IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
January 23, 2014 Session

MORGAN KEEGAN & COMPANY, INC. v. WILLIAM HAMILTON SMYTHE, III, ET AL.

Direct Appeal from the Chancery Court for Shelby County
No. CH-09-2353-1 Walter L. Evans, Chancellor

No. W2010-01339-COA-R3-CV - Filed May 29, 2014

The trial court vacated an arbitration award in favor of Respondent/Appellant on the ground of evident partiality on the part of two arbitrators and remanded the matter to the arbitration board to be re-arbitrated by a different panel. We reverse and remand to the trial court for confirmation of the arbitration award.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed and Remanded

DAVID R. FARMER, J., delivered the opinion of the Court, in which D. MICHAEL SWINEY, J., and J. STEVEN STAFFORD, J., joined.

Christopher S. Campbell and Laura S. Martin, Memphis, Tennessee, and Dale Ledbetter, Fort Lauderdale, Florida, for the appellants, William Hamilton Smythe, III, Individually; William H. Smythe, IV Trust U/A DTD 12/29/87, William H. Smythe, III, Trustee; and Smythe Children's Trust #2 FBO Katherine Thinnes U/A DTD 12/29/87, William H. Smythe, III, Trustee.

John S. Golwen and William G. Whitman, Memphis, Tennessee, for the appellee, Morgan Keegan & Company, Inc.

OPINION

This case arises from an arbitration decision in favor of Respondents/Appellants William Hamilton Smythe, III, Individually; William H. Smythe, IV Trust U/A DTD 12/29/87, William H. Smythe, III, Trustee; and Smythe Children's Trust #2 FBO Katherine S. Thinnes U/A DTD 12/29/87, William H. Smythe, III, Trustee (collectively, "Smythe"), who owned various investment accounts at Morgan Keegan and Company, Inc. ("Morgan

Keegan"), including investments in the "Regions Morgan Keegan" family of Funds ("the RMK Funds") that invested in "junk bonds." Notwithstanding its long procedural history, the facts relevant to our disposition of this matter are largely undisputed.

The documents governing Smythe's investment accounts at Morgan Keegan provided for dispute resolution by arbitration by the Financial Industry Regulatory Authority ("FINRA").[1] In April 2008, Smythe filed an arbitration proceeding against Morgan Keegan following the collapse of the RMK Funds. As provided by the FINRA rules governing disputes in excess of $100,000, a three-member arbitration panel consisting of two public arbitrators and a non-public arbitrator with extensive industry experience was selected and approved by the parties. The panel ultimately agreed upon included public arbitrator Eric Buchanan (Mr. Buchanan); non-public arbitrator Eugene Katz (Mr. Katz); and Michael Hill (Mr. Hill), an experienced public arbitrator who chaired the proceedings. As required by the FINRA rules, the panel members filed disclosures including biographical information, potential conflicts, and other relevant information. In October 2009, Morgan Keegan filed motions for recusal of Mr. Katz and Mr. Hill. The basis for Morgan Keegan's motions was that Mr. Katz and Mr. Hill had served on other panels that resolved disputes concerning the RMK Funds unfavorably to Morgan Keegan. Morgan Keegan also alleged that Mr. Katz was not neutral where one of his brokerage clients had a pending claim against Morgan Keegan. Mr. Hill and Mr. Katz declined to recuse themselves, and the matter was submitted to the FINRA Director of Arbitration, who denied the motions. Following arbitration proceedings from November 2 through 6, 2009, on November 11 the panel awarded Smythe compensatory damages in the amount of $697,000, attorneys' fees in the amount of $195,160, and witness fees in the amount of $20,000.

