may be granted only if it appears that the order involves substantial rights and may materially affect the final decision or that a determination of the correctness of the order before final judgment will better serve the administration and interests of justice. The order permitting the appeal may set forth the particular issue or point of law which will be considered and may be on such terms, including the filing of a bond for costs and damages, as the appellate court may determine. The clerk of the appellate court shall immediately give the parties and trial court notice by mail of any order granting or denying the petition. If the petition is granted, the appeal shall be deemed to have been filed and docketed by the granting of the petition. All proceedings subsequent to the granting of the petition shall be as, and within the time required, for appeals from final judgments except that no docketing statement shall be filed under Rule 9 unless the court otherwise orders.

(g) Stays pending interlocutory review. The appellate court will not consider an application for a stay pending disposition of an interlocutory appeal until the petitioner has filed a petition for interlocutory appeal.

Credits

[Amended effective October 1, 1992; July 1, 1994; April 1, 1996; November 1, 1999; April 1, 2004; November 1, 2006; November 1, 2010.]

Notes of Decisions (52)

State court rules are current with amendments received through April 15, 2011

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IN THE UTAH SUPREME COURT

WESTGATE RESORTS, LTD.,

Plaintiff,

vs.

SHAUN S. ADEL and CONSUMER
PROTECTION GROUP, LLC,

Defendants.

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR SUMMARY
DISPOSITION**

Case No. 201001017 SC

Pursuant to U.R.A.P. 10(a)(2)(B), Appellant/Counterclaimant Consumer Protection Group, LLC (“CPG”), submits this *Memorandum of Points and Authorities in Support of Motion for Summary Disposition*. CPG moves for summary disposition to reverse the order of the trial court based on manifest error.

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INTRODUCTION

A panel of three arbitrators, Judith M. Billings, Richard D. Burbidge, and Paul S. Felt, presided over this matter for approximately one year, including the resolution of numerous motions and an extended evidentiary hearing. On February 2, 2010, the panel entered unanimous findings of fact and conclusions of law finding, *inter alia*, that appellee Westgate Resorts, Ltd. had both committed numerous acts of communications fraud and violated the Utah Pattern of Unlawful Activity Act. In the second phase of the arbitration, appellant Consumer Protection Group (CPG) filed a motion for attorney fees with the arbitrators pursuant to the UPUAA.

While the motion for attorney fees was pending, CPG and Westgate filed competing motions in the Fourth District Court, CPG seeking to confirm the first-phase award and certify it as a final judgment, and Westgate seeking to vacate the award. The arbitrators stayed the remainder of the arbitration pending resolution of Westgate's motion.

Westgate's motion to vacate was based upon the single fact that one of the three arbitrators, Richard Burbidge, failed to disclose that he is one of 22 first cousins of George W. Burbidge, an attorney at Christensen & Jensen (the law firm representing CPG), who had no involvement in the Westgate case. Westgate did not object to the award on any other grounds.

Westgate did not claim to have any evidence of actual impropriety by Richard Burbidge, and the evidence was uncontested that Richard Burbidge and George Burbidge have no personal or social relationship. Nonetheless, the trial court granted Westgate's

motion to vacate, finding that, regardless of whether any personal relationship exists, the failure to disclose the first-cousin relationship required vacatur. As acknowledged by all parties, under the trial court's order, the matter in arbitration is to be reheard by a new panel of arbitrators.

CPG petitioned for permission to appeal from the trial court's order. The Court granted the petition provisionally, directing the parties to address two threshold issues in connection with briefing on the merits, 1) whether the order from which the petition is brought is subject to direct appeal pursuant to Utah Code Ann. §78B-11-129 or otherwise constitutes a final judgment for purposes of appeal; and 2) whether this Court has jurisdiction to review the order pursuant to Rule 5 of the Rules of Appellate Procedure.

This case is particularly appropriate for summary disposition. Although appellant will raise additional issues on appeal (*e.g.*, waiver), this motion is confined to a single, narrow issue of statutory interpretation applied to uncontested facts. This state has a "policy of expediting judicial treatment of arbitration matters," *Buzas Baseball Inc. v. Salt Lake Trappers*, 925 P.2d at 947 n. 4 (Utah 1996). It has been more than a year since the arbitrators issued their first award, and nearly a year since the second phase of the arbitration was put on hold. CPG respectfully submits that, under the particular circumstances of this case, the trial court's ruling constitutes manifest error, and summary reversal is compelled.

ISSUES PRESENTED¹

1. Is the order from which the petition is brought subject to direct appeal pursuant to Utah Code Ann. §78B-11-129 or, does it otherwise constitute a final judgment for purposes of appeal?
2. Does this Court have jurisdiction to review the order pursuant to Rule 5 of the Rules of Appellate Procedure?
3. Did the District Court err in ruling that an undisclosed first-cousin relationship between Richard Burbidge and George Burbidge, without more, required vacatur of the arbitration award?

STANDARD OF REVIEW

Questions of law, including the interpretation of statutes, are reviewed for correctness. *Rushton v. Salt Lake County*, 1999 UT 36, ¶ 17, 977 P.2d 1201.

STATEMENT OF FACTS

Procedural Background

Westgate filed its initial lawsuit in this case on September 19, 2002. In March 2004, CPG was granted leave to and did file a counterclaim asserting, *inter alia*, claims against Westgate under the Utah Pattern of Unlawful Activity Act (UPUAA). (R. 2755.)²

Four years later, Westgate filed a motion to compel arbitration of the UPUAA claims by virtue of a provision of the Act stating that such claims are “subject to”

¹ Although this motion for summary disposition is not the briefing on the merits, consistent with the Court’s provisional order granting interlocutory review, this motion is prefaced with discussion of the threshold jurisdictional issues on which the Court requested briefing.

² Portions of the record have been paginated. Two exhibits that have not (the ruling and the hearing transcript) are attached hereto; other citations are to the record.

arbitration. Over CPG's objection, on October 27, 2008, the trial court granted Westgate's motion, and ordered the UPUAA claims into arbitration. (R. 4718.)

It is undisputed that each party selected an arbitrator. Westgate selected Judith Billings, CPG selected Richard Burbidge, and the two of them then selected Paul Felt as the neutral. After the appointments, Westgate sent an ex parte communication to its designee. (R. 5922-5924.) Upon learning about it, CPG objected to ex parte communications with arbitrators. *Id.* In response, the panel members included a provision in its arbitration fee agreement with the parties stating that they all considered themselves neutral. (R. 5831.)

After a year of discovery and various motions, the arbitration hearing took place December 7-11, 2009, and January 22, 2010.

On February 2, 2010, the Panel issued unanimous Findings of Facts, Conclusions of Law and Award ("Arbitration Award"). (R. 5947.) The Panel found by clear and convincing evidence that Westgate had made false and fraudulent representations, promises, and non-disclosures with the intent to mislead or with reckless indifference to the truth. *Id.*, ¶¶ 10, 23. The Panel also found that the actions of Westgate constituted a scheme or artifice to defraud within the meaning of Utah Code Ann. § 76-10-1801, and that the scheme constituted a pattern of unlawful activity within the meaning of Utah Code Ann. § 76-10-1602. *Id.* at ¶¶ 10, 15.

The Panel awarded \$65,500 on the UPUAA claims. (R. 5937.) CPG then submitted a motion for attorney fees pursuant to UPUAA, and a motion in the Fourth

District Court to confirm the first arbitration award and certify it as final under U.R.Civ.P. 54(b). (R. 5797.) Westgate moved to vacate the award. (R. 5909.)

Westgate's sole objection to the award was that arbitrator Richard D. Burbidge had failed to disclose that he is a first cousin of George W. Burbidge II. Westgate's principal argument was that, although Arbitrator Burbidge was a party appointee, by voluntarily considering himself "neutral" after his appointment, he had subjected himself to disclosure requirements applicable to arbitrators designated as neutral by statute.

CPG argued that voluntary characterizations after appointment do not affect the status of party-appointed arbitrators nor the applicable disclosure standards but that, in any event, the mere existence of a first-cousin relationship without more is insufficient to vacate an award on non-disclosure grounds.

Facts regarding the Burbidges' relationship

The following facts were uncontroverted below (R. 5979-5980; *see also* R. 5982 (CPG's Opposition to Westgate's Motion to Vacate), and R. 6076 (Westgate's Reply)):

Richard D. Burbidge is a first cousin of George W. Burbidge II, one of 22 first cousins.

[George W. Burbidge is] a shareholder in Christensen & Jensen.

Due to a large disparity in ages between their fathers, Richard D. Burbidge is a generation older than George W. Burbidge. (Richard D. Burbidge is 61 years old; George W. Burbidge II is 42.)

Richard Burbidge and George Burbidge have no close familial relationship, have no active social relationship, do not speak with each other regularly, have no business relationship with each other, and have no personal connection outside their familial relationship. They have not spoken in many months. They last spoke for a minute when they happened to bump into each other during the Utah

Bar Convention in Sun Valley, Idaho, in June, 2009. Previously, they both attended the funeral of an aunt in March, 2009.

The law firms at which Richard Burbidge and George Burbidge are associated have been adverse to each other in litigation, and Richard Burbidge and George Burbidge have been adverse to each other in litigation.

George Burbidge has had no involvement in the Westgate case. His financial interest in any recovery by other shareholders in the firm is indirect.

George Burbidge has never asked for, discussed, received, or expected in any way any financial support or benefit from any of his 22 first cousins, including Richard Burbidge. The notion that Richard Burbidge would be influenced by an indirect interest in facilitating George Burbidge's indirect interest in a recovery, or vice versa, is unreasonable.

Westgate does not claim that any actual conflict existed on the part of Richard D. Burbidge, or that he evidenced any partiality in the proceedings.³

On December 13, 2010, the Fourth District Court entered an order vacating the arbitration award. The court ruled that the first-cousin relationship in itself was a fact that Richard Burbidge was required to disclose, because a reasonable person would consider that fact likely to affect the impartiality of the arbitrator. Exh. 1, pp. 7-8. The

³ Westgate counsel: "We've never made an accusation that Mr. Burbidge did anything untoward in connection with discharging his duties as an arbitrator, other than failing to make these disclosures. Again, as the Court pointed out in its synopsis of the – of CPG's position, we've never used the undue means or fraud trigger under the – under Section 125. We've never brought that up. That's not part of it. The only one that we've invoked is the evident partiality. That is only because in Section 113 the presumption of evident partiality is created by the failure to make that disclosure. So we've never professed, and we agreed to this in the reply, that we're making a factual showing that Mr. Burbidge engaged in fraud or undue means or there was evident partiality as a matter of objective evidence or proof. We've not pointed to anything he said or did during the proceedings or anything like that." (Exh. 2, Transcript of Hearing, August 4, 2010, pp 30-31.)

Trial Court concluded that Utah Code Ann. § 78B-11-113(1)(b) mandated disclosure, and that evident partiality was presumed under § 78B-11-113(5). The Court vacated the arbitration award under § 78B-11-124(1)(b)(i) and (iii). *Id.* at 8.

