To Be Argued By
Mark S. Levinstein
Time Requested: 15 minutes

SUPREME COURT

State of New York
Appellate Division – Second Department

Appellate Div. Docket No.: 2017-07940

DARRELLE REVIS and SHAVAE, LLC,

Plaintiffs-Appellants,

against

NEIL SCHWARTZ, SCHWARTZ & FEINSOD, LLC, JONATHAN FEINSOD, and JOHN DOE,

Defendants-Respondents.

Westchester County Clerk's Index No. 67097/2016

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STATEMENT PURSUANT TO CPLR 5531

1. The Index Number in the trial court was 67097/16.
2. The full names of the parties are set forth above. The Defendants have indicated that the true name of Schwartz & Feinsod, LLC is Schwartz & Feinsod, Inc.
3. The action was commenced in the Supreme Court, Westchester County.
4. The summons and complaint were served on November 18, 2016. No answer was filed, as the Defendants moved to compel arbitration.
5. The object of the action is to recover damages due to Defendants' breach of fiduciary duty, fraud, breach of contract, breach of the duty of good faith and fair dealing, unjust enrichment, conversion and other common law violations at law and in equity.
6. The appeal is from an order of the Supreme Court, Westchester County dated June 7, 2017, and entered on June 8, 2017 made by Justice Walker.
7. The appeal is being perfected on the full record method.

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QUESTIONS PRESENTED

1. Whether all of the common-law fraud and breach-of-duty claims asserted in this action, which arise from legal services provided to the plaintiffs with respect to marketing and endorsement agreements, are subject to National Football League Players Association ("NFLPA") arbitration under the Standard Representation Agreement ("SRA"), which governs the relationship between a National Football League ("NFL") player and his NFLPA-certified contract advisor with respect to negotiations with NFL teams.

The trial court erroneously held that each of the claims is subject to NFLPA arbitration under the SRA because the subject matter of the claims relates to the SRA, despite the absence of any connection between the negotiation of Mr. Revis's contracts with NFL teams and legal services related to marketing and endorsement agreements that are the basis for this dispute.

2. Whether the trial court erred by expanding NFLPA arbitral jurisdiction over disputes between NFL players and contract advisors to govern a dispute arising from conduct wholly unrelated to the contract advisor's representation of the NFL player in NFL contract negotiations.

The trial court's erroneous decision to compel arbitration of the claims asserted in this action improperly expands NFLPA authority to arbitrate disputes between NFL players and their contract advisors to include disputes unrelated to

NFL contract negotiations, an unprecedented decision that could have nationwide consequences for NFL players.

3. Whether the claims asserted in this action in fact arise from an attorney-client relationship separate from and unrelated to the NFL contract negotiation services defined in the SRA.

The trial court erroneously held that there was no evidence presented showing an attorney-client relationship giving rise to the claims asserted in this action, ignoring that the record contains multiple sworn affidavits from non-parties and other evidence showing an attorney-client relationship that were contradicted only by self-serving affidavits from the Defendants-Respondents.

PRELIMINARY STATEMENT

This is a common-law action for fraud, conversion, and breaches of fiduciary duties under New York state law. Plaintiff-Appellant Darrelle Revis is a professional football player. Shavae, LLC is Mr. Revis's wholly-owned limited liability company. Defendant-Respondent Neil Schwartz is a licensed attorney in the State of New York and a certified NFLPA contract advisor. Defendant-Respondent Jonathan Feinsod is Mr. Schwartz's business partner, and Schwartz & Feinsod is the legal entity through which Mr. Schwartz and Mr. Feinsod offer their services to clients.

From 2007 to 2016, Mr. Schwartz served as Mr. Revis's attorney handling Mr. Revis's and Shavae's legal work and providing legal counsel and representation with respect to Mr. Revis's business, contract, personal, and financial matters. *See* A-191 (Affidavit of Darrelle Revis ("Revis Aff.") ¶ 8)[1]. Mr. Schwartz also negotiated with NFL teams on Mr. Revis's behalf as his contract advisor. A-191 (Revis Aff. ¶¶ 7–8). Mr. Schwartz's compensation for his legal services was a ten percent (10%) contingent fee for work related to Mr. Revis's and Shavae's marketing and endorsement contracts. *See* A-192 (Revis Aff. ¶ 11); A-96 (Standard Representation Agreement ("SRA") § 3(A)). Mr. Schwartz's compensation as Mr. Revis's attorney was separate and apart from the SRA he entered into with Mr. Revis, under which Mr. Revis agreed to pay Mr. Schwartz two percent (2%) of the compensation Mr. Revis earned under his NFL player contracts while represented by Mr. Schwartz as his contract advisor. A-96 (SRA §§ 3, 4).

In 2014 and 2015, acting in his capacity as Mr. Revis's and Shavae's lawyer, Mr. Schwartz negotiated and handled the drafting and execution of an endorsement contract between, on the one hand, Healthy Beverage, LLC ("Healthy Beverage") and, on the other hand, Mr. Revis and Shavae. *See* A-205–06 (Affidavit of

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[1] Citations to A-X throughout this Brief are citations to the full record produced on appeal.

Zachary Hiller ("Hiller Aff.") ¶¶ 10–12); A-154 (Healthy Beverage Agreement ("HBA") at 1). Without Mr. Revis's knowledge or consent, Mr. Schwartz unilaterally decided to include a term in that endorsement deal to quintuple his legal fee from ten percent (10%) to fifty percent (50%). A-192–93 (Revis Aff. ¶¶ 11, 14). Upon discovering Mr. Schwartz's misconduct in the spring of 2016, Mr. Revis promptly terminated his professional relationship with Mr. Schwartz. A-194 (Revis Aff. ¶ 16). After terminating Mr. Schwartz as his lawyer, Mr. Revis sent a letter to Mr. Schwartz and the NFLPA, giving formal written notice that Mr. Revis had terminated Mr. Schwartz as Mr. Revis's contract advisor for purposes of dealing with NFL teams on behalf of Mr. Revis. A-194 (Revis Aff. ¶ 16). After retaining new counsel, Mr. Revis discovered additional malfeasance by Mr. Schwartz, including improper billing and misappropriation of funds. *See* A-26–27 (Verified Complaint ("Compl.") ¶ 46–47).

After Mr. Schwartz and Mr. Feinsod filed a grievance with the NFLPA against Mr. Revis and a former employee of Schwartz & Feinsod (Zachary Hiller) to arbitrate the distribution of amounts paid by Healthy Beverage related to the HBA, Mr. Revis and Shavae brought this action for common-law fraud and various breaches of fiduciary duty. The Defendants-Respondents moved to compel arbitration of Mr. Revis's and Shavae's claims, and the trial court granted that motion on June 8, 2017.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Mr. Revis Hires Mr. Schwartz.

After declaring that he would leave college to be eligible to be drafted by NFL teams in the 2007 NFL Draft, Mr. Revis and his family interviewed several candidates to represent Mr. Revis. A-191 (Revis Aff. ¶¶ 4–5); A-195 (Affidavit of Diana Gilbert Askew ("Askew Aff.") ¶ 5). It was important to Mr. Revis that he be represented by an attorney who could both serve as his contract advisor to negotiate with NFL teams and also represent him in his other legal matters. As a result, Mr. Revis and his family only interviewed candidates who were licensed attorneys. *See* A-191 (Revis Aff. ¶ 4); A-196 (Askew Aff. ¶ 6). In his presentation to persuade Mr. Revis to retain his services, Mr. Schwartz discussed his legal training and experience and that he was a licensed attorney. A-191 (Revis Aff. ¶ 6); A-196 (Askew Aff. ¶ 6).[2] According to Mr. Schwartz's former employee, Zachary Hiller, who accompanied Mr. Schwartz on recruiting visits with prospective NFL players, Mr. Schwartz's standard presentation to potential clients touted Mr. Schwartz's legal experience, skills, and credentials. A-204 (Hiller Aff.

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2 Mr. Schwartz's promotional biography on the Schwartz & Feinsod website states that he received a J.D. from Quinnipiac University in 1987 and has been "a licensed attorney in the State of New York" since 1988. A-128 (Biography of Neil Schwartz).

¶ 3). Mr. Revis decided to hire Mr. Schwartz to represent him as his attorney, including as his contract advisor to negotiate with NFL teams. A-191 (Revis Aff. ¶ 7).

B. Mr. Revis Signs the SRA with Mr. Schwartz.

As a part of the Collective Bargaining Agreement ("CBA") between the NFL and its players' union, the NFLPA, no person may negotiate a player contract with an NFL team unless he or she: (1) is certified by the NFLPA, and (2) signs an SRA with the player. A-141 (CBA, Art. 48, § 1); A-44–46 (NFLPA Regulations Governing Contract Advisors ("NFLPA Regs.") at 1–3). The SRA is a form contract that governs the relationship between the player and the contract advisor with respect to the contract advisor's representation of the player in the negotiation of employment contracts with NFL teams. *See* A-54 (NFLPA Regs. § 4(A)).