On November 25, 2009, Morgan Keegan petitioned the Chancery Court for Shelby County to vacate the award pursuant to 9 U.S.C. § 10(a)(2) and Tennessee Code Annotated § 29-5-313(a)(1)(B) on the grounds of "evident partiality" and "misbehavior" on the part of two of the arbitrators. In its petition, Morgan Keegan asserted that Mr. Katz and Mr. Hill had participated in prior FINRA arbitration hearings concerning the RMK Funds that resulted in decisions against Morgan Keegan, and that they accordingly demonstrated evident partiality and misconduct prejudicing Morgan Keegan. Morgan Keegan also asserted that Mr. Katz had a direct or indirect interest in the outcome of all RMK Funds arbitrations where he served as a broker for Jalenak Partners, which had invested in the RMK Funds and also had filed an arbitration proceeding against Morgan Keegan. Morgan Keegan also submitted that it filed two motions for recusal during the FINRA arbitration process, and that its motions

[1]FINRA is an independent, non-governmental organization of the financial industry and conducts "nearly 100 percent of securities-related arbitrations and mediations" in the United States. See http://www.finra.org/AboutFINRA/WhatWeDo (last visited April 28, 2014).

were denied. Following a hearing in February 2010, in March 2010 the trial court granted Morgan Keegan's petition for vacatur on the basis of evident partiality and remanded the matter for a new hearing before a different FINRA arbitration panel. Smythe filed a timely notice of appeal to this Court.

In November 2011, we determined that the Federal Arbitration Act ("FAA") governed the enforceability of the parties' arbitration agreement, but that the Tennessee Uniform Arbitration Act ("TUAA") governed whether the trial court's order was appealable. *Morgan Keegan & Co. v. Smythe*, No. W2010–01339–COA–R3–CV, 2001 WL 5517036, at *7 & *16 (Tenn. Ct. App. Nov. 14, 2011), rev'd, 401 S.W.3d 595 (Tenn. 2013). We determined that, notwithstanding appealability under the FAA, we did not have jurisdiction under the TUAA where Tennessee Code Annotated § 29-5-319(5) permits an appeal of an order vacating an award without directing a rehearing, and where no order confirming or denying confirmation of the award had been entered to provide for an appeal under section 29-5-319(3). *Id.* at *18. We accordingly dismissed the matter for lack of subject matter jurisdiction. *Id.* at *19. On appeal, the Tennessee Supreme Court reversed, holding that an order vacating an arbitration award and ordering a second arbitration is the equivalent of an order denying confirmation of an award for the purposes of section 29-5-319(a)(3). *Morgan Keegan & Co. v. Smythe*, 401 S.W.3d 595, 612 (Tenn. 2013) ("*Smythe I*"). The supreme court accordingly remanded the matter for consideration of the issues raised on appeal. *Id.* In March 2014, we directed the parties to obtain entry of a judgment adjudicating Morgan Keegan's claim of misbehavior or misconduct on the part of the arbitrators. On March 18, 2014, the trial court entered an order denying Morgan Keegan's motion to vacate on the ground of misbehavior or misconduct. That judgment has not been appealed. For the reasons discussed below, we reverse the trial court's judgment vacating the FINRA arbitration award on the ground of evident partiality and remand this matter to the trial court for confirmation of the FINRA arbitration award.

Issues Presented

The issues presented by this appeal, as we succinctly state them, are:

(1) Whether the trial court erred by concluding that the evidence demonstrated evident partiality on the part of Arbitrator Eugene Hill.

(2) Whether the trial court erred by concluding that the evidence demonstrated evident partiality on the part of Arbitrator Michael Hill.

Discussion

Morgan Keegan asserts that the trial court correctly vacated the arbitration decision on the ground of evident partiality where Mr. Katz and Mr. Hill served on previous arbitration panels involving the RMK Funds resulting in awards adverse to Morgan Keegan. Morgan Keegan also asserts that Mr. Katz had an indirect financial interest in the outcome of this dispute where a former brokerage client had a claim pending against Morgan Keegan with respect to the RMK Funds.