Now, more than two years since arbitration was compelled, after the expenditure of hundreds of hours of attorney time and nearly \$150,000 in arbitrator fees alone, the parties face having to re-arbitrate if the trial court's ruling is permitted to stand. Additionally, under the trial court's order, all of the work of the prior panel, including rulings on numerous motions and discovery disputes, will be of no legal effect and the parties will have to begin from scratch.⁴

ARGUMENT

I. THE ORDER FROM WHICH THE PETITION IS BROUGHT IS NOT SUBJECT TO DIRECT APPEAL, AND, IN ANY EVENT, AN IMMEDIATE APPEAL WOULD BE PERMISSIVE, NOT MANDATORY.

Utah Code Ann. §78B-11-129 provides that an appeal may be taken from: “(a) an order denying a motion to compel arbitration; (b) an order granting a motion to stay arbitration; (c) an order confirming or denying confirmation of an award; (d) an order modifying or correcting an award; (e) an order vacating an award without directing a rehearing; or (f) a final judgment entered pursuant to this chapter.”

None of the bases for appeal listed in §129 is applicable to this matter. The Ruling and subsequent Order issued by the trial court do not constitute a final judgment in the case as it did not resolve any claim between the parties and denied certification as final.

⁴ Additionally, only portions of the arbitration proceeding were recorded. Consequently, several live witnesses will have to be brought in again.

Nor did the trial court deny a motion to compel arbitration, stay arbitration, or modify or correct the award. The trial court observed that if it granted the motion to vacate, it was not required to issue an order confirming the award, and denied CPG's motion and to enter a final order under U.R.Civ.P. 54(b). Exh. 1 at 6, 7.

The parties agree that the arbitration is to be reheard by a new panel unless this Court reverses the trial court's Order, and thus the order does not constitute a vacature "without ordering a rehearing." As acknowledged by Westgate in its opposition to CPG's petition for interlocutory appeal, "The Order calls for re-arbitration of the case." *Response in Opposition to Petition for Permission to Appeal from Interlocutory Appeal* at 7; *see also id.* at 8, 9 ("CPG's right to arbitrate its case in front of a neutral and impartial panel is unaffected"), and 10 ("the District Court's Order, which in the jargon, ordered a 'do-over'"), and Petition for Permission to Appeal from Interlocutory Order, pp. 4, 6, 15 ("Unless interlocutory review is granted, the parties will be forced to start over in an arbitration that has already cost hundreds of thousands of dollars."); also Exh. 2, p. 34 ("[Westgate counsel]: What the statute says, though, is if you do vacate for evident impartiality, you order a rehearing. THE COURT: Sure.")⁵

⁵ By statute, an order granting vacatur without a rehearing is typically reserved for grounds that, by their nature, preclude a subsequent rehearing of the arbitration. *See, e.g.*, Utah Code Ann. § 78B-11-124(3) ("If the court vacates an award on a ground other than that set forth in Subsection (1)(e) [that there was no agreement to arbitrate], it may order a rehearing. If the award is vacated on a ground stated in Subsection (1)(a) or (b) [evident partiality by an arbitrator appointed as a neutral], the rehearing must be before a new arbitrator.")

Because none of the bases listed in §78B-11-129 is applicable, the trial court's Order is not subject to a direct appeal. If the Order is allowed to stand, the parties will face a new round of arbitration hearings with a new panel, new costs and fees, and a new round of testimony from the witnesses.

As an additional observation, CPG notes that, even if grounds identified in § 78B-11-129 had been present, an immediate appeal under that section is permissive, not mandatory: “(1) An appeal may be taken...” This Court and the Court of Appeals have consistently noted that “may” is a word of permission, not mandate. *See, e.g., In re Olympus Const., L.C.*, 2009 UT 29, ¶ 15, 215 P.3d 129 (“[Utah Code Ann. § 48-2c-] 1305 (1) provides, ‘A dissolved company in winding up may dispose of the known claims against it by following the procedures described in this section.’ (Emphasis added [by court].) Use of the provisions of this section is permissive rather than mandatory. That is, a dissolved company may elect to follow the procedures in this section or it may choose another route.”); *Diversified Holdings, L.C. v. Turner*, 2002 UT 129, ¶ 32, 63 P.3d 686 (“This use of ‘may’ is permissive, rather than mandatory”); *Glezos v. Frontier Investments*, 896 P.2d 1230 (Utah App. 1995) (“[U.R.A.P.] 10(a) provides: ‘Within 10 days after the docketing statement is served, a party may move: (1) To dismiss the appeal or the petition for review on the basis that the appellate court has no jurisdiction.’ Utah R.App.P. 10(a) (emphasis added [by court]). Rule 10(a) is permissive, not mandatory.”); *Pugh v. Dozzo-Hughes*, 2005 UT App. 203, ¶ 13, 112 P.3d 1247 (“a rule 38 motion to substitute parties on appeal is permissive, not mandatory. See Utah R.App.

P. 38(a) (stating another “party may be substituted as a party” by motion (emphasis added [by court])).⁶

II. THIS COURT HAS JURISDICTION PURSUANT TO U.R.A.P. 5.

This Court has jurisdiction to hear interlocutory appeals pursuant to Utah Code Ann. § 78A-3-102(3)(j). Rule 5(a) provides that an appeal from an interlocutory order may be sought within 20 days after the entry of the order. U.R.A.P. 5(a). This Court has explained that “no finality will be ascribed to a memorandum decision or minute entry for purposes of triggering the running of the time for appeal until the prevailing party prepares and submits a proposed order.” *Houghton v. Dept. of Health*, 2008 UT 86, ¶ 11; 206 P. 3d 287; citing to *Code v. Dept. of Health*, 2007 UT 43, ¶ 9, 162 P.3d 1097.

In this matter, the trial court issued a Ruling on September 30, 2010, and directed Westgate to prepare an order consistent with the opinion. The Order prepared by Westgate was signed and entered on December 13, 2010. CPG filed its Petition for interlocutory appeal on December 22, 2010, well within the 20 days allotted by Rule 5(a). Therefore the Petition was timely and the Court has jurisdiction.

⁶ That is only logical: Any other reading would compel an immediate appeal when it might not otherwise be necessary or desired, sacrificing judicial economy and potentially causing additional delay. For example, a party might choose not to appeal immediately an order staying an arbitration if it felt that a resolution of non-arbitrable issues would resolve the case more quickly (and/or at less expense).

III. THE TRIAL COURT’S INTERPRETATION OF THE UTAH ARBITRATION ACT WAS MANIFEST ERROR.

The burden for vacating an arbitration award in Utah is steep. This Court has explained that “a motion to vacate or modify an arbitration award is limited to determining whether any of the very limited grounds for modification or vacatur exist.” *Pacific Development, L.C. v. Orton*, 2001 UT 36, ¶6, 23 P. 3d 1035 (citing *Buzas Baseball v. Salt Lake Trappers*, 925 P. 2d 941, 947 (Utah 1996)).

As discussed *infra*, CPG takes issue with the trial court’s ruling that Richard Burbidge was a “neutral” appointee under the Utah Arbitration Act. However, even assuming that he was, the trial court erred in two central respects, either of which requires reversal. Understanding the nature of the error requires articulation of the relationship among the two disclosure provisions in the Act, one of which applies only to neutrals, and the other of which applies to both neutral- and party-appointees. As discussed herein, the trial court erred under either standard.

Neutral appointees are subject to a disclosure requirement in the Act that does not apply to party appointees. Utah Code Ann. § 78B-11-113(5), states that a neutral appointee who does not disclose a “known, existing, and substantial relationship with a party” is presumed to act with evident partiality:

[78B-11-113(5)] An arbitrator appointed as a neutral arbitrator who does not disclose a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party is presumed to act with evident partiality under Subsection 78B-11-124(1)(b).

Section 78B-11-124(1)(b), in turn, provides:

Upon motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

* * *

(b) there was:

(i) evident partiality by an arbitrator appointed as a neutral arbitrator.

In interpreting these provisions, the trial court erred in a couple of respects, either of which requires reversal. First, it erroneously interpreted “substantial relationship” as including first-cousin relationships unaccompanied by any personal, social, or financial relationship. Second, it erroneously assumed that the presumption of evident partiality was irrebuttable, when all evidence – and Westgate’s own concession – was that no partiality was evidenced by Arbitrator Burbidge.

A. Richard Burbidge’s first-cousin relationship with George Burbidge, without more, was not a “substantial relationship” with a party.⁷

The legislature did not define “substantial relationship” within the Arbitration Act, and this Court need not do so now. It is enough that the (non)relationship in this case does not qualify. From the language of the statute, it is self-evident that a relationship in itself is insufficient to implicate Section 78B-11-113(5); it must be “substantial.”

⁷ CPG does not dispute that Richard Burbidge’s consanguinity with George Burbidge was a “known” and “existing” relationship. Consequently, this discussion focuses on whether it satisfied the third element, a “substantial” relationship with a party.

This Court has warned against interpreting the Arbitration Act so as to impose an “appearance of impropriety” standard on arbitrators. In *DeVore v. IHC Hospitals, Inc.*, 884 P.2d 1246, 1255 (Utah 1994), the Court observed:

[A]s a matter of policy, we think an appearance-of-partiality standard sets an impractically low threshold, especially in a small state like Utah. Indeed, to disqualify any arbitrator who has professional dealings with one of the parties (to say nothing of a social acquaintanceship) would make it impossible, in some circumstances, to find a qualified arbitrator at all.⁸

Similarly, the Utah Ethics Advisory Committee has opined that the participation of a cousin may result in judicial disqualification under the (former) general Canon 3C(1) impartiality standard “*if a close personal relationship exists.*” (R. 5920, Informal Opinion No. 89-5 (emphasis added).) The opinion, while not binding on the Court, supports the contention that a first-cousin relationship alone is not sufficient for disqualification even of a sitting judge – the genetic relationship must be accompanied by a personal or social relationship, which all parties agree is not present here.

In short, being one of 22 cousins, with a 19-year age gap, virtually no personal interaction – in fact, less of a social relationship than many unrelated attorneys – and no financial connection cannot reasonably be construed as a “substantial” relationship. *See, e.g., Washburn v. McManus*, 895 F. Supp 392, 399 (D. Conn. 1994) (“The mere fact of a prior relationship is not in and of itself sufficient to disqualify arbitrators. The

⁸ The Court’s observation regarding the effect of the size of the legal community and jurisdiction is fitting here: Particularly with Utah’s large families and unique heritage, it would be hard to find a law firm in town that does not have a Christensen, Jensen, Snow, Burbidge, etc.

relationship between the arbitrator and the party's principal must be so intimate – personally, socially, professionally, or financially – as to cast serious doubt on the arbitrator's impartiality”).

In *Morelite Construction Corp. v. NY City District Council Carpenters Benefit Fund*, 748 F.2d 79 (2nd Cir. 1984), cited approvingly by this Court in *DeVore*, the Second Circuit upheld the disqualification of an arbitrator whose son was president of the Union, a district chapter of which was a party to the arbitration. However, the court narrowed its ruling and observed that

[w]e need not, and do not, attempt to set forth a list of familial or other relationships that will result in the per se vacation of an arbitration award, except to suggest that such a list would most likely be very short. We do not intend to hold arbitrators to all the standards of Canon 3. 748 F.2d at 85.

The court also predicted post arbitration “sour grapes” by losing parties, stating that “[n]either do we intend that unsuccessful parties to arbitration may have awards set aside by seeking out and finding tenuous relationships between the arbitrator and the successful party.” *Id.* As a California court stated recently,

[t]he test is an objective one – whether such an impression is created in the eye of the hypothetical reasonable person. Thus, unless a reasonable member of the public at large, aware of all the facts, would fairly entertain doubts concerning the arbitrator's impartiality, the arbitrator is not subject to disqualification.