On January 18, 2007, Mr. Revis and Mr. Schwartz signed an SRA agreeing that Mr. Schwartz would serve as Mr. Revis's contract advisor.[3] Section 3 of the SRA delineates the very specific and limited "Contract Services" covered under the SRA and states that "[p]layer hereby retains Contract Advisor to represent, advise, counsel, and assist Player in the negotiation, execution, and enforcement of

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[3] Mr. Feinsod is not a party to the SRA, and Mr. Feinsod is not and never has been authorized to be a contract advisor on behalf of Mr. Revis. *See* A-96, 98 (SRA at 1 & Addenda). Similarly, Shavae and Schwartz & Feinsod are not parties to the SRA.

his playing contract(s)." A-96 (SRA § 3). Section 3 further states that Mr. Schwartz was to be "the exclusive representative for the purpose of negotiating player contracts for Player." A-96 (SRA § 3). In exchange for these NFL contract negotiation services, Mr. Revis agreed to pay Mr. Schwartz two percent (2%) of the compensation Mr. Revis earned under his NFL player contracts while represented by Mr. Schwartz. A-96 (SRA § 4).

The SRA contains an arbitration provision, Section 8, which states that "[a]ny and all disputes between Player and Contract Advisor involving the meaning, interpretation, application, or enforcement of this Agreement or the obligations of the parties under this Agreement shall be resolved exclusively through the arbitration procedures set forth in Section 5 of the NFLPA Regulations Governing Contract Advisors." A-96 (SRA § 8). Section 5 of the NFLPA Regulations, titled "Arbitration Procedures," defines the procedural rules governing NFLPA arbitration. *See* A-56–58 (NFLPA Regs. § 5(B)–(H)). Section 5 also sets out categories of disputes subject to NFLPA arbitration, including disputes between contract advisors, disputes relating to fee agreements, and disputes relating to contract advisor activities. A-56 (NFLPA Regs. § 5(A)(3)–(6)). Relevant here, the sole provision in Section 5 governing disputes "between an NFL player and a Contract Advisor" is limited to disputes relating "to the

conduct of individual negotiations by a Contract Advisor." A-56 (NFLPA Regs. § 5(A)(2)).

Section 3 of the SRA also directs the player and contract advisor to identify the existence of other, additional "agreements or contracts relating to services *other than the individual negotiating services*" covered by the SRA. A-96 (SRA § 3) (emphasis added). Mr. Revis and Mr. Schwartz indicated when they executed the SRA that they had such separate agreements or contracts, and they "[d]escribe[d] the nature of the other services covered by the separate agreement[]" relevant here as "Marketing + Endorsements – Ten (10%) cash only." A-96 (SRA § 3(A)). In other words, Mr. Revis and Mr. Schwartz had another agreement, separate from the SRA, that Mr. Revis would pay Mr. Schwartz a ten percent (10%) contingent fee on cash payments Mr. Revis received from marketing and endorsement contracts negotiated and drafted by Mr. Schwartz as Mr. Revis's attorney.

C. Mr. Schwartz Negotiates, Drafts, and Executes the Healthy Beverage Agreement.

From 2007 onward, in addition to serving as Mr. Revis's attorney and contract advisor in negotiating Mr. Revis's player contracts with NFL teams pursuant to the SRA, as Mr. Revis's attorney Mr. Schwartz negotiated and drafted numerous other marketing and endorsement deals pursuant to Mr. Revis and

Mr. Schwartz's separate agreement. For instance, Mr. Schwartz acted as Shavae's and Mr. Revis's attorney on deals with Bose, Nike, and Electronic Arts, always billing Shavae and Mr. Revis for Mr. Schwartz's ten percent (10%) contingent fee on amounts paid to Shavae or Mr. Revis pursuant to these deals. A-19 (Compl. ¶ 25).

In the fall of 2014, Mr. Hiller—Mr. Schwartz's employee at Schwartz & Feinsod—and Mr. Revis's uncle, Sean Gilbert, identified an opportunity for Mr. Revis to enter into an agreement to endorse Steaz, an iced-tea brand manufactured by Healthy Beverage. A-205 (Hiller Aff. ¶¶ 10–11). After an initial meeting with one of the owners of Healthy Beverage, Mr. Hiller turned over negotiating and drafting the contract to Mr. Schwartz because Mr. Schwartz was Mr. Revis's lawyer and because Mr. Hiller worked for Mr. Schwartz. A-206 (Hiller Aff. ¶ 12). The parties to the contract that Mr. Schwartz ultimately negotiated and drafted were Healthy Beverage on one side and Mr. Revis and his wholly-owned limited liability personal services company, Shavae, on the other. A-154 (HBA at 1). Neither Mr. Schwartz nor his business entity, Schwartz & Feinsod, were parties to the HBA. A-154.

In January 2015, as Mr. Revis was preparing for the NFL Playoffs as a member of the New England Patriots, Mr. Schwartz presented Mr. Revis with the HBA, which had already been signed by Healthy Beverage CEO Linda Barron.

A-21 (Compl. ¶ 32); A-192 (Revis Aff. ¶ 11). The contract provided that all parties expected that a "legally binding definitive agreement[] . . . [would] be drafted, negotiated, and executed by the parties as soon hereafter as possible," A-154 (HBA at 1), but no such subsequent agreement was ever drafted or signed. Attached to the one-page contract was a five-page addendum entitled "Schedule A," which added terms regarding the rights and obligations of the parties, including all the provisions related to the compensation of Shavae. A-155–59 (HBA, Schedule A). Mr. Schwartz asked Mr. Revis to sign the contract. Mr. Schwartz also specifically directed Mr. Revis to initial each of the five pages comprising Schedule A, which Mr. Revis did, despite the fact that Ms. Barron, who had already signed the contract, had not at the time initialed those pages on behalf of Healthy Beverage. A-21 (Compl. ¶ 32); A-192 (Revis Aff. ¶ 11). Mr. Revis did not carefully read the addendum to the HBA before signing it on behalf of Shavae and himself; he relied instead on the advice and assurances of his longtime lawyer, Mr. Schwartz, that it was a good deal. A-192–93 (Revis Aff. ¶ 11).

In seeking Mr. Revis's signature and initials, Mr. Schwartz did not tell Mr. Revis that within Schedule A's five pages of densely worded legal provisions—specifically, in the final provision on the final page of Schedule A—Mr. Schwartz had unilaterally included a provision that quintupled his

longstanding ten percent (10%) contingent fee for marketing and endorsement contracts so that Mr. Schwartz's firm would receive fifty percent (50%) of the payments due to Shavae. A-192 (Revis Aff. ¶ 11); *see* A-159 (HBA, Schedule A).[4] Mr. Schwartz presented the HBA, including the attached Schedule A, to Mr. Revis as a completed deal, ready to be signed, and had Mr. Revis, relying on Mr. Schwartz's counsel, sign the contract and initial the pages of Schedule A without reading them. *See* A-192 (Revis Aff. ¶ 11).

In early 2016, Mr. Schwartz informed Mr. Revis that the owners of Healthy Beverage had received an offer to purchase the company and that, under the HBA, Shavae had a right of last refusal to offer to buy the company at a five percent (5%) premium over the offer. A-158–59 (HBA, Schedule A); A-193 (Revis Aff. ¶ 12). Mr. Revis declined on behalf of Shavae. A-193 (Revis Aff. ¶ 12). Around that time, Mr. Revis realized that he did not have a copy of the HBA. A-193 (Revis Aff. ¶ 13). Contrary to his normal practice, Mr. Schwartz had not sent a copy of the HBA to Mr. Revis's mother, Diana Gilbert Askew, who helped manage

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[4] The Defendants-Respondents claimed below that Mr. Revis "specifically approved of the split of the fees" in the HBA. *See* A-113 (Defs.' Mem. of Law in Supp. of Defs.' Mot. to Compel Arbitration and for a Stay ("Defs.' Mem. ISO Arbitration") at 4). That assertion is false—Mr. Schwartz does not dispute that he included the fifty percent (50%) fee in the HBA before discussing it with Mr. Revis—and the issue is one of several factual disputes that should be resolved by the trial court.

Mr. Revis's business affairs. A-193 (Revis Aff. ¶ 13); A-197 (Askew Aff. ¶ 12). Mr. Revis asked Mr. Schwartz to send him a copy of the contract, but Mr. Schwartz told Mr. Revis that his fax machine was broken and did not follow up on the request. A-193 (Revis Aff. ¶ 13). Mr. Revis's second request for the HBA yielded only blurry photographs of the contract that were sent by text message to Mr. Revis's cell phone and were unreadable. A-193 (Revis Aff. ¶ 13).