The FINRA rules and statutory frame-work governing this matter were examined thoroughly by this Court and the supreme court in *Smythe I*, and we find it unnecessary to repeat that examination here. We therefore begin our discussion with the well-settled judicial philosophy that "courts should play only a limited role in reviewing the decisions of arbitrators." *Arnold v. Morgan Keegan & Co.*, 914 S.W.2d 445, 448 (Tenn.1996) (citing *United Paperworkers Int'l Union, AFL–CIA v. Misco, Inc.*, 484 U.S. 29, 36, 108 S.Ct. 364, 369 (1987)). Accordingly, courts should set-aside arbitrators' determinations "'only in very unusual circumstances.'" *Id*. (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942, 115 S.Ct. 1920, 1923 (1995)). "'[T]he standard for judicial review of arbitration procedures is merely whether a party to arbitration has been denied a fundamentally fair hearing.'" *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 278 F.3d 621, 625 (6th Cir2002) (quoting *National Post Office v. U.S. Postal Serv*., 751 F.2d 834, 841 (6th Cir.1985)). The courts have opined that judicial review of an arbitration decision is "'one of the narrowest standards of judicial review in all of American jurisprudence.'" *Uhl v. Komatsu Forklift Co.*, 512 F.3d 294, 305 (6th Cir.2008) (quoting *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 643 (6th Cir.2005) (quoting *Lattimer–Stevens Co. v. United Steelworkers*, 913 F.2d 1166, 1169 (6th Cir.1990))). We accordingly review a trial court's findings of fact in an arbitration case under a "clearly erroneous standard." *Williams Holding Co. v. Willis*, 166 S.W.3d 707, 710 (Tenn. 2005)(citation omitted). We review questions of law *de novo*, however, with no presumption of correctness. *Pugh's Lawn Landscape Co. v. Jaycon Dev. Corp.*, 320 S.W.3d 252, 258 n. 4 (Tenn. 2010).

The TUAA provides that a reviewing court "shall" vacate an arbitration award where there was evident partiality on the part of an arbitrator. Tenn. Code Ann. § 29-5-313; *Pugh's*, 320 S.W.3d at 259. As we recently observed, "the party challenging the arbitrators' decision "'must show that 'a reasonable person would have to conclude that an arbitrator was partial' to the other party to the arbitration.'"" *Bronstein v. Morgan Keegan & Co.*, No. W2011–01391–COA–R3–CV, 2014 WL 1314843, at *3, (Tenn. Ct. App. April 1, 2014) (quoting *Uhl*, 512 F.3d at 306 (quoting *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1358 (6th Cir.1989) (quoting *Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir.1984)), cert. denied, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed.2d 533 (1990); *see also Nationwide IV*, 429 F.3d at 645; *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 278 F.3d 621, 626 (6th Cir. 2002) (" *Nationwide II* ")). The

challenging party is required to ""establish specific facts that indicate improper motives on the part of the arbitrator."" *Id*. (quoting *id.* (quoting *Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 329 (6th Cir.1998) (internal quotation marks omitted) (quoting *Consolidated Coal Co. v. Local 1643, United Mine Workers*, 48 F.3d 125, 129 (4th Cir.1995)))). "'The alleged partiality must be direct, definite, and capable of demonstration,'" *Id.* (quoting *Nationwide v. Home*, 278 F.3d at 626 (quoting *Andersons*, 166 F.3d at 329)), and "'an amorphous institutional predisposition toward the other side' "is not sufficient" 'because that would simply be the appearance-of-bias standard that [the Sixth Circuit] [has] previously rejected.'" *Id.* (quoting *Uhl*, 512 F.3d at 307 (quoting *Consolidated Coal*, 48 F.3d at 129)).