Mahnke v. Superior Court, 180 Cal. App. 4th 565, 579, 103 Cal. Rptr. 3d 197, 206 (2009). In this matter, a reasonable person, aware of all the facts, would not fairly entertain doubts regarding the impartiality of Richard Burbidge.⁹

B. The uncontroverted evidence rebutted the presumption of evident partiality in any event.

Westgate successfully argued below that Richard Burbidge’s failure to disclose the first-cousin relationship with George Burbidge “is both statutorily presumed to constitute evident partiality and is, in fact, evident partiality” (R. 5909 at 15; *also* Exh. 2, p. 31 (“It’s the presumption, which the statute does not say is rebuttable. . . . We’re saying it is, you know, an irrebuttable presumption of evident partiality which mandates vacatur here under the statute.”).)

But as CPG pointed out, presumptions are just that, presumptions. *See, e.g.*, Exh. 2, pp. 38-39 (“[A] presumption is always rebuttable unless stated otherwise. Courts often refer to it as a balloon. That the balloon is the presumption, and as soon as evidence is presented contrary to the presumption, the balloon pops.”); U.R.E. 301(1); *Burns v.*

⁹ Both Westgate and the Trial Court relied on a 1968 U. S. Supreme Court opinion for the proposition that arbitrators are required to “disclose to the parties any dealings that might create an impression of possible bias.” Exh 1 (court’s ruling) at 8, *quoting Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968). However, this Court not only rejected that standard in *DeVore*, but expressly found reliance upon *Commonwealth* to be misplaced, noting that the quoted language “captured only three other votes,” and that one of the concurring justices, “Justice White further concluded that an arbitrator cannot be expected to provide the parties with a complete and unexpurgated business biography. But it is enough for present purposes to hold, as the Court does, that where an arbitrator has a substantial interest in a firm which had done more than trivial business with a party, that fact must be disclosed.” *DeVore*, 884 P.2d at 1255 n. 11 (brackets omitted).

Boyden, 2006 UT 14, ¶ 20, 133 P.3d 370; Richard C. Mangrum & Dee V. Benson, MANGRUM & BENSON ON UTAH EVIDENCE, at 101-102 (2009-2010 ed.) (“If the basic fact is established and evidence is presented challenging the presumed fact, then the presumption either disappears . . . or remains to allocate the burden of persuasion as to the nonexistence of the presumed fact . . .”). *Contrast Davis v. Provo City Corp.*, 2008 UT 59, ¶¶ 22-23, 193 P.3d 86 (applying statute in which legislature used term “conclusive presumption” and citing other statutes with that wording). Indeed, if the legislature had intended a failure to disclose a substantial relationship in itself to mandate vacatur, it would simply have listed such failure to disclose as a ground for mandatory vacatur under Section 78B-11-124(1), rather than creating a presumption in Section 78B-11-113(5).

CPG adduced affirmative, unrefuted evidence rebutting any inference of partiality, including the fact that no social, personal, or financial relationship existed, that a material difference in age existed, and that the two Burbidges and their firms have been adverse to each other in litigation. *See* pp. 5-6, *supra*. Moreover, Mr. Burbidge was one of three arbitrators, whose decision was unanimous, and who, while affording substantial relief to CPG, did reject portions of CPG’s claims. (*See* R. 5947.)

Once CPG adduced affirmative evidence rebutting the presumption, the burden fell upon Westgate to come up with something from which “a reasonable person would

conclude that an arbitrator, appointed as a neutral, showed partiality” *DeVore v. IHC Hospitals, Inc.*, 884 P.2d 1246, 1256 (Utah 1994).¹⁰

Westgate adduced no such evidence. In fact, counsel conceded that it had no such evidence to offer: “So we’ve never professed, and we agreed to this in the reply, that we’re making a factual showing that Mr. Burbidge engaged in fraud or undue means or there was evident partiality as a matter of objective evidence or proof. We’ve not pointed to anything he said or did during the proceedings or anything like that.” (Exh. 2, pp. 30-31.) (Emphasis added.)

As a matter of law, therefore, Westgate failed to meet the requirements of mandatory vacatur under Utah Code Ann. § 78B-11-124(1)(b). The appropriateness of this conclusion is illustrated by the Court’s application of a similar standard in *DeVore*. In that case, several years before the arbitration, the sole arbitrator (Mabey) had been an LDS stake president under whom an adverse witness served as bishop, a relationship that the trial court characterized as “significant and important.”

That relationship, without more, was insufficient for a reasonable person to find that the arbitrator showed partiality, this Court concluded. “There is no evidence in the record that this particular relationship has continued in any substantial way since 1980,”

¹⁰ Applying similar language in the predecessor to § 78B-11-124, this Court rejected a standard that would require a party seeking vacatur to prove *actual* partiality. Rather, the movant must prove that “a reasonable person would conclude that an arbitrator, appointed as neutral, *showed* partiality Furthermore, the burden of proof falls on the movant, and the evidence of partiality must be certain and direct, not remote, uncertain, or speculative.” *DeVore*, 884 P.2d at 1256 (emphasis added). There is no material difference between the “showed partiality” language construed in *DeVore* and the “evident partiality” language presently utilized in the Act. *Id.* at 1256 n. 12.

the Court noted. “Furthermore, there is no evidence in the record that Mabey continued to be, if indeed he ever was, influenced by his alleged love, respect, and admiration for [the witness]. The affidavits submitted by Dr. DeVore contain, at best, remote, uncertain, and speculative statements. . . . A reasonable person would not regard them as establishing certain and direct evidence for Mabey’s allegiance to [the witness] or any resultant partiality to IHCH.” 884 P.2d at 1257 (emphases added).

The Court further noted that “[t]here is no evidence in the record that Mabey did anything but use his best judgment to decide the issues of fact and law before him. That Mabey found IHCH’s arguments more persuasive than Dr. DeVore’s is not evidence of bias. Indeed, neither an arbitrator’s consistent reliance on the winning party’s evidence nor the arbitrator’s conclusion in the winning party’s favor establish partiality.” *Id.* at 1257.

The trial court erred in assuming that the presumption of evident partiality was sufficient to compel mandatory vacatur, and in failing to recognize that the presumption had been rebutted by the uncontroverted evidence.

C. The trial court also erred in concluding that a non-disclosure under Utah Code Ann. § 78B-11-113(1) had occurred and that any such non-disclosure would mandate vacatur.

If, as CPG contends, Section 78B-11-113(5) has no bearing on this case, that leaves only one additional provision of the Utah Arbitration Act in play. Utah Code Ann. § 78B-11-113(1) is a general disclosure requirement that applies to all arbitrators, whether party-appointed or neutral. Because this standard encompasses arbitrators known to be non-neutral, it imposes a lower standard for disclosure than that for neutrals:

[78B-11-113(1)] Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including:

* * *

(b) an existing or past relationship with any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or representatives, a witness, or another arbitrator.

This provision does not require disclosure of a relationship at all unless “a reasonable person would consider [the relationship] likely to affect the impartiality of the arbitrator” (Emphasis added.) Moreover, even if such relationship is found, it does not mandate vacatur, as the lower court held; failure to disclose under § 78B-11-113(1) leaves vacatur to the court’s discretion:

[§ 78B-11-113(4)] If the arbitrator did not disclose a fact as required by Subsection (1) or (2), upon timely objection by a party, the court under Subsection 78B-11-124(1)(b) may vacate an award.

(Emphasis added.)

In citing Section 78B-11-113 as a basis for vacatur, the trial court erred in two respects: First, for the reasons discussed above, CPG submits that no reasonable person would conclude that the relationship at issue in this case was “likely” to affect Arbitrator Burbidge’s impartiality. Second, even if such likelihood could be found, it does not mandate vacatur, as the trial court (“reluctantly”) believed; rather, the issue is subject to the exercise of sound discretion.

Because CPG adduced uncontroverted evidence that there was no tie between the Burbidges beyond shared ancestors, it would have been an abuse of discretion for the trial court to vacate the award under the correct standard. Consequently, it is appropriate on these undisputed facts for the Court to remand with directions to enter judgment in favor of CPG.

IV. ALTHOUGH THE ARBITRATORS ALL CONSIDERED THEMSELVES NEUTRAL AND CONDUCTED THEMSELVES ACCORDINGLY AFTER THEIR APPOINTMENT, MR. BURBIDGE WAS NOT A “NEUTRAL” APPOINTEE UNDER THE ARBITRATION ACT.

Westgate argued that all three arbitrators in this matter were statutorily neutral, and the trial court considered Richard Burbidge as a “neutral” arbitrator under the statute. Exh. 1, pp. 3, 8. It is true that the Panel members decided after their appointment to consider themselves neutral, and conducted the proceeding accordingly. They then stated their understanding in an “Arbitration Fee Agreement” which the parties signed.

A post-appointment decision by arbitrators cannot retroactively transform the nature of their earlier appointment into the appointment of three statutory “neutrals” under the Utah Arbitration Act. Indeed, Westgate’s choice to forward copies of various State court pleading *ex parte* to “its” arbitrator contradicts the argument that it considered its chosen arbitrator, Judith Billings, to have been a “neutral” appointee.

The appointees in this matter acted in an objective, professional manner throughout the arbitration and, as discussed above, the same result would obtain regardless of whether the standards for “neutrals” applied to all three arbitrators.

However, the trial court's failure to address the legal distinction between a party-appointed arbitrator and an arbitrator-appointed arbitrator was error.

As ordered by the trial court in its Order Regarding Westgate Resorts LTD's Motion to Compel Arbitration (10/27/08), the process utilized in appointing arbitrators in this case is familiar to anyone who litigates in Utah: each party appointed an arbitrator, and those two arbitrators appointed a neutral. In practice, attorneys are trained to be, and generally are, objective in their assessments of facts and law. Nonetheless, party-selected arbitrators are not "neutral" appointees under the Arbitration Act, and no party could reasonably claim otherwise.

The Utah Code indirectly recognizes different roles for party-selected arbitrators and for 'neutral' arbitrators. *See, e.g.,* Utah Code Ann. §§ 78B-11-112(2); 78B-11-113(5); 78B-11-124. Other courts have similarly recognized that subjecting party-selected arbitrators to the same disclosures and disqualification requirements is inconsistent with legislation recognizing the different roles. *See, e.g., Mahnke v. Superior Court, supra* at 577-578; *Washburn v. McManus, supra* at 399 (some subjectiveness is tolerated and even expected from party-selected arbitrators); *Daiichi Hawaii Real Estate Corp. v. Lichter*, 82 P. 3d 411, 428 (Hawaii 2003) ("it stands to intuitive reason that a party-appointed arbitrator might view the proceeding through a more subjective and partial lens than a neutral arbitrator"); *Astoria Med. Group. V. Health Ins. Plan Greater NY*, 182 N.E. 2d 85,88 (1962) ("the very reason each of the parties contract for the choice of his own arbitrator is to make certain that his 'side' will, in a sense, be represented on the tribunal"); *Aetna Gas & Sur. Co. v. Grabbert*, 590 A. 2d

88, 92 (R.I. 1991) (“it would be inappropriate to require the party-appointed arbitrators to adhere to the same standard of neutrality as a judge. That standard ignores the practical realities of arbitration panels composed of party-appointed arbitrators”).