Mr. Revis finally was provided a legible copy of the HBA in or around April 2016, and at that time Mr. Revis and his colleague James Moore met with Mr. Schwartz and his partner, Mr. Feinsod. A-193 (Revis Aff. ¶ 14). Upon reviewing the HBA's terms, Mr. Revis was shocked to learn that Mr. Schwartz had included in the final provision on the last page of Schedule A, the exhibit attached to the contract, that Healthy Beverage was required to send fifty percent (50%) of all amounts earned by Mr. Revis and Shavae to Schwartz & Feinsod, despite the fact that Mr. Schwartz was only entitled to ten percent (10%) and neither Mr. Schwartz nor his firm were parties to the agreement. A-193 (Revis Aff. ¶ 14). Mr. Revis also learned that Mr. Schwartz had hired a law firm to help Mr. Schwartz represent Mr. Revis and Shavae in negotiating and drafting the HBA and then had Healthy Beverage pay the law firm and deduct the legal fees from the amounts owed to Shavae and Mr. Revis under the HBA. A-194 (Revis Aff. ¶ 15). This arrangement was a clear violation of the HBA, which provided that each party

shall pay its own legal expenses. *See* A-154 (HBA at 1 ¶ 3) ("Each of the parties hereto shall bear its own legal, accounting and other expenses in connection with the Transaction."). Again, Mr. Revis was stunned by Mr. Schwartz's deception, as Mr. Revis had believed that Mr. Schwartz, his longtime personal lawyer, was representing Shavae and Mr. Revis on the deal, that Mr. Schwartz was being paid his ten percent (10%) contingent fee to handle the negotiating and drafting of the contract, and that there was no reason for Mr. Schwartz to retain another attorney or for Shavae and Mr. Revis to have to pay Mr. Schwartz and other lawyers as well. *See* A-193–94 (Revis Aff. ¶¶ 14–15).

Mr. Revis terminated his professional relationship with Mr. Schwartz at that meeting in the spring of 2016. A-194 (Revis Aff. ¶ 16). NFLPA Regulations provide that termination of the SRA and Mr. Schwartz's right to represent Mr. Revis with NFL teams requires a written letter of termination, so shortly after the April meeting, Mr. Revis sent a letter terminating the SRA via certified mail to Mr. Schwartz and forwarded a copy to the NFLPA. A-107 (Letter from D. Revis to N. Schwartz (May 1, 2016)).

D. Mr. Revis Discovers Mr. Schwartz's Additional Legal Overbilling, Misappropriation of Funds, and Ethical Misconduct.

After retaining new counsel, Mr. Revis discovered additional misconduct by Mr. Schwartz, including improper billing and misappropriation of funds. A-26–27

(Compl. ¶¶ 46–47). Among other things, Mr. Schwartz billed Mr. Revis and Shavae for and collected contingent fees to which Mr. Schwartz was not entitled. A-26–27 (Compl. ¶ 47). For example, although Mr. Schwartz had no involvement in negotiating any agreements related to royalty payments received by Mr. Revis from the NFL for NFL sales of Revis replica jerseys, Mr. Schwartz improperly billed and received payment of ten percent (10%) legal fees on these royalty payments throughout his professional relationship with Mr. Revis. A-26–27 (Compl. ¶ 47).

Through successor counsel, Mr. Revis requested that Mr. Schwartz provide Mr. Revis a copy of his file and related documents and information, as required under New York law. Mr. Schwartz refused to comply with that request. *See* A-178–81 (Correspondence Between M. Levinstein and M. Aieta)).

E. Mr. Schwartz and Mr. Feinsod Ask the NFLPA to Commence an Arbitration.

On August 12, 2016, in an effort to preempt a lawsuit by Mr. Revis and Shavae, Mr. Schwartz and Mr. Feinsod filed a grievance with the NFLPA against Mr. Hiller and Mr. Revis, requesting arbitration of the proper distribution of amounts paid by Healthy Beverage after it terminated the Agreement. Neither Shavae—an actual party to the HBA—nor Schwartz & Feinsod—delegated to receive payment under the HBA—were identified as parties in the grievance.

Mr. Revis moved to dismiss the grievance on the ground that the dispute is not subject to NFLPA arbitral jurisdiction. *See* A-161 (Mot. to Dismiss for Lack of Jurisdiction, or in the Alternative, Answer and Counter-Grievance by Darrelle Revis and Shavae, LLC)).

F. Mr. Revis and Shavae File Suit Against Mr. Schwartz, Mr. Feinsod, and Schwartz & Feinsod.

On November 15, 2016, Mr. Revis and Shavae brought this action for common-law fraud and various breaches of duty against Mr. Schwartz, Mr. Feinsod, and Schwartz & Feinsod in the Supreme Court of Westchester County. Mr. Revis and Shavae seek in their Complaint: (1) injunctive relief requiring Mr. Schwartz to turn over Mr. Revis's legal file, which he has refused to do in clear violation of his obligations to Mr. Revis under New York law, A-28–29 (Compl. ¶¶ 51–56); (2) damages for fraud and breach of fiduciary duties owed to Mr. Revis and Shavae under their agreement with Mr. Schwartz to represent them as their attorney concerning the negotiation of the HBA, A-29–30 (Compl. ¶¶ 57–63); (3) damages for fraud related to the negotiation of the HBA and the submission of false invoices seeking unearned payments, A-30–32 (Compl. ¶¶ 64–76); (4) damages for Mr. Schwartz's breach of his legal retention agreement with Mr. Revis by unilaterally increasing his contingent fee in Schedule A to the HBA, A-32–33 (Compl. ¶¶ 77–83); (5) damages for breach of the implied duty of good

faith and fair dealing in negotiating the HBA and in misappropriating Mr. Revis's royalty payments, A-33–34 (Compl. ¶¶ 84–89); (6) equitable relief for unjust enrichment based on Mr. Schwartz's misconduct in his representation of Mr. Revis and Shavae, A-34–35 (Compl. ¶¶ 90–94); and (7) damages for conversion and civil theft for Mr. Schwartz's conversion of Mr. Revis's and Shavae's royalty payments A-36 (Compl. ¶¶ 95–100). In the alternative, Mr. Revis and Shavae seek damages for fraudulent inducement should Mr. Schwartz establish that he never intended to act as Mr. Revis's attorney, A-36–38 (Compl. ¶¶ 101–09).

On December 12, 2016, Defendants-Respondents moved the trial court to compel arbitration, arguing that over the course of his decade-long professional relationship with Mr. Revis, Mr. Schwartz never acted as Mr. Revis's attorney and that all of Mr. Revis's and Shavae's claims are subject to NFLPA arbitration under the SRA and NFLPA Regulations. *See* A-110 (Defs.' Mem. ISO Arbitration). Mr. Revis and Shavae opposed NFLPA arbitration on the ground that the dispute at bar does not involve Mr. Schwartz's negotiation of Mr. Revis's contracts with NFL teams and thus cannot be subject to NFLPA arbitration under either the SRA or the NFLPA Regulations, both of which are limited in the player-contract advisor context to disputes arising out of NFL contract negotiations. *See* A-207 (Pls.' Mem. of Law in Opp'n to Defs.' Mot. to Compel Arbitration and for a Stay). Rather, the present action arises out of Mr. Schwartz's work as Mr. Revis's and

Shavae's attorney negotiating marketing and endorsement contracts, in particular the HBA. Mr. Revis also submitted to the trial court multiple sworn affidavits from individuals with personal knowledge recounting Mr. Schwartz's work on Mr. Revis's behalf as his attorney, both generally and in particular with regard to the HBA. *See* A-190–206 (Revis Aff.; Askew Aff.; Affidavit of Martin Gargano ("Gargano Aff."); Hiller Aff.). Mr. Revis also made clear in his opposition that the only parties to the SRA—and thus the only parties who even conceivably could be subject to NFLPA arbitration—are Mr. Revis and Mr. Schwartz. Shavae, Mr. Feinsod, and Schwartz & Feinsod were not parties to the SRA and cannot be compelled to arbitrate under the SRA, and similarly cannot use the SRA to compel a party to arbitration.

On June 8, 2017, the trial court nevertheless entered a Decision & Order (the "Order") compelling Mr. Revis and Shavae to submit to NFLPA arbitration all of their claims and staying all judicial proceedings pending arbitration. A-4–9 (Order). The Order concludes that the subject matter of Mr. Revis's and Shavae's claims relates to the SRA and thus is subject to its arbitration provision. A-8 (Order at 5). The Order also finds that Mr. Revis failed to present any evidence at all that an attorney-client relationship existed between him and Mr. Schwartz. A-9 (Order at 6). Mr. Revis and Shavae timely appealed the Order to this Court on June 20, 2017. A-2 (Notice of Appeal). That same day, an NFLPA arbitrator was

appointed to resolve the grievances filed against Mr. Revis by Mr. Schwartz and Mr. Feinsod. On July 24, 2017, counsel for Mr. Schwartz and Mr. Feinsod agreed in a letter to stay the NFLPA grievances in their entirety pending the resolution of this appeal.

ARGUMENT

POINT I

MR. REVIS'S AND SHAVAE'S COMMON-LAW FRAUD AND BREACH CLAIMS ARE NOT SUBJECT TO NFLPA ARBITRATION BECAUSE THE CLAIMS ARE UNRELATED TO MR. SCHWARTZ'S WORK AS AN NFLPA CONTRACT ADVISOR.

The trial court was tasked with "determin[ing] whether the parties agreed to submit their disputes to arbitration," and, "if so, whether th[is] particular dispute comes within the scope of their agreement." *Matter of Cty. of Rockland (Primiano Constr. Co.)*, 51 N.Y.2d 1, 6 (1980); *Grossman v. Laurence Handprints-N.J.*, 90 A.D.2d 95, 99 (2d Dep't 1982) (stating that *Rockland* established "guidelines for the courts on motions to compel, or stay, arbitration"). The question whether a particular dispute should be arbitrated is a judicial determination to be made by a court, and "the general rule is that courts should apply ordinary state-law principles that govern the formation of contracts." *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 344 (2d Cir. 2010) (applying the Federal Arbitration Act ("FAA") (internal quotation marks omitted)).