As in *Bronstein,* the question in this matter is whether the party challenging the arbitration award, Morgan Keegan in this case, carried its heavy burden to prove ""specific facts that indicate improper motives on the part of the arbitrator."" *Id.* (quoting *Uhl*, 512 F.3d at 307)(quoting *Consolidated Coal*, 48 F.3d at 129)). ""[T]he showing required to avoid confirmation" of an arbitration award "is very high."" *STMicroelectronics, N.V. v. Credit Suisse Securities (USA), LLC*, 648 F.3d 68, 74 (2nd Cir. 2011)(quoting *D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 110 (2nd Cir. 2006)).

In this case, the trial court recited the allegations of the parties, but did not make specific findings of fact or indicate which facts it considered determinative of improper motivation on the part of either Mr. Hill or Mr. Katz. At the conclusion of the February 2010 hearing of this matter, the trial court stated that "it cannot be emphasized enough that arbitrators must be free in fact and in appearance from all bias and prejudice."[2] Quoting an unspecified case, the trial court stated that arbitrators must "bend over backwards to avoid any appearance of bias." The trial court concluded that it was "of the opinion that the arbitration award, which may be confirmed on rehearing[,] was nevertheless filled with an air of partiality . . . . " On the other hand, the trial court also noted that the parties "agree . . . that the standard is whether a reasonable person would have to conclude that the arbitrator was partial to one party in the arbitration." The trial court stated, "So the question is: What would a reasonable person find on the question of bias or prejudice as to one side or the other[?]" The trial court stated that it had

> reviewed and considered each of the areas of concern that has been raised by the Petitioners in the cause and the [c]ourt is of the opinion that a reasonable person under the facts of the case that have been presented would conclude that Mr. Hill and Mr. Katz could not be perceived as being impartial and fair and would be predisposed to view any facts in the light most damaging to the

[2]The trial court incorporated the transcript of the February 2010 hearing into its March 2010 order vacating the arbitration award.

> Petitioner[] because of their previous hearings and conclusions and other matters involving Morgan Keegan.

In its March 2010 order, the trial court granted Morgan Keegan's petition to vacate and remanded the matter to FINRA for a new hearing "for all of those specific reasons that Petitioner raised as constituting bias and prejudice, all of which the [c]ourt hereby finds and adopts." Notwithstanding its articulation of the applicable standard, the trial court's judgment, as we perceive it, was premised on its perception of an overall appearance of bias rather than specific, definite facts demonstrating improper motivation. Thus, we first turn to the standard to be utilized by the trial courts when reviewing an arbitration decision.

Applicable Standard

For the purpose of cases governed by the FAA, the courts will find evident partiality only where a reasonable person could only conclude that an arbitrator was partial to one of the parties. *Andersons, Inc. v . Horton Farms, Inc.*, 166 F.3d 308, 328-329 (6th Cir. 1998)(quoting *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1358 (6th Cir.1989) (adopting standard announced *in Morelite Const. Corp. v. New York City District Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir.1984))). Although this standard does not require proof of actual bias, it "requires a showing greater than an 'appearance of bias[.]'" *Id.* (quoting *id.* at 1358)). Although it is an objective standard, it is "less exacting than the one governing judges." *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 682 (7th Cir. 1983)(cert. denied 464 U.S. 1009, 104 S.Ct. 529 (1983)); mandate amended by 728 F.2d 943 (7th Cir. 1984). Additionally, as noted above, ""the party seeking invalidation must demonstrate more than an amorphous institutional predisposition toward the other side; a lesser showing would be tantamount to an "appearance of bias" standard"" that the Sixth Circuit has rejected. *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 645 (6th Cir. 2005)(quoting *Andersons, Inc*. 166 F.3d at 329)). In *Bronstein*, we adopted the standard set-forth by the Sixth Circuit. *Bronstein*, 2014 WL 1314843, at *3. With this standard in mind, we turn to whether Morgan Keegan carried its heavy burden to introduce evidence upon which a reasonable person would have to conclude that Mr. Katz and Mr. Hill were biased against Morgan Keegan and acted with improper motivation in this matter.