As appointees whom the parties had not designated as neutral prior to their appointment, Richard Burbidge and Judith Billings were subject to the general disclosure requirements of Section 78B-11-113(1), not the neutral-specific requirements of Section 78B-11-113(5). Accordingly, no presumption of evident partiality ever arose, and the trial court erred in vacating the award based upon such a presumption.

REQUEST FOR ATTORNEY FEES AND LITIGATION EXPENSES ON APPEAL

As urged above, CPG is entitled to an order reversing the trial court’s order of vacatur as manifest error. If CPG prevails in this appeal, it is entitled to “reasonable attorney fees and other reasonable expenses of litigation” pursuant to Utah Code Ann. § 78B-11-126 (fees and expenses recoverable by prevailing party in contested judicial proceeding under Section 78B-11-123 (confirmation) or 78B-11-124 (vacatur).)

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court’s legal ruling that a first cousin relationship with an attorney not directly involved in the arbitration, without more, triggered a duty to disclose on the part of the arbitrator and provided a basis for vacating the award. That ruling was manifest error.

DATED this 16th day of March, 2011.



L. Rich Humpherys
Karra J. Porter
Scot A. Boyd
Alain C. Balmanno

CERTIFICATE OF SERVICE

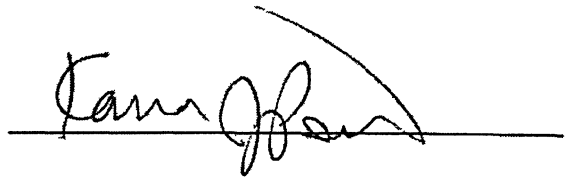
This is to certify that, on the 16th day of March, 2011, a true and correct copy of the foregoing was sent to the following by the method indicated below:

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IN THE UTAH SUPREME COURT

WESTGATE RESORTS, LTD., Plaintiff, vs. SHAUN S. ADEL and CONSUMER PROTECTION GROUP, LLC, Defendants.	PETITION FOR PERMISSION TO APPEAL FROM INTERLOCUTORY ORDER Subject to Assignment to the Court of Appeals Fourth District Court Case No. 02040468
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Pursuant to U.R.A.P. 5(a), Defendant and Counterclaimant Consumer Protection Group, LLC ("CPG"), petitions for permission to appeal from the District Court's order of December 13, 2010, vacating an arbitration award entered by arbitrators Judith M. Billings, Richard D. Burbidge, and Paul S. Felt.

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STATEMENT OF FACTS

Procedural Background

Westgate filed its initial lawsuit in this case on September 19, 2002. In March 2004, CPG was granted leave to file a counterclaim asserting, *inter alia*, claims against Westgate under the Utah Pattern of Unlawful Activity Act (UPUA). Four years later, Westgate filed a motion to compel arbitration of the UPUA claims by virtue of a provision of the act stating that such claims are “subject to” arbitration. Over CPG’s objection (based upon timeliness and waiver grounds), on October 27, 2008, the trial court granted Westgate’s motion, and ordered the UPUA claims into arbitration.

Each party selected an arbitrator, who then selected a third arbitrator. Westgate selected Judith Billings, CPG selected Richard Burbidge, and the two of them selected Paul Felt as the neutral. After their appointment, Westgate sent an ex parte communication to its designee. Upon learning of the communication, CPG objected, and in response, the panel members stated that they considered themselves neutral.

After a year of discovery and numerous motions, the arbitration took place December 7-11, 2009, and January 22, 2010.

On February 2, 2010, the Panel issued Findings of Facts, Conclusions of Law and Award (“Arbitration Award”), attached hereto as Exhibit 1. The Panel unanimously found by clear and convincing evidence that Westgate had made false and fraudulent representations, promises, and non-disclosures with the intent to mislead or with reckless indifference to the truth. Arbitration Award at ¶¶ 10 and 23.

The Panel also found unanimously that the actions of Westgate constituted a scheme or artifice to defraud within the meaning of Utah Code Ann. § 76-10-1801, and that the scheme constituted a pattern of unlawful activity within the meaning of Utah Code Ann. § 76-10-1602. *Id.* at ¶¶ 10 and 15.

The Panel further found unanimously that Westgate profited from its operation and enterprise within the meaning of Section 76-10-1603 of the Utah Code Annotated. *Id.* at ¶ 16.

The Panel awarded \$65,500 on the UPUA claims. Exhibit 1 at 11. CPG then submitted a motion for attorney fees pursuant to UPUA, and a motion in the Fourth District Court to confirm the arbitration award.

In response, Westgate moved to vacate the award. Westgate's sole basis for challenging the award was that arbitrator Richard D. Burbidge had failed to disclose that he is a cousin of George W. Burbidge II, an attorney at Christensen & Jensen, the law firm representing CPG. Westgate argued that, although Mr. Burbidge was a party appointee, by voluntarily considering himself "neutral" after his appointment, Mr. Burbidge had subjected himself to enhanced disclosure requirements applicable to arbitrators designated as neutral by statute.

CPG argued that the mere existence of a first-cousin relationship without more is insufficient grounds to vacate an award under either neutral or party-appointee standards, and that voluntary characterizations after appointment do not affect the status of arbitrators as neutral or non-neutral nor the applicable disclosure standards.

Facts

It was undisputed below that:

Richard D. Burbidge is one of 22 first cousins of George W. Burbidge.

George W. Burbidge is a member of Christensen & Jensen, the law firm representing CPG.

Due to a large disparity in ages between their fathers, Richard D. Burbidge is a generation older than George Burbidge. (Richard D. Burbidge is 61 years old, George W. Burbidge II is 42.)

Richard Burbidge and George Burbidge have no close familial relationship, have no active social relationship, do not speak with each other regularly, have no business relationship with each other, and have no personal connection outside their familial relationship. They have not spoken in many months. They last spoke for a minute when they happened to bump into each other during the Utah Bar Convention in Sun Valley, Idaho, in June, 2009. Previously, they both attended the funeral of an aunt in March, 2009.

The law firms at which Richard Burbidge and George Burbidge are associated have been adverse to each other in litigation, and Richard Burbidge and George Burbidge have been adverse to each other in litigation.

George Burbidge has had no involvement in the Westgate case. His financial interest in any recovery by other shareholders in the firm is indirect.

George Burbidge has never asked for, discussed, received, or expected in any way any financial support or benefit from any of his 22 first cousins, including Richard

Burbidge. The notion that Richard Burbidge would be influenced by an indirect interest in facilitating George Burbidge's indirect interest in a recovery, or vice versa, is unreasonable.

Westgate does not claim that any actual conflict existed on the part of Richard Burbidge, or that any impropriety occurred. Its argument is limited to a per se violation.¹

On December 13, 2010, the Fourth District Court entered an order vacating the arbitration award. The court ruled that the first-cousin to George Burbidge in itself was a fact that Richard Burbidge was required to disclose, because a reasonable person would consider that fact likely to affect the impartiality of the arbitrator. Exhibit 3 pp. 7-8. The trial court concluded that Utah Code Ann. § 78B-11-113(1)(b) mandated disclosure, and that partiality was presumed under Section 78B-11-113(5). The Court vacated the arbitration award under Section 78B-11-124(1)(b)(i) and (iii). Exhibit 3 p. 8.

Now, more than two years since arbitration was compelled, after the expenditure of hundreds of hours of attorney time and nearly \$150,000 in arbitrator fees alone, the parties face having to re-arbitrate if interlocutory review is not available. Additionally,

¹ Westgate counsel: "We've never made an accusation that Mr. Burbidge did anything untoward in connection with discharging his duties as an arbitrator, other than failing to make these disclosures. Again, as the Court pointed out in its synopsis of the — of CPG's position, we've never used the undue means or fraud trigger under the — under Section 125. We've never brought that up. That's not part of it. The only one that we've invoked is the evident partiality. That is only because in Section 113 the presumption of evident partiality is created by the failure to make that disclosure. So we've never professed, and we agreed to this in the reply, that we're making a factual showing that Mr. Burbidge engaged in fraud or undue means or there was evident partiality as a matter of objective evidence or proof. We've not pointed to anything he said or did during the proceedings or anything like that." Exhibit 2, Transcript of Hearing, August 4, 2010.

under the trial court's order, all of the work of the prior panel, including rulings on numerous motions and discovery disputes, will be of no legal effect and the parties will have to begin from scratch. As such, the order involves substantial rights of the parties, particularly the right of Westgate to enforcement of an arbitration award.²

Issue Presented and Standard of Review

Did the District Court err in ruling that a first cousin relationship, with an attorney not directly involved in the case in itself triggered a mandatory duty to disclose on the part of Richard Burbidge under Utah Code Ann. §§ 78B-11-112 and 113, the breach of which mandated vacation of the arbitration award?

Did the District Court err in ruling that a party-appointed arbitrator should be treated as a neutral if an arbitration panel decides *sua sponte* that each arbitrator will act as a neutral?

Questions of law, including the interpretation of statutes, are reviewed for correctness. See *Rushton v. Salt Lake County*, 1999 UT 36, ¶ 17, 977 P.2d 1201; *A.K. & R. Whipple Plumbing & Heating v. Aspen Constr.*, 1999 UT App 87, ¶ 11, 977 P.2d 518, *cert. denied*, 994 P.2d 1271 (Utah 1999).

Preservation

The issues presented were argued to the District Court in the parties' respective motions to enforce and to vacate the arbitration award, and form the basis for the District Court's decision.

² Additionally, only portions of the arbitration proceeding were recorded. Consequently, most live witnesses will have to be brought in again.

NECESSITY OF IMMEDIATE INTERLOCUTORY APPEAL

The Order vacating the arbitration award leaves the parties where they were two years ago, facing the beginning of a new round of arbitration hearings with a new panel, and new costs and fees, and leaving the witnesses facing another round of testimony.

This Court has ruled that an award may be vacated only if a reasonable person would conclude that an arbitrator, showed partiality or was guilty of misconduct that prejudiced the rights of any party, and that the burden of proof falls on the movant to show that the evidence of partiality is certain and direct, not remote, uncertain, or speculative. *DeVore v. IHC Hospitals, Inc.*, 884 P. 2d 1246, 1256 (Utah 1994). Resolving the issue presented may obviate the need for a re-arbitration of the disputes between the parties.

There are no issues of fact in dispute. The first cousin relationship is uncontroverted, as is the lack of any business relationship, social relationship, or familial activity between the arbitrator and an attorney who is not involved in this matter, but whose law partners represent one of the parties to the arbitration. The only issue to be decided is purely legal in nature, a task well suited for interlocutory appeal. Where Westgate raised only this single issue in objecting to confirmation, a reversal of the trial court's ruling will entitled CPG to confirmation of the award, and much time, costs and fees will be saved.

Analysis of Statutes and Rules

A. Even If All Three Arbitrators Had Been “Neutral” Appointments Under The Act, Westgate Has Not Made Even A Prima Facie Case For Disqualification.

As stated below, it is CPG’s view (and Westgate does not dispute) that all three arbitrators performed in a neutral and professional manner throughout this complex arbitration. Even applying the measure of recusal / disclosure most favorable to Westgate (all three arbitrators deemed neutral appointees) the trial court’s ruling was erroneous.