The trial court's inquiry centered on the question of arbitral scope, *i.e.*, "whether there is a reasonable relationship between the subject matter of the dispute"—Mr. Schwartz's alleged misconduct in negotiating and executing marketing and endorsement contracts on Mr. Revis's and Shavae's behalf—"and the general subject matter of the [SRA]," which governs the negotiation and execution of NFL player contracts with NFL teams. *Matter of Bd. of Educ. of Watertown City Sch. Dist. (Watertown Educ. Ass'n)*, 93 N.Y.2d 132, 143 (1999). The court held that the SRA's arbitration provision constitutes "a clear and unequivocal agreement to arbitrate" Mr. Revis's and Shavae's common-law fraud and breach claims, which the court found relate to "the general subject matter of the underlying SRA." A-8 (Order at 5). That decision should be reversed for at least three reasons.

First, as the Order correctly notes, the SRA's arbitration clause is limited to disputes "involv[ing] the parties' application or enforcement of the [SRA] or the obligations of the parties under the [SRA]." A-8 (Order at 5). The SRA's purpose, scope, and obligations are set out clearly in the terms of the Agreement, and they relate solely to the negotiation and execution of NFL playing contracts with NFL teams by a certified contract advisor on behalf of an NFL player. By contrast, the dispute at bar does not involve the application or enforcement of the SRA and bears no relation to Mr. Schwartz's work negotiating with NFL teams as

Mr. Revis's contract advisor. The scope of the SRA's arbitration provision therefore does not extend to the present dispute.

Second, by compelling Mr. Revis and Shavae to submit all of their claims to NFLPA arbitration, the Order erroneously and dangerously expands NFLPA authority in an unprecedented manner that risks stripping NFL players of their right to a judicial forum by shielding attorneys and non-attorney contract advisors for misconduct entirely unrelated to their services as NFLPA contract advisors. All NFLPA contract advisors have SRAs with the NFL players they represent; the Order gives them *carte blanche* to defraud those players with judicial impunity even as to matters completely unrelated to the contractual relationship.

Third, the present dispute arises from Mr. Schwartz's work as attorney for Mr. Revis and Shavae, which is not even a party to the SRA, in negotiating marketing and endorsement contracts on their behalf with third parties. The trial court's contrary conclusion—provided without factual support or legal analysis—constitutes reversible error.

A. The Trial Court Ignored the Plain Terms of the SRA in Determining the Scope of Its Arbitration Provision.

Scarcely more than a page in length, the SRA is by design an uncomplicated contract; it governs a straightforward exchange of services in return for a percentage payment. By the SRA's terms, Mr. Revis "retain[e]d [Mr. Schwartz] to

represent, advise, counsel, and assist [Mr. Revis] in the negotiation, execution, and enforcement *of his playing contract(s) in the National Football League*." A-96 (SRA § 3) (emphasis added). "In performing these services," Mr. Schwartz agreed to act as Mr. Revis's "exclusive representative *for the purpose of negotiating player contracts*" and to "assure effective representation of [Mr. Revis] *in individual contract negotiations with NFL Clubs*." A-96 (SRA § 3) (emphases added). In return for Mr. Schwartz's NFL player contract services, Mr. Revis promised to compensate Mr. Schwartz by paying him two percent (2%) of any payments Mr. Revis earned under an NFL player contract that Mr. Schwartz successfully negotiated on Mr. Revis's behalf. A-96 (SRA § 4). That simple bargained-for exchange defines the SRA's purpose, its scope, and the parties' obligations thereunder. *See, e.g.*, *Mark Patterson, Inc. v. Bowie*, 237 A.D.2d 184, 186 (1st Dep't 1997) (holding that court should avoid result that "conflict[s] with the express terms of the bargained-for exchange" and that "equitable considerations will not allow an extension of coverage beyond the agreement's fair intent and meaning in order to obviate objections which might have been foreseen and guarded against" (internal quotation marks and alterations omitted)); *Wyman-Gordon Co., Inc. v. United Steel Workers of Am.*, 337 F.Supp.2d 241, 245 (D. Mass. 2004) ("[A]s a matter of contract interpretation, this Court should presume

that the parties intended to be bound by the terms of their bargained-for exchange.").

Each provision of the SRA plainly reflects that bargained-for exchange. Section 3, for example, makes clear that the Agreement does not govern, and is not "conditioned upon," any "*separate* agreements" "relating to services *other than* the individual negotiating services described in this Paragraph," *i.e.*, "represent[ing Mr. Revis] in individual contract negotiations with NFL Clubs." A-96 (SRA § 3) (emphases added). Similarly, Section 8—the arbitration provision on which the trial court relied—is expressly limited to "disputes between Player and Contract Advisor involving the meaning, interpretation, application, or enforcement of this Agreement or the obligations of the parties under this Agreement." *See* A-8 (Order at 5 (quoting SRA § 8)).

The question presented then is whether Mr. Revis's and Shavae's allegations of legal wrongdoing relating to Mr. Schwartz's negotiation and execution of marketing and endorsement contracts, particularly the HBA—an iced-tea endorsement deal among Mr. Revis, Shavae, and Healthy Beverage—constitute a dispute "involving the meaning, interpretation, application, or enforcement of" the SRA or the parties' obligations thereunder. They do not.

To begin, Mr. Revis's and Shavae's claims lack any discernible subject-matter relationship to the SRA's singular topic of coverage: Mr. Schwartz's

provision of representation services to Mr. Revis in his playing contract negotiations with NFL teams. The express terms of the various agreements make that point clear. The HBA confines the scope of its own "Subject Matter" to "the services of Darrelle Revis . . . as a spokesman for Steaz," the iced-tea beverage manufactured by Healthy Beverage. A-155 (HBA, Schedule A). A dispute arising out of a product endorsement contract does not bear any relationship, much less a reasonable one, to the NFL-representation agreement defined in the SRA, which concerns playing contracts. Moreover, the SRA specifically identifies Mr. Revis's general "marketing and endorsement" agreement with Mr. Schwartz as a "*separate* agreement[]" "relating to services *other than* the individual negotiating services" that define the subject matter of the SRA. A-96 (SRA § 3) (emphases added). Thus, *by the SRA's own terms*, the "marketing and endorsement" agreements at issue in this dispute, including and particularly the HBA—an endorsement contract that would not exist for nearly a decade after Mr. Revis and Mr. Schwartz executed the SRA—are distinct and independent oral or written instruments unrelated to the NFL-representation services described in the SRA. They therefore are not subject to the SRA's arbitration clause.

This Court has adhered closely to the precept that a dispute must reasonably relate to the subject matter of a contract before the parties to the dispute can be compelled to arbitrate under that contract. In fact, it has rejected arbitration in

cases far closer than this one. In *Matter of Am. Centennial Ins. Co. v. Williams*, 233 A.D.2d 320 (2d Dep't 1996), for example, the Court considered whether to allow arbitration of an *under*insured motorist claim on the ground that the relevant insurance policy contained an agreement to arbitrate *un*insured motorist claims. *Id.* at 320. Despite the general subject matter of the insurance policy and the arbitration agreement's specific coverage of uninsured motorist claims, the Court rejected arbitration because "there was no such agreement with respect to underinsured motorist claims." *Id.* Similarly, in the public sector union context, the Court held that a teachers union's dispute concerning increased class preparation time was not arbitrable under an agreement to arbitrate "dispute[s] concerning the meaning, interpretation or application of" the collective bargaining agreement because the subject matter of the bargaining agreement extended only to "the number of teaching periods, parent conferences and extra hours to be spent in 'curriculum development'" and was "silent on the question of 'productivity increases.'" *Matter of Wyandanch Union Free Sch. Dist. v. Wyandanch Teachers Ass'n*, 66 A.D.2d 895, 897 (2d Dep't 1979). Accordingly, the SRA's subject matter is not to be defined at some high level of abstraction but by strict reference to its terms, which extend only to Mr. Schwartz's representation of Mr. Revis in contract negotiations with NFL teams.

Beyond general subject matter, there also is no relationship between the present dispute and the duties and obligations created by the SRA. *See Primavera Labs. v. Avon Prods.*, 297 A.D.2d 505, 506 (1st Dep't 2002) (reading "arbitration clauses . . . in context with the other requirements and obligations of the parties' agreements" to determine their scope). Under the HBA, Healthy Beverage agreed to pay Shavae to engage Mr. Revis to act as the spokesperson for Steaz and to participate in certain promotional engagements and activities. A-155 (HBA, Schedule A). Under Mr. Revis's agreement for Mr. Schwartz to serve as his attorney and identify and negotiate marketing and endorsement agreements, Mr. Revis agreed to pay Mr. Schwartz ten percent (10%) of the payments Mr. Revis received under any such marketing or endorsement contract. The SRA, however, bears no relation to any of those duties or obligations. Under the SRA, Mr. Revis agreed to pay Mr. Schwartz for his services representing Mr. Revis in negotiating player contracts with NFL teams. There is no discernible connection between, on the one hand, the obligations set out in the HBA and the marketing and endorsement agreement, and on the other, the obligations set out in the SRA.