Prior Arbitration Proceedings

Morgan Keegan contends, and the trial court concluded, that Mr. Hill and Mr. Katz could not be perceived as being impartial in this matter where they participated in a previous arbitration proceeding resulting in awards against Morgan Keegan. In its petition to vacate, Morgan Keegan asserted, "[b]ecause each prior hearing involved the presentation of the same or similar evidence, witnesses and testimony, Mr. Katz and Mr. Hill formed biases and

opinions of the witnesses and evidence."

In its brief to this Court, Morgan Keegan asserts that, after the parties accepted the arbitration panel in this case, Mr. Katz served on two other FINRA arbitration panels in which investors sought to recover losses arising from the RMK Funds. Morgan Keegan also asserts that those matters were "substantially similar to the Smythe arbitration" and that they involved the same counsel for both parties. Morgan Keegan asserts that the cases involved the same issues and disclosures, and that they "were premised on the same theory: that the Funds did not pass the reasonable suitability test, were fatally flawed, and were unsuitable for everyone." Morgan Keegan asserts the trial court correctly determined that a reasonable person would find Mr. Katz to be partial in favor of Smythe after having heard evidence that the RMK Funds were not suitable for any investor and ruling against Morgan Keegan.

Smythe, on the other hand, asserts that Morgan Keegan did not demonstrate any improper motive on the part of Mr. Katz based on his participation in previous arbitrations. Smythe contends that the previous arbitrations, like the current one, resulted in unanimous decisions, and that Morgan Keegan "offered no evidence" in support of its contention that Mr. Katz was influenced by his participation in previous proceedings. Smythe submits that FINRA arbitration panels do not provide parties with findings of fact, and that Morgan Keegan "imputed the statements of the expert in [the prior two cases] as a 'finding' of those panels." Smythe contends:

> Nowhere in the record of the Smythe case did [Mr.] Katz reference or ask another witness about the conclusions reached by the expert in the [other] cases. Any argument to the contrary would be purely speculation about what [Mr.] Katz may have done, not what he did do. This does not support a finding of evident partiality.
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> . . . Morgan Keegan did not attempt to enter into the record any testimony or representations made in any of the other 80 cases against Morgan Keegan that have been to arbitration hearings. [Mr.] Katz has served on 18 panels where Morgan Keegan was a party. If he had "pre-judged" Morgan Keegan and/or the Fund[s], there would be ample available evidence of this improper motivation.

The parties forward similar arguments with respect to Mr. Hill. Morgan Keegan emphasizes that Mr. Hill served as chairman of a prior arbitration proceeding involving the RMK Funds that resulted in an award of compensatory and punitive damages. Morgan Keegan asserts that an award of punitive damages is reserved for cases involving "the most egregious of wrongs" and that the prior case accordingly was "a remarkably rare decision."

Morgan Keegan contends that "of the more than one hundred (100) cases that FINRA arbitration panels have decided regarding the RMK Funds, the Hill-led . . . case is the only time punitive damages have been awarded." Smythe, on the other hand, contends that although the prior case involved the same family of Funds, it involved a different broker, different witnesses, and different financial circumstances. Smythe further submits that Morgan Keegan did not move to vacate the award of punitive damages, and that it did not attempt to demonstrate that punitive damages were not warranted in that case.

Morgan Keegan's argument demonstrates that many FINRA arbitration proceedings have been held with respect to the RMK Funds. Morgan Keegan references "over 100" proceedings. In *Smythe I*, the supreme court observed that, as of April 2013, there had been more than 170 FINRA arbitrations involving the RMK Funds. *Morgan Keegan v. Smythe*, 401 S.W.3d 595, 599 n.2 (Tenn. 2013). Morgan Keegan does not allege that either Mr. Katz or Mr. Hill have a professional, social, or family relationship with any of the attorneys, witnesses, or parties involved. It also does not allege that Mr. Katz or Mr. Hill had any prior knowledge of the Smythe case or Smythe's circumstances. Rather, Morgan Keegan's argument, as we perceive it, is that Mr. Katz and Mr. Hill were pre-disposed to decide in Smythe's favor merely because they had decided in favor of previous claimants represented, in some cases, by the same attorneys and where some of the witnesses overlapped. As the Second Circuit has noted:

