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.

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REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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PRELIMINARY STATEMENT

Plaintiff-Appellants Darrelle Revis, a professional football player, and Shavae, LLC, his wholly-owned limited liability company, sued their former lawyer and agent, Neil Schwartz, Mr. Schwartz's business partner Jonathan Feinsod, and their firm Schwartz & Feinsod (collectively, "Defendants-Respondents") for defrauding and stealing from the plaintiffs. In 2014 and 2015, Mr. Schwartz, acting in his capacity as Mr. Revis's and Shavae's lawyer, negotiated an endorsement agreement among Mr. Revis, Shavae, and Healthy Beverage, LLC (the "HBA"). Even though the Defendants-Respondents were not parties to the HBA, without any authorization Mr. Schwartz secretly included a provision in the HBA that directs Healthy Beverage to send half of all payments due to Mr. Revis and Shavae to Defendants-Respondents. This case is about Mr. Schwartz's misconduct as Mr. Revis's and Shavae's attorney negotiating and executing the HBA.

Defendants-Respondents have tried throughout this litigation to make this case about everything it is not, and their response brief is another such effort. The response brief is wrong in the following key ways:

***First*,** this case is not about the Standard Representation Agreement ("SRA") between Mr. Revis and Mr. Schwartz, and the SRA's arbitration provision does not apply. The SRA, to which neither Mr. Feinsod nor Schwartz & Feinsod are

parties, is a form contract mandated by the National Football League Players Association ("NFLPA"). *See* A-96–97 (SRA).[1] As such, it is strictly limited to the jurisdiction of the NFLPA as the union party to the Collective Bargaining Agreement ("CBA") with the National Football League ("NFL"). The NFLPA only has the power to regulate NFL player relationships with attorneys or other contract advisers that concern the representation of players in negotiations to play for NFL clubs. Therefore, the SRA only applies to such contracts, and the arbitration provision in the SRA is limited to disputes arising from those employment negotiations and employment contracts, which are not relevant here.

This dispute is about the HBA, to which none of the Defendants-Respondents are parties, as well as the oral agreement by which Mr. Schwartz agreed to serve as Mr. Revis's lawyer for negotiating marketing and endorsement contracts, which is identified explicitly in the SRA as a "*separate* agreement." A-96 (SRA § 3(A)).[2] Defendants-Respondents are simply wrong to claim that this oral agreement is somehow part of the SRA, or that the SRA somehow creates the fiduciary and ethical duties that Mr. Schwartz violated in connection with the HBA. Defendants-Respondents are also wrong that this dispute is about fees paid

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

[2] As a matter of information, and to protect the player from coercive conduct, the NFLPA asks contract advisors to disclose what other agreements they have with the players whose employment contracts they negotiate, but by being disclosed in the SRA those contracts do not become part of or subject to the SRA. *See* A-96 (SRA § 3(A)–(B)).

under the SRA. This dispute is about Mr. Schwartz, without authorization, inserting a provision into a contract among Mr. Revis, Shavae, LLC and Healthy Beverage providing that Mr. Schwartz and his firm would receive half the amount due to Mr. Revis and Shavae. This case is not about the SRA.

***Second*,** the NFLPA Regulations Governing Contract Advisors do not apply to this case. Nor could they. Again, the NFLPA can only regulate player-contract advisor disputes related to the player's employment contracts with NFLPA teams, and, in any case, neither Mr. Feinsod nor Schwartz & Feinsod had relationships with Mr. Revis to which the NFLPA Regulations even apply. Defendants-Respondents are also wrong that the NFLPA has the authority to resolve this dispute because it involves a "fee agreement," as all agreements in this case are entirely unrelated to the negotiation of Mr. Revis's NFL employment contracts.