Put simply, the trial court's conclusory declaration that Mr. Revis's and Shavae's claims "involve[] the parties' application or enforcement of the [SRA] or the obligations of the parties under the [SRA]" is as inexplicable as it is

unsupported. *See* A-8 (Order at 5).[5] Mr. Revis and Shavae do not assert any claim that Mr. Schwartz breached the terms of the SRA, nor did they ask the trial court to interpret, apply, or enforce that Agreement. Mr. Revis and Shavae allege that Mr. Schwartz and the other Defendant-Respondents committed fraud and various breaches related to separate marketing and endorsement contracts that do not contain arbitration provisions (and to which the Defendants-Respondents are not parties, save Mr. Schwartz as to the agreement to serve as Mr. Revis's and Shavae's attorney with respect to marketing and endorsement agreements). The Defendants-Respondents have not argued that those separate agreements incorporate the SRA or the NFLPA Regulations Governing Contract Advisors, nor could they. This Court should reverse the Order on that basis alone.[6]

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[5] Defendants-Respondents have likewise failed to explain how this dispute relates to the SRA's application or enforcement. They argued below that because Mr. Revis and Shavae seek damages, including the possible return of fees paid to Mr. Schwartz under the SRA, the dispute involves the meaning, interpretation, application or enforcement of the SRA. A-119 (Defs.' Mem. ISO Arbitration at 10). That is *ipse dixit*, and, in any case, this Court has declined to endorse such inverted reasoning. *See Shuffman v. Rudd Plastic Fabrics Corp.*, 64 A.D.2d 699, 699 (2d Dep't 1978) (refusing to extend arbitration agreement to dispute "merely because the resolution of that dispute will affect" an issue that was subject to arbitration).

[6] It is no answer that the SRA's arbitration provision is "broad" because it refers to "[a]ny and all disputes." A-8 (Order at 5). As the Court of Appeals made clear in *Gangel v. DeGroot*, 41 N.Y.2d 840 (1977), relying on that type of boilerplate language in an arbitration provision simply begs the question of the contract's subject matter and its connection to the dispute at bar. *Id.* at 842 (rejecting party's attempt to "blandly refer to the arbitration clause as governing 'all disputes,' thus begging the question"); *see also Bowmer v. Bowmer*, 67 A.D.2d 8, 9–10 (1st Dep't 1979) (acknowledging that the "arbitration clause under discussion is drawn in broad terms," but holding that the dispute at bar "d[id] not arise (1) out of, or (2) in connection with, or (3) as a result of any breach of the . . . agreement"). And in any case, here SRA Section 8 reads

Because the present dispute plainly does not relate to the SRA, the practical import of the trial court's Order compelling arbitration in this case is profound. By its reasoning, the Order imputes the SRA's arbitration provision to any dispute arising between Mr. Revis and Mr. Schwartz, regardless of subject matter or the parties' intent to arbitrate. The Order amounts to a judicial determination that by entering the SRA in 2007 to secure representation in negotiating playing contracts with NFL clubs, Mr. Revis intended to forego in perpetuity a judicial forum for any and all harms committed against him, so long as they are committed by his contract advisor. That would be an extreme and unfair result, and New York law forbids such reasoning for precisely that reason.

In point of fact, this dispute involves separate and complete instruments from the SRA. New York courts, and particularly this Court, have long held that parties to a contract containing an agreement to arbitrate disputes arising out of that contract cannot be forced to arbitrate a dispute that arises out of a separate and distinct agreement. *See, e.g.*, *Rahman v. Park*, 63 A.D.3d 812, 813–14 (2d Dep't 2009) (allowing claims under side agreement to proceed in court despite a mandatory arbitration clause in related operating agreement); *Credit Suisse First*

"[a]ny and all disputes *between Player and Contract Advisor*"; as discussed *infra*, the provision cannot govern the rights of Shavae, or the rights of Mr. Revis with respect to Mr. Feinsod or Schwartz & Feinsod.

Boston Corp. v. Cooke, 284 A.D.2d 365, 366 (2d Dep't 2001) (rejecting arbitration of dispute regarding note and mortgage, which "exist separate and apart from the subsequent agreement," because "plaintiff never agreed to arbitrate any dispute regarding the note and mortgage, and those documents do not contain any reference to arbitration"); *Salmanson v. Tucker Anthony, Inc.*, 216 A.D.2d 283, 284 (2d Dep't 1995) (holding employment-related dispute was outside scope of arbitration agreement because "the claims herein arise from a separate distinct agreement, the Joint Defense Agreement, which concerns issues with regard to the defendant's proper defense of itself and the plaintiff in the arbitration proceeding and does not concern significant aspects of the plaintiff's employment or the business of the defendant"); *Binkow v. Brickman*, 1 A.D.2d 906, 906 (2d Dep't 1956) (holding that "the dispute sought to be arbitrated was not within the scope of the arbitration clause" in joint venture agreement because "[t]he language of that clause is not sufficiently broad to encompass a controversy concerning the validity of an independent contract unconnected with the conduct of the joint venture or with any of the provisions of the agreement of joint venture"); *see also ITT Avis, Inc. v. Tuttle*, 27 N.Y.2d 571, 573 (1970) (rejecting arbitration where although the employment agreement at issue mentioned the separate stock option plan, "there [wa]s absolutely no indication in the employment agreement that the parties ever

contemplated arbitrating the disputes which might arise under the separate stock option agreement").[7]

In addition to the cavalcade of precedent, this Court's recent decision in *Glauber v. G & G Quality Clothing, Inc.*, 134 A.D.3d 898 (2d Dep't 2015), is instructive. In *Glauber*, the plaintiff brought an action alleging breach of a severance agreement, which did not contain an arbitration provision. *Id.* at 898. The *Glauber* Court rejected the defendants' attempt to compel arbitration on the basis of an "arbitration clause contained in a separate shareholders' agreement" because that separate agreement "d[id] not evince an express, direct, and unequivocal agreement by the parties to arbitrate any dispute that arises between them, much less those, as here, that do not relate to the shareholders' agreement."

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[7] In the trial court, the Defendants-Respondents theorized that arbitration is required because the SRA "contains both the 2% fee on Contract Advisor services . . . and the 10% fee on 'Marketing and Endorsements,'" and therefore "all of Revis's contentions . . . derive from the [SRA]." A-271–72 (Defs.' Reply Mem. in Further Supp. of Defs.' Mot. to Stay and to Compel Arbitration ("Defs.' Reply Mem. ISO Arbitration") at 6–7). That is incorrect first as a matter of contract interpretation. The SRA simply asks for an identification of separate agreements, and the SRA plainly refers to the "marketing and endorsements" agreement as a "*separate agreement*[]" concerning "services *other than* the individual negotiating services described" in the SRA. A-96 (SRA § 3(A)) (emphases added). But even if it were true, where two agreements are executed in one transaction, the fact that one of the agreements contains an arbitration clause is not itself sufficient for the court to conclude that the parties intended to arbitrate disputes arising under the *other*, *separate* agreement. *See Rosen v. Mega Bloks Inc.*, No. 06-CV-3474 (LTS/GWG), 2007 WL 1958968, at *4–5 (S.D.N.Y July 6, 2007) (rejecting defendants' argument that arbitration clause in employment contract was "incorporated by reference into" stock purchase agreement, despite both being executed at same time and stock purchase agreement's reference to employment contract as an "integral part").

Id. at 899. Applied here, *Glauber* compels the conclusion that the trial court erred both in applying the SRA's arbitration clause to separate agreements without evidence of any such intent, and also in doing so where the separate agreements bear no relation to the SRA. *See id.*

Compounding the error here is the fact that the trial court improperly applied the arbitration provision from the unrelated SRA *to govern the rights of non-parties to the SRA*. It is, of course, "an elementary principle of contract law that generally only parties in privity of contract may enforce terms of the contract." *LI Equity Network, LLC v. Vill. in the Woods Owners Corp.*, 79 A.D.3d 26, 35 (2d Dep't 2010) (internal quotation marks omitted). "[T]he enforceability of agreements to arbitrate is governed by the rules applicable to contracts, and as in any bilateral agreement both parties must be bound or neither is bound." *Riccardi v. Modern Silver Linen Supply Co., Inc.*, 45 A.D.2d 191, 193 (1st Dep't 1974) (citations omitted). In *Waldron v. Goddess*, for example, the Court of Appeals rejected arbitration to avoid such non-party bootstrapping:

> Nowhere is the right to compel arbitration extended to a nonparty to the agreement . . . and nowhere is a party to the agreement required to submit to the latter's demand. Absent clear language to the contrary, this arbitration agreement . . . may not be so extended by construction or implication to include an employee not a party to the agreement.

61 N.Y.2d 181, 184–86 (1984) (internal quotation marks omitted).

In this case, the SRA's arbitration provision is limited to "disputes between Player and Contract Advisor," *i.e.*, between Mr. Revis and Mr. Schwartz. A-96 (SRA § 8). Therefore, even assuming that Mr. Revis's and Shavae's claims reasonably related to the SRA's general subject matter (they do not), the Defendants-Respondents cannot use that arbitration clause as a sword to force non-party Shavae into arbitration, nor as a shield to protect non-parties Mr. Feinsod and Schwartz & Feinsod from the courtroom. Moreover, splintering this case to compel only the SRA's parties (Mr. Revis and Mr. Schwartz) to arbitration would invite piecemeal litigation and risk inconsistent judgments regarding the same dispute.