> to disqualify any arbitrator who had 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. Mindful of the trade-off between expertise and impartiality, and cognizant of the voluntary nature of submitting to arbitration, we read Section 10(b) as requiring a showing of something more than the mere "appearance of bias" to vacate an arbitration award. To do otherwise would be to render this efficient means of dispute resolution ineffective in many commercial settings.

Morelite Const. Corp. v. New York City Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 83-84 (2nd Cir. 1984)(footnote omitted). Additionally, the courts have noted that "'[t]he most sought-after'" arbitrators "'are those who are prominent and experienced members of the specific business community in which the dispute to be arbitrated arose[,]" *STMicroelectronics, N.V. v. Credit Suisse Securities (USA) LLC*, 648 F.3d 68, 77 (2nd Cir. 2011)(citation omitted), and that for attorneys practicing in a specific area of law to appear together with some degree of frequency is not unusual. In light of the substantial amount of arbitration involving the RMK Funds as acknowledged by Morgan Keegan, it is not unusual that some proceedings would involve the same attorneys and sometimes the same witnesses, or that individual FINRA arbitrators would participate in more than one arbitration

proceeding involving the RMK Funds.

We agree with Smythe that Morgan's Keegan's allegations of evident partiality based on Mr. Katz's participation in two similar arbitration proceedings and Mr. Hill's participation on a panel that awarded punitive damages against Morgan Keegan rest on speculation and not direct, definite evidence of improper motives. At best, the evidence suggest an "amorphous predisposition." Arbitrators are sought-out precisely because they are prominent and experienced members of a specific industry and "some degree of overlapping representation and interest inevitably results." *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 646 (6th Cir. 2005)(quoting *Int'l Produce, Inc. v. A/S Rosshavet*, 638 F.2d 548, 552 (2nd Cir. 1981)). Smythe's contention that the award of punitive damages in an earlier proceeding chaired by Mr. Hill was predicated on the particular facts of that case, and not on a predisposed bias against Morgan Keegan, is buttressed by the fact that punitive damages were not awarded in the current case. Additionally, "[a]n adverse award in and of itself is no evidence of bias absent some evidence of improper motivation." *Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 330 (6th Cir. 1998)(citing *see Sheet Metal Workers Intern. Ass'n Local Union No. 420 v. Kinney Air Conditioning Co.*, 756 F.2d 742, 746 (9th Cir.)("Even repeated rulings against one party to the arbitration will not establish bias absent some evidence of improper motivation.")). The fact that Mr. Katz and Mr. Hill served on previous FINRA arbitration panels involving Morgan Keegan and the RMK Funds is not direct, definite proof of improper motivation on their part. We reverse the trial court's judgment insofar at it is premised on allegations of predisposition.

Indirect Financial Motivation

We turn next to Morgan Keegan's contention that Mr. Katz was motivated by "at least an indirect financial motivation" rendering him biased against Morgan Keegan. In August 2009, Mr. Katz disclosed that he served as a broker for Jalenak Holdings Partnership ("Jalenak Partners") which also had filed an arbitration claim against Morgan Keegan. Without discussing the nature or extent of Mr. Katz's relationship with Jalenak Partners, Morgan Keegan submits that the mere fact of a client relationship with another claimant is direct evidence of evident partiality. Without making any findings with respect to Mr. Katz's connection to Jalenak Partners or with respect to its claim against Morgan Keegan, the trial court agreed. We must disagree with the trial court.