The essence of Westgate’s argument, and the trial court’s ruling, was that the mere existence of a first-cousin relationship, without more, is enough to disqualify an arbitrator and taint the award because the arbitrator did not reveal the genetic relationship. But this contention is not even sufficient to require the disqualification of a judge in Utah, let alone an arbitrator.

1. Utah Ethics Advisory Committee opinion 89-5 and *DeVore v. IHC Hospitals*

An opinion of the Utah Ethics Advisory Committee applicable to judges held that “the participation of a cousin may still result in judicial disqualification under the general Canon 3C(1) impartiality standard if a close personal relationship exists.” Informal Opinion No. 89-5. The opinion, while not binding on the court, provides support for the contention that a first-cousin relationship alone is not sufficient for disqualification – only one accompanied by a “close personal relationship.” Even if Richard Burbidge were a sitting judge, he would not be disqualified merely because he is one of nearly two dozen first cousins of George Burbidge, where the two have no close personal relationship. It is

the depth and extent of the relationship – or, as in this case, the absence thereof – that is controlling.

Similarly, this Court has ruled that an arbitration award may be vacated only

[i]f a reasonable person would conclude that an arbitrator, appointed as neutral, showed partiality or was guilty of misconduct that prejudiced the rights of any party. Furthermore, the burden of proof falls on the movant, and the evidence of partiality must be certain and direct, not remote, uncertain, or speculative.

DeVore v. IHC Hospitals, Inc., 884 P. 2d 1246, 1256 (Utah 1994).

Although Westgate conceded that it did not claim, nor did it cite any evidence, that arbitrator Burbidge showed partiality, the trial court held that a first cousin relationship is a fact that a reasonable person would consider likely to affect the impartiality of the arbitrator. Exhibit 3 pp. 7-8. The trial court's conclusion that a mere genetic relationship is sufficient is directly contrary to *DeVore's* conclusion that – absent actual evidence of bias – recusal of an arbitrator is not required even when based upon professional dealings or a social relationship with counsel:

[A]s a matter of policy, we think an appearance-of-partiality standard sets an impractically low threshold, especially in a small state like Utah. Indeed, to disqualify any arbitrator who has professional dealings with one of the parties (to say nothing of a social acquaintanceship) would make it impossible, in some circumstances, to find a qualified arbitrator at all.

DeVore v. IHC Hospitals, Inc., 884 P. 2d at 1255.

In this case, there is no business relationship, no social relationship, no familial activity, and no financial tie between the two men. The trial court's conflation of a similar DNA pattern with a close personal relationship is insupportable under Utah law. With no claim or evidence of actual partiality, the court below concluded that the failure

to disclose the genetic relationship creates a presumption of partiality. Informal Opinion, p. 8. With respect, that is not Utah law. When none of the statutory or judicially created grounds exist, a motion to vacate an award must be denied. *Buzas Baseball Inc. v. Salt Lake Trappers*, 925 P. 2d at 951.

2. Utah Arbitration Act

The statutorily presumed partiality to which the trial court refers is found in Utah Code Ann. § 78B-11-113. That code section provides that “an arbitrator appointed as a neutral arbitrator who does not disclose a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party is presumed to act with evident partiality under Subsection 78B-11-124(1)(b)”. Utah Code Ann. § 78B-11-113(5). By its own terms, however, the statute is inapplicable here. Burbidge has no interest in the outcome of the arbitration at all, and no existing, “substantial relationship” with a party, or with counsel for a party.

Utah Code Ann. § 78B-11-113(1) provides that an arbitrator must disclose

any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including: (a) a financial or personal interest in the outcome of the arbitration proceeding; and (b) an existing or past relationship with any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or representatives, a witness, or another arbitrator.

Factors (a) and (b) do not apply here. However, the trial court concluded that, no matter how attenuated, the familial relationship between George Burbidge II and Richard Burbidge qualifies under the “reasonable person would consider likely to affect” language. But a reasonable person would not consider a familial relationship not marked

by a substantial association or rapport likely to affect the impartiality of an attorney-arbitrator.

The standard established by the Court and the Utah Code require that the party alleging bias establish facts creating a reasonable impression of bias. The reasonable person standard requires direct and certain evidence of a known, existing and substantial relationship, not speculative statements of a remote, uncertain, or non-existent relationship.

3. Federal Decisions

When necessary, Utah law looks to federal law for guidance on issues of arbitration. *Buzas Baseball*, 925 P. 2d at 948, n. 5. Of course, there is no such need when there is already Utah case law on point, *see supra*. In any event, however, the former does not support the trial court's ruling.

Federal courts evaluating the disqualification of an arbitrator examine four factors: (1) the extent and character of the personal interest, if any, of the arbitrator in the proceedings, (2) the directness of any relationship between the arbitrator and the party he or she 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 proceedings. When considering each factor, the court determines whether the asserted bias is direct, definite, and capable of demonstration, rather than remote, uncertain or speculative. *ANR Coal Co., Inc. v. Cogentrix of North Carolina, Inc.*, 173 F. 3d 493, 500 (4th Cir. 1999).

Although a party seeking vacatur need not prove improper motives on the part of the arbitrator under federal law, that party "must put forward facts that objectively

demonstrate such a degree of partiality that a reason-able person could assume that the arbitrator had improper motives. The movant carries a ‘heavy’ burden, in order to meet this ‘onerous’ standard.” *Id.* at 500-501 (emphasis in original) (citations omitted); *Nationwide Mut. Ins. Co. v. Homes Ins. Co.*, 429 F. 3d 640, 645 (6th Cir. 2005); *Washburn v. McManus*, 895 F. Supp 392, 399 (D. Conn. 1994), *aff’d*, 57 F.3d 1064 (2nd Cir. 1995) (“The mere fact of a prior relationship is not in and of itself sufficient to disqualify arbitrators. The relationship between the arbitrator and the party’s principal must be so intimate – personally, socially, professionally, or financially – as to cast serious doubt on the arbitrator’s impartiality”).

One of the most often cited federal cases establishing the need for an objective standard is *Morelite Construction Corp. v. NY City District Council Carpenters Benefit Fund*, 748 F.2d 79 (2nd Cir. 1984), cited approvingly by this Court in *DeVore*. *See* 884 P. 2d at 1256. In *Morelite*, the Second Circuit upheld the disqualification of an arbitrator whose son was president of the Union, a district chapter of which was a party to the arbitration. The court narrowed its ruling and observed that

[w]e need not, and do not, attempt to set forth a list of familial or other relationships that will result in the per se vacation of an arbitration award, except to suggest that such a list would most likely be very short. We do not intend to hold arbitrators to all the standards of Canon 3. 748 F.2d at 85.

In addition to this clarification, the court also predicted post arbitration “sour grapes” by losing parties, stating that “[n]either do we intend that unsuccessful parties to arbitration may have awards set aside by seeking out and finding tenuous relationships between the arbitrator and the successful party.” *Id.*

As one California court has more artfully stated,

[t]he test is an objective one – whether such an impression is created in the eye of the hypothetical reasonable person. Thus, unless a reasonable member of the public at large, aware of all the facts, would fairly entertain doubts concerning the arbitrator’s impartiality, the arbitrator is not subject to disqualification.

Mahnke v. Superior Court, 180 Cal. App. 4th 565, 579, 103 Cal. Rptr. 3d 197, 206 (2009). In this matter, a reasonable person, aware of all the facts, would not and could not fairly entertain doubts regarding the impartiality of Richard D. Burbidge.

B. Although the Arbitrators All Considered Themselves Neutral and Conducted Themselves Accordingly After Their Appointment, Mr. Burbidge Was Not a “Neutral” Appointee Under the Act.

The standard in Utah for vacating an arbitration award is steep and narrow. Vacatur is limited by the specific grounds set forth in Utah Code Ann. § 78B-11-124. The grounds relevant to this matter mandate vacating “an award made in the arbitration proceeding if (a) the award was procured by corruption, fraud, or other undue means; (b) there was: (i) evident partiality by an arbitrator appointed as a neutral arbitrator; (ii) corruption by an arbitrator; or (iii) misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding.” Utah Code Ann. § 78B-11-124 (1).

This Court has explained that “a motion to vacate or modify an arbitration award is limited to determining whether any of the very limited grounds for modification or vacatur exist.” *Pacific Development, L.C. v. Orton*, 2001 UT 36, ¶6; 23 P. 3d 1035, (citing *Buzas Baseball v. Salt Lake Trappers*, 925 P. 2d 941, 947 (Utah 1996)). Applying this standard, the Tenth Circuit has held that “the burden is on the party seeking to vacate an arbitration award ... to show that one of the limited statutory grounds exists for setting

aside the arbitration result. That burden is very great.” *Young v. American Nutrition, Inc.*, 537 F.3d 1135, 1141 (10th Cir 2008).

Westgate argued that all three arbitrators in this matter were considered neutral, and the trial court considered Richard Burbidge as a neutral arbitrator. Exhibit 3 pp. 3, 8. It is true that the Panel members stated after their appointment that they considered themselves neutral, and conducted the proceeding accordingly. However, for purposes of Westgate’s motion, that did not retroactively transform their appointment into the appointment of three “neutrals” under the Utah Arbitration Act. Westgate’s choice to forward copies of various State court pleading to “its” arbitrator contradicts the argument that it considered its chosen arbitrator to be “neutral.”

The appointees in this matter acted in an objective, professional manner throughout the arbitration and, as discussed in Point A *supra*, the same result would obtain regardless of whether the Act’s standards for “neutrals” were applied to all three arbitrators. However, the trial court’s failure to address the legal distinction between a party-appointed arbitrator and an arbitrator-appointed arbitrator was error.

As ordered by the state court in its Order Regarding Westgate Resorts, LTD’s Motion to Compel Arbitration (10/27/08), the process utilized in appointing arbitrators in this case is familiar to anyone who litigates in Utah: each party appointed an arbitrator, and those two arbitrators appointed a neutral. In practice, attorneys are trained to be, and generally are, objective in their assessments of facts and law. Nonetheless, they are not “neutral” appointees under the Utah Arbitration Act, and no party can reasonably claim otherwise.

Westgate's assertion and the trial court's conclusion that all three arbitrators should be deemed "neutral" as defined by the Act overstates the normal understanding regarding party-selected arbitrators, and seems to go far beyond current thought regarding the role of such arbitrators. The Utah Code indirectly recognizes different roles for party-selected arbitrators and for 'neutral' arbitrators. See §§ 78B-11-112(2); 78B-11-113(5); 78B-11-124.

Other courts have similarly recognized that subjecting party-selected arbitrators to the same disclosures and disqualification requirements is inconsistent with legislation recognizing the different roles. *See, e.g., Mahnke*, 180 Cal.App.4th at 577-578; *Washburn*, 895 F.Supp. at 399 (some subjectiveness is tolerated and even expected from party-selected arbitrators); *Daiichi Hawaii Real Estate Corp. v. Lichter*, 82 P.3d 411, 428 (Hawaii 2003) ("it stands to intuitive reason that a party-appointed arbitrator might view the proceeding through a more subjective and partial lens than a neutral arbitrator"); *Astoria Med. Group. V. Health Ins. Plan Greater NY*, 182 N.E.2d 85, 88 (N.Y. 1962) ("the very reason each of the parties contract for the choice of his own arbitrator is to make certain that his 'side' will, in a sense, be represented on the tribunal"); *Aetna Gas & Sur. Co. v. Grabbert*, 590 A.2d 88, 92 (R.I. 1991) ("it would be inappropriate to require the party-appointed arbitrators to adhere to the same standard of neutrality as a judge. That standard ignores the practical realities of arbitration panels composed of party-appointed arbitrators").