It is axiomatic that "[a] party to an agreement will not be compelled to arbitrate, and thereby, to surrender the right to resort to courts, in the absence of evidence affirmatively establishing that the parties expressly agreed to arbitrate *the dispute at hand*." *Glauber*, 134 A.D.3d at 898–99 (emphasis added). New York law simply will not tolerate Mr. Revis and Shavae to be compelled "to arbitrate . . . claim[s] which they did not intend to arbitrate." *Matter of We're Assocs. Co.*, 163 A.D.2d 393, 395 (2d Dep't 1990). Yet that is exactly what has happened to Mr. Revis and Shavae here, "lead[ing] the parties into arbitration unwittingly through subtlety." *ITT Avis, Inc.*, 27 N.Y.2d at 573 (internal quotation marks omitted).

While Mr. Revis and Shavae appreciate the policies favoring and encouraging arbitration, "these considerations must be reconciled with the equally strong policy considerations that a party who agrees to arbitration waives in large part many of his normal rights under the procedural and substantive law of the State, and it would be unfair to infer such a significant waiver on the basis of anything less than a clear indication of intent." *Computer Assocs. Int'l, Inc. v. Com-Tech Assocs.*, 239 A.D.2d 379, 381 (2d Dep't 1997) (internal quotation marks omitted).[8] Neither Mr. Revis nor Shavae intended or agreed to arbitrate the dispute at bar, and it would be unfair to infer such assent from Mr. Revis's agreement in 2007 to arbitrate claims related to his NFL contract negotiations. This Court should reverse the trial court's Order.

B. The Trial Court's Order Erroneously and Dangerously Expands NFLPA Jurisdiction Over NFL Player-Contract Advisor Disputes.

The trial court did not rely on or even discuss the NFLPA Regulations in reaching its decision. Nevertheless, the Order's effect is to expand, in

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[8] *See also Gerling Glob. Reinsurance Corp. v. Home Ins. Co.*, 302 A.D.2d 118, 125 (1st Dep't 2002) ("While federal policy generally favors arbitration, the obligation to arbitrate nevertheless remains a creature of contract. Thus, the mere invocation of the FAA does not operate to convert a non-arbitrable claim into an arbitrable one. . . . [A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." (internal quotation marks and citations omitted)).

unprecedented fashion, the NFLPA's arbitral jurisdiction over player-contract advisor disputes far beyond the limits imposed in the NFLPA Regulations. Should the Order stand, it will all but guarantee that the courthouse doors remained closed to any NFL player seeking judicial recourse based on his contract advisor's misconduct, even when that contract advisor is *not* negotiating playing contracts with NFL clubs. That extraordinary and dangerous widening of NFLPA authority further supports the Order's reversal.

As an initial matter, the SRA and NFLPA Regulations must be placed in proper context. As noted, the SRA states that through it, "[p]layer hereby retains Contract Advisor to represent, advise, counsel and assist player in the negotiation, execution, and enforcement of his playing contract(s) in the National Football League." A-96 (SRA § 3). And the SRA limits the scope of arbitration to disputes "involving the meaning, interpretation, application, or enforcement of this Agreement or the obligations of the parties under this Agreement . . . ." A-96 (SRA § 8). That limitation on arbitral authority exists precisely because the NFLPA's jurisdiction to arbitrate disputes between players and their contract advisors is confined to those disputes arising from the contract advisors' work related to the players' employment contracts with NFL teams.

Under federal labor law, as the union representing all present and future NFL players, the NFLPA is the sole and exclusive bargaining representative for all

employees in that bargaining unit. *See* A-44–45 (NFLPA Regs., Introduction). As such, the NFLPA could negotiate every term related to wages, hours, and working conditions of all NFL players with the teams of the NFL, the multi-employer bargaining unit that negotiates with the NFLPA. The NFLPA negotiates almost all of the terms of the relationship between NFL players and their teams, and in addition to all the terms of the CBA between the NFLPA and the NFL teams, the CBA requires all players to sign the standard NFL Player Contract,[9] which is Appendix A to the CBA and includes almost all of the terms of the players' individual contracts with their respective NFL teams, A-143–51 (CBA, Appx. A). However, the NFLPA and NFL teams have chosen to provide that certain very specific terms of the Uniform Player Contract can, under specific circumstances, be the subject of limited individual negotiations between NFL players and their teams. *See* A-134 (CBA, Art. 4, §§ 3–4). No NFL team or player is allowed to agree to any provision in any player contract that is inconsistent with the terms of the CBA. A-134 (CBA, Art. 4, §§ 3–4); A-136 (CBA, Art. 4, § 5(f)).

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[9] *See* A-134 (CBA, Art. 4 (NFL Player Contract), § 1) ("The NFL Player Contract form attached hereto as Appendix A will be used for all player signings. This form cannot be amended without the approval of the NFL and the NFLPA.").

The NFLPA could also have chosen to have its own lawyers negotiate all of the individual terms for each NFL player. However, the NFLPA and the NFL teams instead agreed that the NFLPA would certify certain contract advisors to handle those individual negotiations on behalf of the NFLPA and its individual players, would regulate their conduct, and the NFL teams are prohibited from engaging in any negotiations about an NFL player's contract with anyone who is not on the NFLPA's list of certified "agents"[10] or "contract advisors," as referred to in NFLPA regulations. *See* A-44–45 (NFLPA Regs., Introduction).

As part of its regulation of contract advisors representing NFL players in negotiations with NFL teams, the NFLPA limits the amounts that contract advisors are allowed to charge NFL players *for services related to negotiating playing contracts with NFL teams. See* A-54–55 (NFLPA Regs. § 4). As part of that right to regulate such contract advisors, the NFLPA requires the players and contract advisors to enter into an SRA, which has to be submitted to and approved by the NFLPA. A-54 (NFLPA Regs. § 4(A)). The contract advisor compensation agreed

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[10] *See* A-141 (CBA, Art. 48 (NFLPA Agent Certification), § 1) ("The NFL and the Clubs recognize that, pursuant to federal labor law, the NFLPA will regulate the conduct of agents who represent players in individual contract negotiations with Clubs. On or after the date on which the NFLPA notifies the NFL that an agent regulation system is in effect and provides the NFL with a list of the NFLPA-certified agents, Clubs are prohibited from engaging in individual contract negotiations with any agent who is not listed by the NFLPA as being duly certified by the NFLPA . . . ").

to in the SRA has to comply with the NFLPA's limits on what the contract advisor is permitted to charge the player and requires arbitration of disputes related to the work the contract advisor does with respect to negotiating the few negotiable terms in the player's employment contract. *See* A-54–58 (NFLPA Regs. §§ 4–5). The NFLPA does not have jurisdiction under the labor laws over any agreement between the player and the contract advisor (or anyone else) for other services. Similarly, if a lawyer represents a player for all contract negotiations with corporate sponsors and other legal issues, but is not involved in the player's contract negotiations with his NFL team, the NFLPA has no jurisdiction over that lawyer and none of his agreements with the player will be subject to NFLPA arbitration.

The NFLPA does, however, have a right to decide whether to allow a certified contract advisor to continue in that role, representing the NFLPA and its players. *See* A-141–42 (CBA, Art. 48); A-58–61 (NFLPA Regs. § 6). Therefore, the NFLPA mandates a disciplinary process by which it can decide to revoke or suspend contract advisor certification or issue other discipline as punishment for improper conduct by contract advisors, whether directed at NFL players or otherwise. *See* A-58–61 (NFLPA Regs. § 6). The NFLPA Regulations mandate that if the NFLPA determines that a contract advisor should be disciplined for misconduct, any disputes about that discipline are to be addressed in NFLPA

arbitration. *See* A-60 (NFLPA Regs. §§ 6(E), (F)). These arbitrations are not about disputes between players and their contract advisors; they are arbitrations between the NFLPA and the contract advisors about contract advisor discipline. *See* A-58–61 (NFLPA Regs. § 6). Therefore, if the NFLPA takes appropriate disciplinary action against Mr. Schwartz or Mr. Feinsod for their misconduct at issue in this case, any dispute between them and the NFLPA will be resolved in NFLPA arbitration; however, that provides no basis for the NFLPA, which has no jurisdiction over a player-contract advisor dispute unrelated to NFL representation, to serve as the forum for the claims asserted in this litigation.

In the trial court, the Defendants-Respondents relied exclusively on Section 5 of the NFLPA Regulations, which details the NFLPA's "arbitration procedures," to argue that the SRA's arbitration agreement is somehow broader than its express limitation to SRA-related disputes. Again, proper context is critical. The NFLPA Regulations address arbitration in three general contexts: (1) disciplinary proceedings initiated by the NFLPA against contract advisors; (2) grievances by one contract advisor brought against another contract advisor; and (3) grievances by players against contract advisors. *See* A-56, 58–61 (NFLPA Regs. §§ 5(A), 6). The scope of arbitrable claims, however, differs dramatically depending on the nature of the dispute and who is party to the action. For example, all disciplinary charges brought by the NFLPA against contract advisors are, on appeal, subject to

NFLPA arbitration. A-60 (NFLPA Regs. § 6(E)). Disputes in which one contract advisor claims that another interfered with his or her agreement with an NFL player are also subject to arbitration, as are disputes between contract advisors concerning their individual entitlement to fees owed by a jointly represented player. A-56 (NFLPA Regs. §§ 5(A)(5)–(6)).