***Third*,** contrary to Defendants-Respondents' assertion, there is overwhelming record evidence that Mr. Revis hired Mr. Schwartz to be his lawyer and Mr. Revis had an ongoing attorney-client relationship with Mr. Schwartz. Mr. Revis hired Mr. Schwartz in 2007 to represent him as his and (when the LLC was created) Shavae's attorney in all matters. The record reflects that Mr. Schwartz held himself out as an attorney to Mr. Revis before and after Mr. Revis hired him and used his status as an attorney, and his ability to represent athletes beyond his work on their NFL employment contracts, to recruit clients, including Mr. Revis.

See A-191 (Affidavit of Darrelle Revis ("Revis Aff.") ¶¶ 7–8); A-196–97 (Affidavit of Diana Gilbert Askew ("Askew Aff.") ¶¶ 9); A-201 (Affidavit of Martin Gargano ("Gargano Aff.") ¶¶ 6–8). Record evidence reflects that Mr. Revis believed Mr. Schwartz was his lawyer, as did the people around Mr. Revis and people who worked for Mr. Schwartz, and that he performed a wide variety of legal services for Mr. Revis, including advising him 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); *see also* A-19 (Verified Complaint ("Compl.") ¶ 25). As Mr. Revis's and Shavae's attorney, Mr. Schwartz owed them a fiduciary duty, which he breached by defrauding them in connection with the HBA. He also breached his ethical duties as a licensed member of the bar of the State of New York. As a lawyer, he was bound by fiduciary and ethical obligations to his clients even when performing work that could be done by a non-lawyer.

***Fourth*,** the NFLPA arbitrator should not determine the arbitrability of this case. Mr. Revis's relationships with Mr. Feinsod and Schwartz & Feinsod are not subject to the NFLPA Regulations (or the SRA), and, in any event, because the SRA and the NFLPA Regulations do not provide clearly and unmistakably that the NFLPA arbitrator should arbitrate his own jurisdiction, the Court should decide the

issue of arbitrability. Moreover, the NFLPA arbitrator assigned to this dispute recently declined jurisdiction over a related case against Defendants-Respondents precisely because the NFLPA is not empowered, or equipped, to resolve legal claims based on misconduct unrelated to NFL contract negotiations.

ARGUMENT

I. The SRA is Not Relevant to this Dispute.

As a threshold matter, only one of the three Defendants-Respondents (Mr. Schwartz) can even raise the SRA as a defense. The record is clear that neither Mr. Feinsod nor Schwartz & Feinsod are parties to the SRA, and the opening brief is equally clear that neither can seek its refuge to avoid the legal claims against them. Plaintiffs-Appellants' Br. at 17, 30–31; *see* A-96 (SRA) (stating that SRA is "between Darrelle Revis (hereinafter 'Player') and Neil S. Schwartz (hereinafter 'Contract Advisor')."); *id.* (SRA § 8) (expressly limiting arbitration to "disputes between Player and Contract Advisor"). In fact, Mr. Feinsod's name was affirmatively crossed-out in the SRA's Addendum to make it crystal clear that he did not represent Mr. Revis. *See* A-98 (SRA Addendum).

Ignoring the record, Defendants-Respondents claim that all parties to the present dispute agree that Mr. Feinsod and Schwartz & Feinsod are subject to the SRA's arbitration agreement. Defendants-Respondents' Br. at 17. That is simply not true. Mr. Revis and Shavae have disputed the SRA's application to Mr.

Feinsod and Schwartz & Feinsod at every opportunity throughout this litigation, including an extended discussion of the issue and controlling Second Department case law in the opening brief. Plaintiffs-Appellants' Br. at 30–31 (stating "the trial court improperly applied the arbitration provision from the unrelated SRA *to govern the rights of non-parties to the SRA*" and, therefore, the SRA cannot "protect non-parties Mr. Feinsod and Schwartz & Feinsod from the courtroom" (emphasis in original)).[3] Defendants-Respondents simply misrepresent the record.