As appointees whom the parties had not designated as neutral prior to their appointment, neither Richard Burbidge nor Judith Billings were subject to

disqualification even if he or she had a “direct and material interest” in the outcome of the proceeding, or an “existing and substantial relationship” with a party. Utah Code Ann. § 78B-11-112(2) limits such disqualification to arbitrators required by agreement to be neutral: “An individual who has a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party may not serve as an arbitrator required by an agreement to be neutral.” There was no such agreement here. It was the arbitrators themselves who, after the commencement of the arbitration, indicated their intent to be neutral (for purposes of evaluation, not as defined by the Act).

AN APPEAL WILL MATERIALLY ADVANCE THE TERMINATION OF THE LITIGATION

Unless interlocutory review is granted, the parties will be forced to start over in an arbitration that has already cost hundreds of thousands of dollars. Conversely, if review is granted and the trial court’s ruling is overturned, CPG will be entitled to judgment on the arbitration award as a matter of law, because the first-cousin issue was Westgate’s sole grounds for objecting to confirmation of the award. Under these circumstances, review of the trial court’s order both materially affects the final decision in the cases, and better serves the administration and interests of justice.

WHY THE SUPREME COURT SHOULD DECIDE THIS CASE

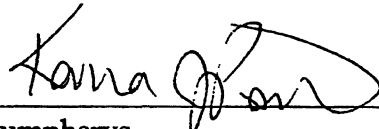
This case has been aggressively litigated for more than six years. Without question, review in this Court will be sought of any ruling by the Court of Appeals. The Supreme Court has consistently declared the enforcement of arbitration awards a matter

of legislative, judicial, and public policy, and direct review by the Court is necessary to further the goal of providing an expedient means of resolving disputes.

CONCLUSION

For the reasons set forth above, CPG requests the Court grant leave to bring an interlocutory appeal to resolve the issue of whether a first cousin relationship with an attorney not directly involved in the case, without more, triggered a duty to disclose on the part of the arbitrator and provided a basis for vacating the arbitration award.

DATED this 22nd day of December, 2010.



L. Rich Humpherys
Karra J. Porter
Scot A. Boyd
Alain C. Balmanno
Attorneys for Defendant
Consumer Protection Group, LLC

CERTIFICATE OF SERVICE

This is to certify that, on the 22nd day of December, 2010, a true and correct copy of the foregoing was sent to the following by the method indicated below:

Todd Shaughnessy
David P. Williams
SNELL & WILMER
15 West South Temple, Suite 1200
Salt Lake City, UT 84101

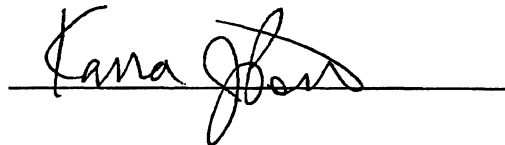
HAND DELIVERED

Richard W. Epstein
Rebecca F. Bratter
Trade Center South, Suite 700
100 West Cypress Creek Road
Fort Lauderdale, FL 33309-2140

EMAIL and U.S. MAIL

Shaun S. Adel
30 Capobella
Irvine, CA 92614

EMAIL ONLY



Tab E

4TH DISTRICT COURT - PROVO
UTAH COUNTY, STATE OF UTAH
APPEALED: CASE #20090065
WESTGATE RESORTS LTD vs. SHAUN S ADEL

CASE NUMBER 020404068 Miscellaneous

CURRENT ASSIGNED JUDGE

LYNN W. DAVIS
Division 8

PARTIES

Plaintiff - WESTGATE RESORTS LTD
Represented by: MICHAEL D ZIMMERMAN
Represented by: DAVID P WILLIAMS
Represented by: TROY L BOOHER

Defendant - CONSUMER PROTECTION GROUP LLC
Represented by: L RICH HUMPHERYS
Represented by: KARRA J PORTER
Represented by: SCOT A BOYD

Defendant - SHAUN S ADEL
Represented by: L RICH HUMPHERYS
Represented by: KARRA J PORTER
Represented by: SCOT A BOYD

Other Party - RICHARD W EPSTEIN

Other Party - ROBBY H BIRNBAUM

ACCOUNT SUMMARY

TOTAL REVENUE	Amount Due:	1,434.25
	Amount Paid:	1,434.25
	Credit:	0.00
	Balance:	0.00

BAIL/CASH BONDS	Posted:	30,350.26
	Forfeited:	0.00
	Refunded:	300.00
	Balance:	30,050.26

TRUST TOTALS	Trust Due:	300.00
	Amount Paid:	300.00
	Credit:	0.00
	Trust Balance Due:	0.00
	Balance Payable:	0.00

Location: Third floor, Rm 301
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601
Before Judge: LYNN W. DAVIS

The court has set aside two hours for oral argument on Motion to Vacate Arbitration Award.

06-10-10 ORAL ARGUMENT scheduled on July 27, 2010 at 01:30 PM in Third floor, Rm 301 with Judge DAVIS.

06-17-10 Filed: Stipulated Motion to Certify Judgments as Final Pursuant to Rule 54(b)

Filed by: SHAUGHNESSY, TODD M

06-22-10 ORAL ARGUMENT rescheduled on August 04, 2010 at 03:00 PM

Reason: Counsel stipulated..

06-22-10 Note: Mr. Humpherys to send notice of change of court date.

06-24-10 Filed: Notice of Hearing

07-01-10 Filed: Order from Supreme Court

07-01-10 Filed: Notice of Appeal

07-01-10 Fee Account created Total Due: 225.00

07-01-10 APPEAL Payment Received: 225.00

Note: Code Description: APPEAL

07-01-10 Bond Account created Total Due: 300.00

07-01-10 Bond Posted Payment Received: 300.00

07-07-10 Note: Certified copy of Notice of Appeal mailed - #55500090533

07-07-10 Note: The Court Of Appeals (Merilyn H) request for the Record

Index by 7/27/10 was assigned to Julie A for processing.

07-08-10 Filed order: Order Granting Stipulated Motion to Certify judgments as Final Pursuant to Rule 54(b)

Judge LYNN W. DAVIS

Signed July 08, 2010

07-09-10 Filed: Notice of Cross Appeal

07-13-10 Filed: Certificate That No Further Transcripts are Required

07-16-10 Bond Account created Total Due: 300.00

07-16-10 Bond Posted Payment Received: 300.00

Note: Mail Payment;

07-16-10 Fee Account created Total Due: 225.00

07-16-10 APPEAL Payment Received: 225.00

Note: Code Description: APPEAL, Mail Payment;

07-20-10 Note: Certified copy of Notice of Cross Appeal mailed to Court of Appeals, State Mailtrac #55500090634, attn: Merilyn H

07-20-10 Filed: First Supplemental Clerk's Certificate and Judgment Roll and Index

07-20-10 Filed: Letter from Supreme Court to Counsel dated July 19, 2010

07-21-10 Note: 1st Supplemental Judgment Roll and Index mailed to Utah Supreme Court, attn: Merilyn State MailTrac #55500090535

07-21-10 Filed: Order from Supreme Court dated 7/20/10 (motion to consolidate appeals is granted)

07-26-10 Note: Copy request taken by Keri.

07-27-10 Fee Account created Total Due: 5.00
07-27-10 TELEPHONE/FAX CHARGE Payment Received: 5.00
08-04-10 Minute Entry - Minutes for ORAL ARGUMENT
 Judge: LYNN W. DAVIS
 Clerk: kimo
 PRESENT
 Plaintiff's Attorney(s): RICHARD W EPSTEIN
 Defendant's Attorney(s): L RICH HUMPHERYS
 KARRA J PORTER

 Audio
 Tape Number: 301 Tape Count: 3:02-4:47

HEARING

TAPE: 301 COUNT: 3:02-4:47
This matter comes before the court for oral arguments. The court presents a summary of the procedural posture of the case. Mr. Epstein addresses the court and presents arguments. Mr. Humpherys responds and presents arguments.
The court will issue a written ruling within sixty days.

08-13-10 Filed: Certificate Of Attorney To Temporarily Withdraw Record Of Case On Appeal (OUT: 19 green files, 14 transcripts, and 2 manilla envelopes checked out to Snell & Wilmer for Troy Booher)

08-16-10 Note: E-mail from Marilyn H (Supreme Court) to Kristen R (Provo Court): The following case was checked out from your office by the firm of Snell and Wilmer. They have made arrangements to return the record to us when they are finished writing their

08-16-10 Note: brief. The Supreme Court plans to retain the record here until after Oral Argument. Please contact me if you need additional information not provided here or other problems arise. Thank you for your efforts. Utah Supreme Court Case #: 20100425 T

08-16-10 Note: rial Court Case #: 020404068 Case Title: Westgate v. Adel Thanks, Merilyn Hammond Judicial Assistant Supreme Court

08-16-10 Filed: E-mail from Supreme Court (Marilyn H) to 4th District Court (Kristen R): Snell & Wilmer have made arrangements to return the record directly to Supreme Court where it will be held until after Oral Arguments

08-16-10 Filed: Notice of Appearance (M Zimmermand and T Booher for Westgate)

08-25-10 Filed: TRANSCRIPT for Hearing of 08-04-2010

09-01-10 Note: Original Transcript Oral Argument Hearing August 4, 2010; transcribed by Wendy Haws

09-30-10 Filed order: Ruling
 Judge LYNN W. DAVIS

Signed September 30, 2010

10-04-10 Minute Entry - SIGNATURE PAGE

Judge: LYNN W. DAVIS

The signature page of the Westgate decision entered on September 30, 2010, contains an inaccurate date of the year 2008.

The court is substituting a corrected copy of the signature page of the ruling, nunc pro tunc. The signature page is attached.

Date: _____
Judge LYNN W. DAVIS

10-18-10 Filed: Letter from Troy L. Booher (record has been returned to the Utah Supreme Court)

12-13-10 Filed order: Order on Consumer Protection Group, LLC's Combined Motion to Confirm Arbitration Award and for Attorney Fees and Expenses and for Rule 54(b) Certification of Judgment as Final, and Westgate Resorts LTD's Motion to Vacate Arbitration Award
Judge LYNN W. DAVIS

Signed December 13, 2010

12-22-10 Fee Account created Total Due: 0.50

12-22-10 COPY FEE Payment Received: 0.50

12-27-10 Filed: Letter from Supreme Court of Utah dated 12/23/10

02-03-11 Note: Shaun S Adel called to update his address.

03-04-11 Filed: Letter from Supreme Court of Utah to Counsel dated 3/3/11

03-08-11 Note: Supreme Court (Sue R) request for a supplemental index due by 3/23/11 assigned to Julie A for processing.

03-14-11 Filed: 2nd Supplemental Clerk's Certificate and Judgment Roll and Index

03-14-11 Note: 2nd Supplemental Clerk's Certificate and Judgment Roll and Index and remaining documents sent to Court of Appeals, attn: DSusan Richards; State MailTrac 55500101983

07-28-11 Filed: Notice Of Withdrawal Of Counsel

Tab F

L. Rich Humpherys, 1582
Karra J. Porter, 5223
Scot A. Boyd, 9503
Alain C. Balmano, 3985
CHRISTENSEN & JENSEN, P.C.
15 West South Temple, Suite 800
Salt Lake City, Utah 84101
Telephone: (801) 323-5000
Facsimile: (801) 355-3472

IN THE UTAH SUPREME COURT

WESTGATE RESORTS, LTD.,

Plaintiff,

vs.