The arbitrability of disputes involving *players*, however, is uniquely circumscribed under the NFLPA Regulations. Section 5(A)(2) is the sole provision in the NFLPA Regulations that addresses disputes "between an NFL player and a Contract Advisor," and that provision is expressly confined to disputes involving "the conduct of individual negotiations [with an NFL team] by [the] Contract Advisor." A-56 (NFLPA Regs. § 5(A)(2)). That limitation, of course, makes perfect sense—it mirrors exactly the scope of the SRA's arbitration provision, which governs the relationship between an NFL player and his contract advisor, and it is limited to the NFLPA's jurisdiction over player representation—when players in the NFLPA have retained someone to negotiate their contract with an NFL team.

In the trial court, however, the Defendants-Respondents contended that Section 5(A)(4)—which calls for arbitration of disputes arising from "other activities of a Contract Advisor within the scope of these Regulations"—should be read to supersede the express limitation in Section 5(A)(2) on player-contract

advisor disputes, as well as the SRA's express limitation to disputes arising out of that Agreement. That is an unreasonable interpretation of the NFLPA Regulations, and it would create perverse incentives and lead to absurd results. Because they are the NFLPA Regulations *Governing Contract Advisors*, the scope of Contract Advisor "activities" subject to the NFLPA Regulations is virtually unlimited; it extends to "any other activity or conduct which directly bears upon the Contract Advisor's integrity, competence or ability to properly represent individual NFL Players and the NFLPA in individual contract negotiations." A-46 (NFLPA Regs. § 1(B) ("Activities Covered")). Thus, interpreting Section 5 to mandate that NFL players arbitrate any dispute involving contract advisor "activity or conduct which directly bears upon the Contract Advisor's integrity, competence or ability" to represent the player would constitute a complete debarment of NFL players from judicial redress of claims against their contract advisors. It is difficult to predict the full extent of the risks that would accompany such impunity, but it suffices simply to note, as an example, that a contract advisor who commits civil fraud or theft against his or her player entirely unrelated to the player's NFL representation would escape judicial recourse. It defies reason to believe that the drafters of the NLFPA Regulations intended such an outcome.

Beyond inviting absurd results, reading Section 5(A)(4) of the NFLPA Regulations to broaden the scope of arbitrable player-contract advisor disputes

would violate basic canons of contract interpretation by improperly rendering narrow clauses of the SRA and Regulations meaningless.

First, the scope of the SRA's arbitration provision is not coextensive with the scope of arbitral disputes described in Section 5 of the NFLPA Regulations. SRA Section 8 limits arbitration to "disputes between Player and Contract Advisor" that "involv[e] the meaning, interpretation, application, or enforcement of this Agreement or the obligations of the parties under this Agreement." A-96 (SRA § 8).[11] Nothing in the SRA indicates that the NFLPA Regulations nullify those clear, consistent limitations. Indeed, the SRA is intended to be read "in accordance with the" NFLPA Regulations. A-96 (SRA § 1). And the sole reference in the SRA to the arbitration provisions in the NFLPA Regulations simply notes Section 5 of the Regulations as the source of the *procedural rules* that are to govern SRA-related disputes. A-96 (SRA § 8) (requiring that disputes under Section 8 "be resolved exclusively through the arbitration procedures set forth in Section 5 of the NFLPA Regulations").

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[11] As noted, that limitation is reflected in Section 5(A)(2) of the NFLPA Regulations, which tracks the SRA and expressly limits arbitration of "[a]ny dispute between an NFL player and a Contract Advisor" to those disputes relating "to the conduct of individual negotiations [with an NFL team] by a Contract Advisor." A-56 (NFLPA Regs. § 5(A)(2)).

Thus, interpreting Section 5(A)(4) of the NFLPA Regulations to require arbitration of all player disputes involving contract advisor activities "within the scope of these Regulations" would make superfluous those identical limitations on player-contract advisor disputes set out both in Section 5(A)(2) of the NFLPA Regulations and in Section 8 of the SRA itself. Under New York law, however, the NFLPA Regulations "should not be interpreted so as to render [those provisions] meaningless." *See, e.g., LI Equity Network, LLC*, 79 A.D.3d at 35 ("An interpretation that gives effect to all the terms of an agreement is preferable to one that ignores terms or accords them an unreasonable interpretation." (internal quotation marks and alterations omitted)). Nor should the general language set out in Section 5(A)(4) of the NFLPA Regulations prevail over the specific restrictions on player-contract advisor disputes in Section 5(A)(2) and SRA Section 8. *See, e.g., Aguirre v. City of New York*, 214 A.D.2d 692, 693 (2d Dep't 1995) (holding "[w]here there is an inconsistency between a specific provision and a general provision of a contract, the specific provision controls"). To be sure, NFLPA contract advisors are subject to NFLPA disciplinary action, and thus NFLPA arbitration, for any activities bearing on their integrity, competence, or ability. But there simply is no basis in contract or reason to conclude that the NFLPA Regulations compel NFL players or companies they own to arbitrate claims of

attorney or contract advisor misconduct entirely outside the scope of the player's contractually defined relationship with their contract advisor.[12]

As a final point, although the decision was not published, the Court should at least be aware that the California Court of Appeal adjudicated an issue virtually identical to the present dispute in *Morton v. Steinberg*, 2007 WL 3076934, at *2 (Cal. Ct. App. Oct. 22, 2007, No. G037793) (unpublished). A-183–89 (*Morton v. Steinberg*). Like this case, *Morton* involved a lawyer, Leigh Steinberg, who both was an NFLPA contract advisor and provided other legal services to NFL players related to marketing and endorsement contracts. Steinberg was sued by NFL player Chad Morton for "breach of contract (none involving the [SRA]), as well as claims for," *inter alia*, concealment and misrepresentation, fraud, breaches of fiduciary duty and the covenant of good faith and fair dealing, and unjust enrichment. *Id.* Steinberg moved to compel NFLPA arbitration of Morton's claims, but the trial court rejected Steinberg's attempt because "Morton's claims were not within the scope of the [SRA] containing the arbitration provision, and . .

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12 In the trial court, the Defendants-Respondents also relied in passing on Section 5(A)(3), which calls for arbitration of disputes involving "[t]he meaning, interpretation or enforcement of a fee agreement." Like Section 5(A)(4), Section 5(A)(3) has no bearing on this dispute. Mr. Revis and Shavae do not assert a claim to enforce a fee agreement. They assert common-law claims of fraud and breaches of duty under New York law.

. there were other parties to the proceeding who were not subject to mandatory arbitration." *Id.* at *3.

The California Court of Appeal agreed. The court reasoned that because Morton's claims did not involve the interpretation or application of the SRA but instead involved "other contracts which [did] not contain arbitration provisions" and did not incorporate the SRA or NFLPA Regulations, those arbitration clauses could not govern the dispute. *Id.* at *4. Moreover, the court rejected Steinberg's argument, identical to the Defendants-Respondents' here, that the dispute should be arbitrated because "Morton's claims are directly related to conduct prohibited by or otherwise related to the NFLPA regulations." *Id.* The court explained that

> [u]nder Steinberg's theory, virtually any conduct of any type occurring between Steinberg and Morton would be within the NFLPA Regulations and thus within the arbitration provision. If Steinberg punched Morton, would a claim for personal injuries be subject to mandatory arbitration? Such an action would presumably create a conflict of interest with Morton, is unlawful, would reflect adversely on Steinberg's fitness as an advisor to Morton, and would jeopardize his ability to represent Morton. We believe it is clear, however, that such an action is not intended to be encompassed by the arbitration provision in the [SRA].

Id. at *6. The court added that Section 5 of the NFLPA Regulations supported such a conclusion because "regulations stating that arbitration is required for one specific type of dispute between a player and contract advisor ('[a]ny dispute ...

with respect to the conduct of individual negotiations') tend to show other disputes between a player and agent are not." *Id.* at *6 n.1.

The trial court's Order upends the consistent and limited language both in the SRA and in the NFLPA Regulations, and it does so in a way that will shield contract advisors from judicial recourse. This Court should reverse the Order to avoid sanctioning such an unprecedented and dangerous precedent that would violate the rights of all NFL players.

C. Mr. Revis's and Shavae's Common-Law Fraud and Breach-of-Duty Claims Arise From Mr. Schwartz's Work as Mr. Revis's Attorney Unrelated to Employment Contract Negotiations with an NFL Club.

As the preceding makes clear, this dispute is not subject to arbitration under the SRA, as the trial court held, because it is not reasonably related to Mr. Schwartz's representation of Mr. Revis in negotiation of terms of his Uniform Player Contracts with NFL clubs. That conclusion alone requires the Order's reversal. What is more, the actual basis for this action—Mr. Schwartz's alleged misconduct as a New York attorney providing legal representation and counsel to Mr. Revis and Shavae—provides further support for reversal.