As to the SRA itself, the agreement's scope and subject matter are clear. Through it, Mr. Revis retained Mr. Schwartz for the *sole* purpose of "represent[ing], advis[ing], counsel[ing], and assist[ing Mr. Revis] in the negotiation, execution, and enforcement of his playing contract(s) in the National Football League." A-96 (SRA § 3). In return, 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). The SRA's arbitration provision reflects that simple exchange, expressly limiting arbitration to player-contract advisor disputes involving the representation agreement. A-96 (SRA § 8).

[3] *See also* Plaintiffs-Appellants' Br. at 17; A-224 (Pls.' Mem. of Law in Opp'n to Defs.' Mot. to Compel Arbitration and For a Stay) at n.4 ("The Defendants do not even address the fact that Shavae, Mr. Feinsod, and Schwartz & Feinsod are not parties to the SRA.").

Nothing in the SRA or its obligations—not its clearly defined subject matter, nor any provision, clause, or term—relates to this dispute such that the SRA is at issue.

The SRA's subject matter is unambiguous because it is a form contract mandated by the NFLPA and therefore is strictly limited to the NFLPA's authority to regulate contract advisors. As explained in detail in Section II, the NFLPA only has the power to regulate NFL player relationships with attorneys or other contract advisers that concern negotiations for the player to play for NFL clubs. Therefore, the SRA is only about representation of players in negotiations with NFL teams, and the arbitration provision in the SRA is limited to disputes about conduct and fees for those employment negotiations.

A. The SRA's Arbitration Provision is Inapplicable Under Controlling New York Law.

Defendants-Respondents do not deny the well-established New York and Second Department precedent that govern this issue. For example, they do not dispute that "[a] party to an agreement will not be compelled to arbitrate, and thereby, to surrender the right to resort to courts," without actual evidence of the party's intent to arbitrate the dispute at hand. *Glauber v. G & G Quality Clothing, Inc.*, 134 A.D.3d 898 (2d Dep't 2015); *see* Plaintiffs-Appellants' Br. 31–32. Nor do Defendants-Respondents challenge that this Court has held consistently that the dispute at bar must reasonably relate to the subject matter of a contract before the parties to the dispute can be compelled to surrender their judicial rights and

arbitrate under that contract. *See, e.g.*, *Matter of Am. Centennial Ins. Co. v. Williams*, 233 A.D.2d 320, 320 (2d Dep't 1996) (rejecting arbitration where arbitration agreement related to *un*insured motorist claims but dispute involved *under*insured motorist claim); *see also* Plaintiffs-Appellants' Br. at 23–26.

Thus, the subject matter of this case—which concerns the HBA and Mr. Revis's and Mr. Schwartz's oral legal services agreement related to "marketing and endorsement[s]" expressly identified in the SRA as a "*separate* agreement[]" "relating to services *other than* the individual negotiating services" in the SRA—is not reasonably related to the SRA's subject matter. The parties to the SRA, Mr. Revis and Mr. Schwartz, clearly did not intend to arbitrate the dispute at hand.

Defendants-Respondents similarly do not deny this Court's longstanding hostility to applying an arbitration agreement from one contract to govern the rights of the parties in a dispute arising from a separate and distinct agreement. *See, e.g.*, *Glauber*, 134 A.D.3d at 899 (rejecting attempt to compel arbitration on the basis of "a separate shareholders' agreement" because the 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"); *see also* Plaintiffs-Appellants' Br. at 27–30 (collecting and surveying Second Department case law).

Thus, the trial court erred both in applying the SRA's arbitration provision to separate agreements without any evidence of an intent to arbitrate, and also in doing so where the separate agreements are unrelated to the SRA.[4]

B. Defendants-Respondents Misstate the SRA's Scope and the Nature of this Dispute.

Attempting to circumvent controlling New York law, Defendants-Respondents make several plainly incorrect assertions about the SRA's scope, and also blatantly mischaracterize the nature of this case.