SHAUN S. ADEL and CONSUMER
PROTECTION GROUP, LLC,

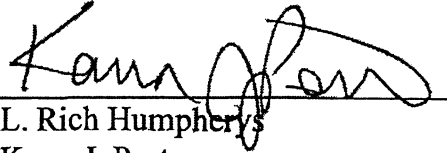
Defendants.

**MOTION FOR SUMMARY
DISPOSITION**

Case No. 20101017 SC

Pursuant to U.R.A.P. 10(a)(2)(B), Appellant/Counterclaimant Consumer Protection Group, LLC ("CPG"), moves this court to summarily reverse the trial court's ruling on the grounds that it was manifest error for the court to interpret the Utah Arbitration Act as requiring vacatur of an arbitration award due to non-disclosure of a bare first-cousin relationship. This Motion is supported by a *Memorandum of Points and Authorities in Support of Motion for Summary Disposition*.

DATED this 18th day of March, 2011.



L. Rich Humphreys

Karra J. Porter

Scot A. Boyd

Alain C. Balmanno

CERTIFICATE OF SERVICE

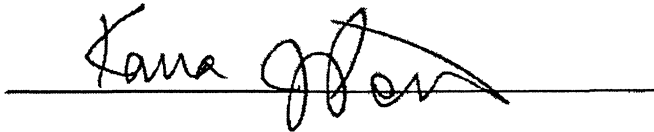
This is to certify that, on the 18th day of March, 2011, a true and correct copy of the foregoing was sent to the following by the method indicated below:

Todd Shaughnessy
David P. Williams
Troy L. Booher
SNELL & WILMER
15 West South Temple, Suite 1200
Salt Lake City, UT 84101

U. S. MAIL

Richard W. Epstein
Rebecca F. Bratter
Trade Center South, Suite 700
100 West Cypress Creek Road
Fort Lauderdale, FL 33309-2140

EMAIL and U.S. MAIL



Tab G

IN THE SUPREME COURT OF THE STATE OF UTAH

—oo0oo—

FILED
UTAH APPELLATE COURTS
APR 4 2011

Westgate Resorts, Ltd.,

Appellee,

v.

Case No. 20101017 -SC

Shaun S. Adel, and Consumer Protection
Group, LLC,

Appellant.

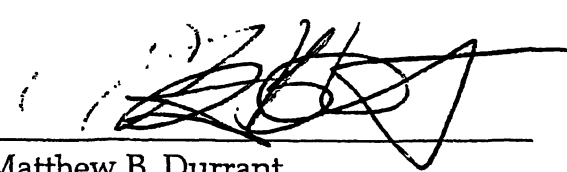
ORDER

This matter is before the Court on Appellant's motion for summary reversal. The motion is deferred until plenary presentation on the merits. The stay imposed in response to the filing of the motion is lifted. As to the arguments raised in connection with the motion the parties may choose to rest on the pleadings they have submitted or may address the matter as they see fit in briefing and/or at argument.

FOR THE COURT:

Date

4-4-11


Matthew B. Durrant
Associate Chief Justice

CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2011, a true and correct copy of the foregoing ORDER was deposited in the United States mail or placed in Interdepartmental mailing to be delivered to:


SHAUN S. ADEL
177 RIVERSIDE AVE STE F-1043
NEWPORT BEACH CA 92663

L. RICH HUMPHERYS
KARRA J. PORTER
SCOT A. BOYD
CHRISTENSEN & JENSEN PC
15 W S TEMPLE STE 800
SALT LAKE CITY UT 84101

MICHAEL D. ZIMMERMAN
DAVID P. WILLIAMS
TROY L. BOOHER
CHRISTOPHER L. STOUT
SNELL & WILMER LLP
15 W S TEMPLE STE 1200
SALT LAKE CITY UT 84101-1004

RICHARD W. EPSTEIN
MICHAEL MARDER
GREENSPOON MARDER PA
100 W CYPRESS CREEK RD STE 700
FORT LAUDERDALE FL 33309

Dated this April 5, 2011.

By 
Judicial Assistant

Case No. 20101017
District Court No. 020404068

Tab H

Richard W. Epstein, Esq. (admitted *pro hac vice*)
Rebecca K. Bratter, Esq. (admitted *pro hac vice*)
GREENSPOON MARDER, P.A.
Trade Centre South, Ste. 700
100 West Cypress Creek Road
Fort Lauderdale, FL 33309
Telephone: (954) 491-1120
Facsimile: (954) 343-6958
Attorneys for Westgate Resorts, Ltd.

FILED

DEC 13 2010 *160*

4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

IN THE FOURTH JUDICIAL DISTRICT COURT,
UTAH COUNTY, STATE OF UTAH

WESTGATE RESORTS, LTD.,

Plaintiff,

vs.

SHAUN S. ADEL and CONSUMER
PROTECTION GROUP, LLC,

Defendants.

ORDER ON CONSUMER PROTECTION
GROUP, LLC'S COMBINED MOTION
TO CONFIRM ARBITRATION AWARD
AND FOR ATTORNEY FEES AND
EXPENSES AND FOR RULE 54(B)
CERTIFICATION OF JUDGMENT AS
FINAL, AND WESTGATE RESORTS
LTD.'S MOTION TO VACATE
ARBITRATION AWARD

Case No.: 020404068

Division No. 8

Judge: Lynn W. Davis

Pursuant to this Court's Ruling dated September 30, 2010, attached hereto as Exhibit "A"
and incorporated herein by reference, it is hereby ORDERED, ADJUDGED AND DECREED
that:


1. Westgate Resorts, Ltd.'s Motion to Vacate Arbitration Award is GRANTED;

2. The Findings of Fact, Conclusions of Law and Arbitration Award dated February 2, 2010 issued in the arbitration proceedings styled: *Consumer Protection Group, LLC v. Westgate Resorts, Ltd.*, is VACATED, RENDERED NULL AND VOID and OF NO FORCE AND EFFECT; and

3. Consumer Protection Group, LLC's Combined Motion to Confirm Arbitration Award and for Attorney Fees and Expenses and For Rule 54(b) Certification of Judgment as Final is DENIED.

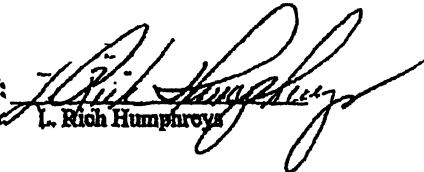
DATED this 13 ^{December} day of ~~October~~, 2010.

BY THE COURT


Judge Eugene W. Davis
Fourth District Court

Approved As To Form:

CHRISTENSEN & JENSEN, P.C.

BY: 
L. Rich Humphreys

Tab I

FILED
SEP 30 2010 *WTO*
4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

**IN THE FOURTH JUDICIAL DISTRICT COURT,
UTAH COUNTY, STATE OF UTAH**

WESTGATE RESORTS, LTD, Plaintiff, vs. SHAUN S. ADEL and CONSUMER PROTECTION GROUP, LLC, Defendants.	RULING Date: September 30, 2010 Case No.: 020404068 Judge: Lynn W. Davis
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I. Procedural Posture

This matter comes before the Court on two outstanding motions: Consumer Protection Group's Combined Motion to Confirm Arbitration Award and for Attorney Fees and Expenses and For Rule 54(B) Certification of Judgment as Final, and Westgate Resorts' Opposition to Consumer Protection Group's Combined Motion and Westgate Resorts' Motion to Vacate Arbitration Award.

II. Arguments of the Parties

a. Consumer Protection Group's Arguments in Support of Combined Motion

Consumer Protection Group ("CPG") states that a highly qualified arbitration panel issued an award of \$65,500 in favor of CPG and against Westgate Resorts ("Westgate"). The Utah Arbitration Act requires the district court to issue an order confirming the arbitration award

unless the award is modified or corrected pursuant to statute. *See* Utah Code Ann. § 78B-11-123. CPG argues that based on this, the arbitration award should be confirmed.

Further, CPG argues entitlement to attorney fees and costs associated with the arbitration and Utah Pattern of Unlawful Activity Act ("UPUAA") claims. CPG seeks attorney fees on two independent grounds. First, the UPUAA entitles a prevailing plaintiff to recover reasonable attorney fees and expenses. *Id.* § 76-10-1605(2). Second, the Utah Arbitration Act provides that a "court may allow reasonable costs of the motion [to confirm] and subsequent judicial proceedings." *Id.* § 78B-11-126(2); *Buzas Baseball, Inc. v. Salt Lake Trappers, Inc.*, 925 P.2d 941, 953 (Utah 1996). In the instant case, Westgate refused to voluntarily pay the arbitration award, forcing CPG to file this motion to confirm.

Finally, CPG requests the arbitration judgment to be certified as a final order under Rule 54(B), as there is no just reason for delay and there is no overlap in this judgment and any other remaining issues in the case.

b. Westgate's Arguments in Opposition to Combined Motion and in Support of Motion to Vacate Arbitration Award

Westgate avers that the arbitrator chosen by CPG, Richard D. Burbidge, is a first cousin to CPG attorney George W. Burbidge II. Based on this fact alone, as supported by abundant law, this Court should deny CPG's Motion to Confirm Arbitration Award and grant Westgate's Motion to Vacate Arbitration Award.

Westgate argues that the statute which requires the Court to confirm an arbitration award has a key exception; the Court has a duty to confirm unless "the award is vacated pursuant to Section 78B-11-124." Utah Code Ann. § 78B-11-123. The exception statute states that the Court shall vacate an arbitration award if there was evident partiality by an arbitrator appointed as a neutral arbitrator, corruption or misconduct by an arbitrator.

Required disclosures, found in Utah Code 78B-11-113, include an existing or past relationship between any arbitrator and any counsel or representatives of a party to the arbitration. The statute imposes a duty to disclose to all parties and to other arbitrators any facts "which a reasonable person would consider likely to affect the impartiality of the arbitrator." *Id.* § 78B-11-113(2). The Code of Ethics for Arbitrators in Commercial Disputes requires arbitrators to disclose facts regarding any personal relationship which might affect impartiality or independence in the eyes of any of the parties. Further, any doubt should be resolved in favor of disclosure.

Westgate asserts that there was no such disclosure. In this case, the arbitrators had the power to award \$1.2 million in attorney fees to CPG. George Burbidge's direct financial interest in the outcome of the case, left in the hands of the first cousin Richard Burbidge, is surely a reason to doubt the validity of any such award. Westgate should have been informed of this decision so Westgate could choose to demand disqualification from the Panel. Further, the lack of disclosure to the other arbitrators surely poisoned the well, calling into question any decision of the Panel.

Westgate further argues that it does not matter that Arbitrator Burbidge was selected by CPG. There was still a duty to disclose. CPG cannot argue that Westgate knew that Arbitrator Burbidge was not neutral because the Panel prepared a fee agreement in which the arbitrators designated themselves as neutral arbitrators. The arbitrators were bound by the Code of Ethics, and thus bound by duty to disclose any potential conflicts or reasons for impartiality, such as a familial relationship with a party or its counsel.