Mr. Revis and Shavae presented substantial evidence in the trial court of Mr. Revis's attorney-client relationship with Mr. Schwartz, including sworn affidavits from Mr. Revis, his mother and business manager Diana Askew, his tax

and accounting advisor Martin Gargano, and Mr. Schwartz's own employee, Zachary Hiller. Those documents recount Mr. Schwartz's express agreement in 2007 to act as Mr. Revis's attorney at the start of their professional relationship, and they outline Mr. Schwartz's provision of legal services to Mr. Revis from 2007 to 2016, including, but not limited to, advice about family law issues, tax issues, real estate issues, financial issues, contracts, and contract provisions—including the HBA at issue in this dispute. *See* A-191 (Revis Aff. ¶ 7–8); A-196–97 (Askew Aff. ¶ 9); A-201 (Gargano Aff. ¶ 6–8). Mr. Hiller's sworn statement further details Mr. Schwartz's provision of legal services to his clients and his explicit invocation of the attorney-client privilege. A-204 (Hiller Aff. ¶ 3). And Mr. Revis and Shavae presented additional evidence that Mr. Schwartz publicly advertises to potential clients both his law degree and also that he has been "a licensed attorney in the State of New York" since 1988. *See* A-128 (Biography of Neil Schwartz).

Apparently ignoring that evidence, the trial court found that Mr. Revis "provide[d] absolutely nothing to show how and when Schwartz acted as anything other than his agent." A-8 (Order at 5). Oddly, the court's conclusion that no attorney-client relationship existed between Mr. Revis and Mr. Schwartz rests solely on the fact that Mr. "Revis' own letter terminating the relationship between Schwartz and Revis . . . makes no mention of an attorney/client relationship." A-9 (Order at 6). That is clear error at this stage. New York law does not attribute

dispositive legal significance to how parties refer to a relationship; rather, "a court must look to the general character of the relationship," *M.J. Woods, Inc. v. Conopco, Inc.*, 271 F.Supp.2d 576, 585 (S.D.N.Y. 2003), and whether the client had a reasonable belief that the attorney was representing him as legal counsel, *First Hawaiian Bank v. Russell & Volkening, Inc.,* 861 F.Supp 233, 238 (S.D.N.Y. 1994) (listing indicia of attorney-client relationship). Moreover, drafting and negotiating and providing advice about the terms of an endorsement agreement—as Mr. Schwartz did with the HBA, as well as multiple other agreements—is the provision of legal services, whether Mr. Schwartz was referred to as an agent or a sports agent, a lawyer or a sports lawyer, or any other term. *See Matter of Rowe*, 80 N.Y.2d 336, 341–42 (1992) ("The practice of law involves the rendering of legal advice and opinions directed to particular clients."). *Compare* A-267 (Defs.' Reply Mem. ISO Arbitration at 2) ("Revis fails to come forward with even one piece of evidence to support his bogus assertion that his sports agent was not his sports agent, but was instead his lawyer."), *with Matter of Horak*, 224 A.D.2d 47, 52 (2d Dep't 1996) (rejecting attorney's argument that he should not be subject to the New York State Code of Professional Responsibility because he "was nothing more than a 'sports agent'"). Indeed, had Mr. Schwartz not been a licensed attorney, his actions in handling the HBA contract negotiations would have constituted the unauthorized practice of law. *See, e.g., Duncan & Hill Realty, Inc.*

v. Dep't of State, 62 A.D.2d 690, 698–701 (4th Dep't 1978) (holding real estate broker engaged in unauthorized practice of law by inserting a contract provision that required the exercise of legal expertise without alerting the affected party to consult his attorney before signing the contract).

The trial court's error is not saved by the limited record below. Relying on Mr. Schwartz's attestations, the Defendants-Respondents claimed in the trial court that Mr. Schwartz "never agreed to be Revis's lawyer," "never represented to Revis or to anyone else that he was acting as Revis's lawyer," and "never acted as Revis's lawyer." A-112 (Defs.' Mem. ISO Arbitration at 3); *see* A-92 (Affidavit of Neil Schwartz ¶ 8). Each of those self-serving assertions was contradicted directly by other more competent record evidence, including affidavits from non-parties, and/or is otherwise incorrect as a matter of law. To begin, Mr. Schwartz expressly agreed to act as Mr. Revis's attorney at the start of their professional relationship. A-191 (Revis Aff. ¶ 7). But even if he had not expressly agreed, Mr. Schwartz would still have formed an attorney-client relationship with Mr. Revis through "the general character of the[ir] relationship." *See M.J. Woods, Inc.*, 271 F.Supp.2d at 585. Specifically, Mr. Schwartz actually represented Mr. Revis and Shavae, both in legal matters unrelated to marketing and endorsement agreements and by negotiating and/or drafting a number of marketing and endorsement deals on their behalf—including the HBA at the heart of this

dispute—as well as agreements with Bose, Nike, and Electronic Arts. *See* A-191–92 (Revis Aff. ¶ 7–11); A-19 (Compl. ¶ 25). *Compare id.*, *with* A-112 (Defs.' Mem. ISO Arbitration at 3) (arguing that Mr. Revis "fail[ed] to identify any matter in which Schwartz Acted as Revis's lawyer"); *see First Hawaiian Bank*, 861 F.Supp. at 238 (considering as a relevant factor "whether the attorney actually represented the individual in one aspect of the matter (e.g., at a deposition)")).

Mr. Schwartz's provision of legal representation and counsel to Mr. Revis and Shavae, his statements to others that he represented Mr. Revis as his lawyer, and his actions on behalf of Mr. Revis over the course of nearly a decade instilled in Mr. Revis, as well as those around him, the subjective and reasonable belief that Mr. Schwartz was Mr. Revis's attorney. *See* A-191 (Revis Aff. ¶ 7); A-198–99 (Askew Aff. ¶ 16); A-201 (Gargano Aff. ¶ 8)); *see also First Hawaiian Bank*, 861 F.Supp. at 238 (noting that indicia of attorney-client relationship includes "whether the purported client believes that the attorney was representing him and whether this belief is reasonable"). Thus, even assuming the unlikely notion that Mr. Schwartz for nine years was harboring unshared doubts about the nature of his relationship with Mr. Revis and Shavae, those doubts would be legally irrelevant.[13]

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[13] It is likewise immaterial, as the Defendants-Respondents claimed below, that Mr. Schwartz "never charged Revis for legal services," A-112 (Defs.' Mem. ISO Arbitration at 3), both because Mr. Schwartz's services drafting and negotiating marketing and endorsement contracts and NFL team contracts were legal services for which he charged and was paid handsomely, and

Ultimately, though, the fatal flaw in the trial court's conclusion is its prematurity, regardless of the relative merits of the parties' positions. Before the trial court were genuine questions concerning facts material to determining whether the dispute at bar arises from the SRA or from rights and duties separate from that Agreement, including those flowing from an attorney-client relationship. Those genuine disputes were not resolved by the Defendants-Respondents' dubious position below that Mr. Revis's sworn statements were somehow "proven to be false" by Mr. Schwartz's contradictory sworn statements. A-267–68 (Defs.' Reply Mem. ISO Arbitration at 2–3). Nor were they settled by dramatic indignance. *See, e.g.*, A-117 (Defs.' Mem. ISO Arbitration at 8) (describing Mr. Revis's sworn statement that he relied on Mr. Schwartz's representations he would serve as Mr. Revis's attorney as a "preposterous allegation"); A-120 (Defs.' Mem. ISO Arbitration at 11) (describing the existence of attorney-client relationship as a "Bald-Faced Fabrication[]"). This Court should reverse the Order

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because the attorney-client "relationship is not established because one pays a legal fee, or lost because the client does not pay a fee," *see People v. O'Connor*, 85 A.D.2d 92, 95 (4th Dep't 1982) (internal citations omitted); *Young v. Oak Crest Park, Inc.*, 95 A.D.2d 956, 957 (3d Dep't 1980) (noting that "it is not essential to the establishment of an attorney-client relationship that the client be billed or that a fee arrangement be made")).

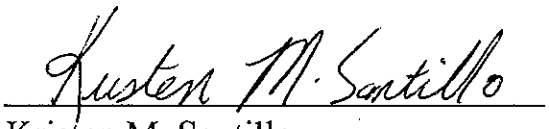
so the trial court properly can consider these questions of fact which are material to the question of arbitrability.

CONCLUSION

For the trial court's Order to stand, New York requires affirmative evidence that Mr. Revis and Shavae expressly and unequivocally agreed to arbitrate their claims. No such evidence exists. Both the SRA and the NFLPA Regulations limit arbitration between NFL players and their contract advisors to disputes involving NFL contract negotiations. The dispute at bar, however, does not relate in any way to Mr. Schwartz's work as Mr. Revis's contract advisor. This case involves Mr. Schwartz's separate work as Mr. Revis's and Shavae's attorney, negotiating and drafting endorsement deals with third parties. Neither Mr. Revis nor Shavae agreed to arbitrate this dispute. This Court should reverse the trial court's Order compelling arbitration.

September 21, 2017

Respectfully submitted,



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*Motions for admission *pro hac vice* in the Appellate Division pending.

CERTIFICATE OF COMPLIANCE PURSUANT TO SECTION 670.10.3(f)

The foregoing brief was prepared on a computer (on a word processor). A proportionally spaced typeface was used, as follows:

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