First, the Defendants-Respondents assert that the SRA "creates" the alleged attorney-client relationship between Mr. Revis and Mr. Schwartz, although they do not actually rely on the SRA for this claim. Instead, they cite a single sentence about the SRA in the Complaint's factual background, which describes the SRA as "providing that Attorney Schwartz would represent Mr. Revis as his attorney and contract advisor." A-17–18 (Compl.) ¶ 21; *see* Defendants-Respondent's Br. at 15. Based solely on Paragraph 21 in the Complaint, they claim that the "attorney-client relationship between Revis and Schwartz was created by the SRA." Defendants-

[4] Notwithstanding their misrepresentation of the issue, *see supra* pages 5 to 6, Defendants-Respondents also do not dispute that arbitration provisions cannot be applied to govern the rights of non-parties to the agreement. *See, e.g.*, *Waldron v. Goddess*, 61 N.Y.2d 181, 184–86 (1984) (rejecting extension of right to compel arbitration under an agreement to a non-party "[a]bsent clear language to the contrary"); *see also* Plaintiffs-Appellants' Br. at 30–31. Because the SRA's arbitration provision is limited expressly to "disputes between Player [Mr. Revis] and Contract Advisor [Mr. Schwartz]," it cannot shield Mr. Feinsod and Schwartz & Feinsod from judicial recourse under well-established New York law. *See* A-96 (SRA § 8).

Respondents' Br. at 15. As an initial matter, Paragraph 21 simply explains that when Mr. Schwartz, an attorney, was representing Mr. Revis in contract negotiations with NFL teams, he was subject to the ethical principles of an attorney in addition to the NFLPA regulations.[5] More to the point, Paragraph 21 describes how the attorney-client and contract advisor relationship *in negotiating playing contracts* with NFL teams is related to the SRA. But, in fact, the SRA did not "create" the attorney-client relationship between Mr. Revis and Mr. Schwartz with respect to matters other than Mr. Revis's NFL employment, and the subjects of this suit are unrelated to negotiating NFL playing contracts.

The Complaint clearly alleges throughout "an oral agreement that Attorney Schwartz would provide legal services related to marketing and endorsement agreements," which was "the only agreement between Mr. Revis and Attorney Schwartz besides the [SRA]." A-18 (Compl.) ¶ 23; *id.* at 24, 78. Moreover, as Defendants-Respondents acknowledge, Section 10 of the SRA clearly states that it

[5] To qualify as an NFL contract advisor under the NFLPA regulations, Mr. Schwartz had to have a law degree or some other qualifying graduate degree. *See* A-46 (NFLPA Regs. § 2(A)). And, under the law of New York and perhaps every other jurisdiction that has addressed the issue, when a person retains a lawyer to provide services, even services that could be performed by a non-lawyer, the lawyer is bound by the ethical and legal duties applicable to lawyers. *See, e.g.*, New York Rules of Prof'l Conduct, 22 N.Y.C.R.R. 1200.0, Rule 5.7 (defining New York lawyers' "responsibilities regarding nonlegal services" and providing that (1) the New York ethical rules apply where the nonlegal services either are not distinct from legal services already being provided, or are distinct but the client could reasonably believe a client-lawyer relationship exists; and (2) "it will be presumed that the person receiving nonlegal services believes the services to be the subject of a client-lawyer relationship unless the lawyer or law firm has advised the person receiving the services in writing" that they are not).

"cannot be amended, modified or changed orally" and therefore cannot encompass the oral agreement for legal services alleged in the Complaint. A-96 (SRA § 10); *see* Defendants-Respondents' Br. at 23. Thus, Defendants-Respondents' claim that the SRA "created" the alleged attorney-client relationship is misleading and false.[6]

Defendants-Respondents also make the facially incorrect claim that "the SRA, and only the SRA," "sets forth" the alleged *oral* 10% contingent fee agreement for legal services related to marketing and endorsement contracts. Defendants-Respondents' Br. at 15. Of course, the SRA explicitly identifies the 10% "marketing and endorsement" agreement as a "*separate* agreement[]" "relating to services *other than* the individual negotiating services described in" the SRA. A-96 (SRA § 3(A)) (emphases added). The notion that the SRA somehow "creates" an agreement that it explicitly identifies as "separate" is nonsensical.