Under section 78B-11-113(4) an arbitrator's failure to disclose a fact such as an existing or past relationship with a party's counsel, is grounds for vacating under 78B-11-124(b). Failure to disclose constitutes "evident partiality." *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 148 (1968).

The Utah Ethics Advisory Committee has opined that the participation of a cousin may result in judicial disqualification. Further, if the judge's impartiality might reasonably be questioned, the judge should either recuse or disclose the relationship to the parties to allow them to decide whether recusal is warranted.

c. CPG's Arguments Against Westgate's Motion to Vacate Arbitration Award

CPG argues that Westgate has waived any rights to seek recusal. First, the timing of Westgate's Motion to Vacate, given its history in this litigation, is suspect. Losing parties in an arbitration should not get a second bite at the apple when the facts show that the losing party should have discovered their basis for disqualification or recusal before the arbitration.

CPG asks the Court to look at the timing of the motion to vacate, which is clear evidence of Westgate's motive. Further, Westgate has a history of making prior late discoveries, costing the parties great expense and time.

Moreover, CPG argues that Arbitrator Burbidge was not technically neutral under the Utah Arbitration Act. However, the arbitrators did consider themselves neutral after their appointment and conducted themselves accordingly.

Party-selected arbitrators are clearly not the same as arbitrator-appointed arbitrators. Courts have recognized the differences between them. For example, it is reasonable that party-selected arbitrators might have some subjectiveness and they are not expected to adhere to the same standard of neutrality as a judge. In fact, even if a party-selected arbitrator had a substantial relationship with a party or attorney, the law states that the arbitrator "may not serve as an arbitrator required by an agreement to be neutral." *Id.* § 78B-11-112(2) (emphasis added). CPG points out that there was no such neutrality agreement; it was added by the arbitrators themselves after they commenced the arbitration.

Even if all the arbitrators had been neutral, CPG argues that Westgate did not even come close to making a prima facie case for disqualification. The Utah Supreme Court ruled that to vacate an arbitration award, "the evidence of partiality must be certain and direct, not remote, uncertain, or speculative." *DeVore v. IHC Hospitals, Inc.*, 884 P.2d 1246, 1256 (Utah 1994). CPG argues that Westgate's motion is full of speculation. The only fact alleged is that the Burbidges are first cousin. Every other "fact" drawn from that is mere hypothesis and conjecture.

Further, CPG contends that Westgate misquoted a Utah Ethics Advisory Committee opinion regarding whether a judge who is a cousin to one of the parties should recuse. The full quote shows that the cousin relationship is relevant only "if a close personal relationship exists." Utah Ethics Advisory Committee, Informal Opinion 89-5.

George Burbidge II and Richard Burbidge do not have a close personal relationship. Richard is one of 22 first cousins of George. They are nearly 20 years apart in age. They do not speak regularly, have no active social relationship, no business or personal connection, and in fact have not spoken in many months. Indeed, the Burbidges have been adverse to each other in litigation before. A mere genetic relationship does not constitute a substantial relationship requiring disclosure or recusal.

CPG argues that Westgate has provided no evidence supporting claims of corruption, fraud, undue means, or evident partiality. Arbitrator Burbidge has no interest in the outcome of the arbitration, and no existing substantial relationship with any party. Because no evidence to support any of the statutory or judicially created grounds exists, a motion to vacate an award must be denied. *Buzas Baseball Inc. v Salt Lake Trappers*, 925 P.2d at 951.

Moreover, federal decisions do not support Westgate's argument. CPG cites several federal cases to show that the standard to vacate an arbitration award is a heavy, onerous burden, and that the mere existence of a genetic relationship or the mere fact of a prior relationship is not sufficient to cast doubt on the arbitrator's impartiality. If a reasonable person objectively viewing all the facts would fairly entertain doubts about impartiality, then the arbitrator would be subject to disqualification. CPG alleges that once all the facts are known about the relationship between the two Burbidges, no reasonable person could have doubts about Arbitrator Burbidge's

impartiality. Also, general guidelines from the American Arbitration Association and found in the Uniform Arbitration Act do not support vacating this award under these circumstances.

Finally, CPG asserts that Westgate's motion is brought in bad faith. Westgate did not file a certificate that the motion was filed in good faith, which would have been required in a motion to disqualify a judge under Utah Rule of Civil Procedure 63. Westgate's long history of attacking CPG and delaying the judicial process continues with the motion to vacate. Without supporting evidence, Westgate accuses Arbitrator Burbidge and CPG of impropriety and bias. These accusations should not be tolerated.

Based on the foregoing, CPG seeks confirmation of the arbitration award and denial of Westgate's Motion to Vacate Arbitration Award.

d. Westgate's Reply Arguments to CPG's Opposition to Westgate's Motion to Vacate

In reply, Westgate argues that it never waived the right to move to vacate based on Arbitrator Burbidge's failure to make a statutorily required disclosure. The burden was not on Westgate to discover an improper link between arbitrator and attorney; the burden was on the parties so linked to disclose. See Utah Code Ann. § 78B-11-113.

Further, the concealment of the relationship calls into question the impartiality of the arbitrator. Thus, both the relationship and the concealment of the relationship create doubts as to the validity of the outcome of the arbitration. Also, CPG's citation of Rule 63 and its 20-day deadline is not applicable in this case as the rule applies only to judges.

The emails show that Westgate brought this issue to the attention of the parties as soon as it noticed the similarity in names. After confirmation that the Burbidges were first cousins, Westgate immediately sent a letter to the Panel raising the issue. There was no bad-faith delay by Westgate. The bad faith is by CPG, who failed to make required disclosures, and Arbitrator Burbidge, who is statutorily required by Subsection 78B-11-113(1) to disclose *before accepting appointment*.

Moreover, Westgate argues that CPG's contention that Burbidge was not neutral simply confirms the doubts as to his impartiality. It also goes against the Arbitration Fee Agreement, which stated that "[t]he panel members each consider themselves as neutral arbitrators." Also, because Burbidge told the parties he was neutral, then any argument that there was no duty to disclose the relationship is wrong. Westgate had every reason and right to believe that the Panel was composed of neutral arbitrators, based on the parties' agreement, on statutory law, and on the representation of the Panel.

Westgate reiterates that according to Utah statute, an arbitrator who does not disclose a relationship with counsel "is presumed to act with evident partiality." *Id.* § 78B-11-113(5). Thus, Westgate did not have to produce evidence of partiality because the failure to disclose gives rise to a presumption of partiality. The Panel itself expressly adopted the AAA Code of Ethics, which requires all arbitrators, whether neutral or not, to disclose any facts which might affect their neutrality, independence and partiality. A familial relationship is obviously one which falls within the type of information that might reasonably affect impartiality and should be disclosed. See *Burlington Northern Railroad Corp v. TUCO, Inc.*, 960 S.W.2d 629, 637 (Tex. 1997). Westgate also argues that CPG's cited cases do not support its contention.

Finally, Westgate contends that CPG has engaged in distortion, deceit, and misrepresentation.

Based on the foregoing, Westgate requests this Court to vacate the arbitration award.

III. Ruling

The Court reluctantly grants Westgate's Motion to Vacate Arbitration Award and denies CPG's Combined Motion to Confirm Arbitration Award and for Attorney Fees and Expenses and For Rule 54(B) Certification of Judgment as Final. The Utah Uniform Arbitration Act provides:

(1) Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including:

...

(b) an existing or past relationship with any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or representatives, a witness, or another arbitrator.

...

(4) If the arbitrator did not disclose a fact as required by Subsection (1) or (2), upon timely objection by a party, the court under

Subsection 78B-11-124(1)(b) may vacate an award.

(5) An arbitrator appointed as a neutral arbitrator who does not disclose a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party is presumed to act with evident partiality under Subsection 78B-11-124(1)(b).

Utah Code Ann. § 78B-11-113. Additionally, “[a]n individual who has . . . a known, existing, and substantial relationship with a party may not serve as an arbitrator required by an agreement to be neutral,” under § 78B-11-112(2).

When an arbitrator fails to disclose or otherwise violates the rights of a party to the proceeding, § 78B-11-124 provides:

(1) Upon motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

...

(b) there was:

(i) evident partiality by an arbitrator appointed as a neutral arbitrator; [or]

...

(iii) misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding.

Such motion must be filed within 90 days. *See Id.* If the Court grants that motion, then the Court is not required to issue an order confirming the award. *See Id.* § 78B-11-123.

The question at issue is whether Richard D. Burbidge should have disclosed his relationship to counsel. A first cousin relationship is a fact that an arbitrator would be required to disclose because a reasonable person would consider this fact likely to affect the impartiality of

the arbitrator. In the present case, the arbitrator Richard D. Burbidge did not disclose his relationship to counsel as he was required to do by statute.

CPG asserts the relationship is not particularly close and that this omission does not meet the standard to vacate the award because "the evidence of partiality must be certain and direct, not remote, uncertain, or speculative." *DeVore v. IHC Hospitals, Inc.*, 884 P.2d 1246, 1256. But the standard is not proof-of-actual-bias; this standard would be neigh impossible to meet. *Id.* The "certain and direct, not remote, uncertain, or speculative" evidence must be evidence of facts that "a reasonable person would consider likely to affect the impartiality of the arbitrator." Utah Code Ann. §78B-11-113. The first cousin relationship is an uncontroverted fact.

The quality of the Burbidges' relationship does not change Arbitrator Burbidge's duty to disclose. Though CPG argues a judge in a similar situation need not recuse, the Supreme Court of the United States has ruled, "[W]e 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 law as well as the facts and are not subject to appellate review. We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that the arbitrators disclose to the parties any dealings that might create an impression of possible bias." *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 148 (1968).

Additionally, the arbitrators were all designated as neutral in the fee agreement. Even if this was done *sua sponte*, the designation that they were neutral is in a formal agreement with the parties. Under Utah Code § 78B-11-112(2), Arbitrator Burbidge, in the absence of disclosure, should not have served at all, and under § 78B-11-113(5) his service creates a presumption of partiality.

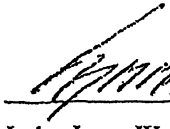
His failure to disclose the relationship as required by § 78B-11-113(1)(b) violated the rights of Westgate to know the facts Arbitrator Burbidge was required to reveal, and he is presumed partial under § 78B-11-113(5). CPG's argument that Westgate's motion should be denied for timeliness fails. The statute sets the time limit at 90 days. The award was entered February 2, 2010. Westgate filed its motion April 8, 2010. Westgate's motion was timely. Therefore, this Court vacates the arbitration award according to §§ 78B-11-124(1)(b)(i) and (iii).

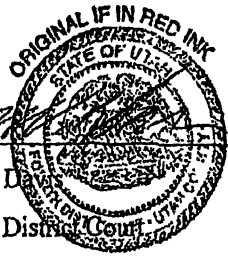
Westgate's Motion to Vacate Arbitration Award is granted.

CPG's Combined Motion to Confirm Arbitration Award and for Attorney Fees and Expenses and For Rule 54(b) Certification of Judgement as Final is denied.

The Court instructs counsel for Westgate to prepare an order consistent with this opinion.

Dated this 30th day of September, 2010.


Judge Lynn W. Davis
Fourth Judicial District Court



A certificate of mailing is on the following page.