Mr. Katz's FINRA arbitrator's disclosure report indicates that, since 1960, Mr. Katz has served as vice-president for investment at F.I. Dupont; E.F. Hutton; Prudential Securities; Wachovia Securities; and, since January 2009, with Wells Fargo. His securities expertise includes annuities, common stock, commodities futures, corporate bonds, Fannie Mae, Freddie Macs, Ginnie Maes, government securities, limited partnerships, mutual Funds,

municipal bonds and bond Funds, options, preferred stock, real estate investment trusts, stock index futures and warrants/rights. His August 2009 disclosure report includes disclosures referencing AG Edwards, Prudential Equity Group, Prudential Securities, Wachovia Securities, Wells Fargo Bank, and Jalenak Partners. Mr. Katz reported approximately 500 active accounts.

The record reflects that the Jalenak entities, which consists of four entities including L. R. Jalenak, Jr., individually, and Jalenak Partners, holds assets in excess of $35 million in securities accounts with at least nine broker-dealers including Schwab, Wachovia, Morgan Keegan, Smith Barney, J.P. Morgan, Wunderlich Securities, Bank of America, Morgan Stanley, and Wells Fargo. Jalenak Partner's account with Mr. Katz consisted wholly of real estate investment trusts and was valued at $170,000 in January 2007. It is undisputed that Jalenak Partners closed its account with Mr. Katz prior to November 2009, and the funds in the account were transferred to Schwab. The Jalenak entities filed their claim against Morgan Keegan in December 2008, seeking compensatory damages in the amount of $1.3 million. The matter ultimately was settled.

The parties in this case agreed to submit their dispute to an arbitration panel consisting of an expert involved in the securities industry. As observed above, "'[t]he most sought-after arbitrators are those who are prominent and experienced members of the specific business community in which the dispute to be arbitrated arose. Since they are chosen precisely because of their involvement in that community, some degree of overlapping representation and interest inevitably results.'" *Nationwide v. Home*, 429 F.3d at 646 (quoting *Int'l Produce*, 638 F.2d at 552). As the *STMicroelectronics* court noted, non-public arbitrators, Mr. Katz in this case, are "specifically chosen for [their] industry connection." *STMicroelectronics, N.V. v. Credit Suisse Securities (USA) LLC*, 648 F.3d 68, 77 (2nd Cir. 2011).

Although actual bias is difficult to demonstrate, evident partiality requires specific, definite proof that is "powerfully suggestive of bias." *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 681 (7th Cir. 1983). There is nothing in this record to suggest that Mr. Katz had a financial interest in the outcome of the Smythe arbitration proceeding, or that he stood to benefit indirectly by virtue of his relationship with Jalenak Partners. On the contrary, the undisputed proof in the record demonstrates that Mr. Katz's relationship with Jalenak Partners did not involve the RMK Funds; Jalenak Partners was one of approximately 500 active accounts; and Mr. Katz's broker-client relationship with Jalenak Partners terminated prior to the Smythe arbitration proceedings. Further, in light of the sheer number of claims against Morgan Keegan arising from the RMK Funds and the multiple investment accounts held by investors such as Smythe and Jalenak Partners with multiple financial entities, it is not unreasonable to expect that an arbitrator who is also a prominent member of the

financial/investment industry would have some institutional connection to a client with a claim against Morgan Keegan relating to the RMK Funds. Morgan Keegan has failed to carry its onerous burden to demonstrate with specificity how Mr. Katz's former broker-client relationship involving investments unrelated to the RMK Funds manifests evident partiality. Insofar as the trial court's judgment was premised on Morgan Keegan's assertions otherwise, it is reversed.

Conclusion

In light of the foregoing, the judgment of the trial court is reversed. Costs on appeal are taxed to the appellee, Morgan Keegan & Company, Inc. This matter is remanded to the trial court for confirmation of the FINRA arbitration award and for the collection of costs.

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DAVID R. FARMER, JUDGE