Finally, the Defendants-Respondents attempt to obscure the nature of this dispute by making a convoluted claim that because the underlying Complaint included, in the alternative, a cause of action for fraud in the inducement should

[6] In a related diversion, the Defendants-Respondents claim that the SRA also creates the fiduciary duty that arose from the attorney-client relationship, citing only the correct factual allegation that Section 3 of the SRA contains an acknowledgment that Mr. Schwartz would be acting in a fiduciary capacity. Defendants-Respondents' Br. at 15. The SRA's fiduciary acknowledgement, however, has nothing to do with this case. The Complaint clearly alleges a breach of the fiduciary duty that Mr. Schwartz owed Mr. Revis "[b]y virtue of his position as Mr. Revis's [and Shavae's] attorney and legal representative." A-28–29 (Compl.) ¶¶ 52, 58. The SRA, by contrast, simply acknowledges that Mr. Schwartz would be "acting in a fiduciary capacity on behalf of [Mr. Revis] . . . *in individual contract negotiations with NFL Clubs*." A-96 (SRA § 3) (emphasis added).

Mr. Schwartz establish he never intended to act as Mr. Revis's attorney—the relief for which, if granted, would impact the SRA—this dispute somehow involves the SRA's interpretation or enforcement. Defendants-Respondents' Br. at 14–15. That is incorrect, and this Court previously has rejected such inverted reasoning—not, as Defendants-Respondents claim, due to leniency in the standard of review, but because such arguments are illogical. *See Shuffman v. Rudd Plastic Fabrics Corp.*, 64 A.D.2d 699, 699 (2d Dep't 1978). The Court in *Shuffman* dismissed out of hand the notion that an arbitration agreement "limited to any dispute concerning the amount of commissions owed" could be "extended to include a controversy" about the commission agreement itself "merely because the resolution of that dispute will affect the subsequent calculation of commissions." *Id.* In other words, the potential that a claim's resolution might impact a separate contract does not render the claim itself arbitrable under that separate contract.

II. The NFLPA Regulations Governing Contract Advisors Are Not Relevant to this Dispute.

The opening brief makes clear that the NFLPA Regulations do not shield Defendants-Respondents from judicial recourse for misconduct unrelated to their work as contract advisors. Nevertheless, Defendants-Respondents ask this Court to hold that the NFLPA Regulations exempt certified contract advisors from litigation so long as the controversy "regard[s] a fee agreement." Defendants-

Respondents' Br. at 21.[7] This Court should reject that request and decline to apply the NFLPA Regulations to a player-agent dispute unrelated to the negotiation and execution of NFL playing contracts with NFL teams.

A. The NFLPA's Authority Over Player-Contract Advisor Disputes is Limited to Disputes Involving Playing Contract Negotiations with NFL Teams.

Defendants-Respondents repeatedly misstate the scope of the NFLPA Regulations' arbitration agreement. First, they claim as a general matter "Section 5(A) of the NFLPA Regulations provides that all disputes between players and contract advisors (not just disputes arising under the SRA) are subject to arbitration." Defendants-Respondents' Br. at 17. That is wrong. Only one provision in Section 5(A) addresses disputes "between an NFL player and a Contract Advisor," and that provision is limited expressly to disputes involving "the conduct of individual negotiations by a Contract Advisor." A-56 (NFLPA Regs. § 5(A)(2)). That limitation, which mirrors exactly the scope of the SRA's arbitration provision, comports with the authority delegated by the NFLPA, as a

[7] As with the SRA, only Mr. Schwartz has standing to invoke the NFLPA Regulations as a defense. Neither Mr. Feinsod nor Schwartz & Feinsod entered into an SRA with Mr. Revis to represent him as a certified contract advisor such that the NFLPA Regulations could apply to them. *See* A-46 (NFLPA Regs. § 1(A)) (conditioning application of the NFLPA Regulations on signing an SRA "with *the* player" (emphasis added)). In addition, Schwartz & Feinsod is categorically ineligible from invoking the NFLPA Regulations, which are limited "only to individuals and not any firm, corporation, partnership, or other business entity." A-46 (NFLPA Regs. § 2(A)) (outlining eligibility requirements for contract advisor certification).

union party to the CBA, to certified contract advisors to represent NFL players in negotiations with the NFLPA's CBA counterparty, NFL member teams.

Ignoring this clear restriction on player-agent disputes, Defendants-Respondents point only to Section 5(A)(3), which provides for arbitration of disputes that "arise from . . . [t]he meaning, interpretation or enforcement of a fee agreement." A-56 (NFLPA Regs. § 5(A)(3)). That reliance is misplaced, and it reveals a fundamental misunderstanding of the NFLPA Regulations Governing Contract Advisors.

The NFLPA Regulations were promulgated "pursuant to the authority and duty conferred upon the NFLPA as the exclusive collective bargaining representative of NFL players" under federal labor law. A-44 (NFLPA Regs., Introduction). In other words, Section 5(A)(3)'s "fee agreement" provision, like all provisions in the NFLPA Regulations, stems from the NFLPA's creation and definition of the contract advisor as its delegate for negotiating playing contracts with NFL teams—a role that has nothing to do with this litigation.

In Defendants-Respondents' view, however, the NFLPA's limited authority under the federal labor laws is irrelevant.[8] That is patently incorrect. Indeed, that authority is where courts tasked with applying the NFLPA Regulations' arbitration

[8] *See* Defendants-Respondents' Br. at 19 (disparaging Plaintiffs-Appellants' explanation of the NFLPA-NFL relationship under the CBA as a "vain" and "lengthy exegesis" that does not bear on the terms of the SRA or the NFLPA Regulations).

agreement consistently, and appropriately, begin their analyses: "Under federal labor law, the NFLPA has exclusive authority to negotiate with NFL clubs on behalf of NFL players. Player agents are permitted to negotiate player contracts in the NFL only because the NFLPA has delegated a portion of its exclusive representational authority to them." *White v. Nat'l Football League*, 92 F.Supp.2d 918, 924 (D. Minn. 2000). Upon certification, a contract advisor "agree[s] to be bound by the regulations promulgated under the collective bargaining agreement," and his or her "license to act as [an] agent[] for NFL players comes by delegation from the NFLPA, which is a party to the collective bargaining agreement." *Black v. Nat'l Football League Players Ass'n*, 87 F.Supp.2d 1, 4 (D.D.C. 2000).

Thus, the NFLPA Regulations—and, by extension, the SRA—are inherently defined by the NFLPA's limited power, first to license contract advisors and then to delegate to them the authority to represent NFL players vis-à-vis NFL teams in a manner limited by the CBA. The NFLPA's licensing power is broad, and through it the NFLPA regulates agent conduct as part of its internal disciplinary process.[9] But unlike its broad incidental power to discipline certified agents for misconduct, and thereby prevent them from negotiating with NFL teams on behalf of NFL

[9] *See* A-51–54 (NFLPA Regs. § 3(B) (enumerating categories of prohibited behavior that will subject the agent to disciplinary proceedings); A-58–61 (NFLPA Regs. § 6) (defining internal disciplinary process).

players, the NFLPA's authority over the player-contract advisor relationship is circumscribed by the power it delegates to the contract advisor to act on the player's behalf in negotiations with NFL teams.[10] Thus, in the context of dispute resolution, the NFLPA's authority over a player-contract advisor controversy is limited to claims arising from the certified contract advisor's agreement to represent the player in contract negotiations with NFL teams. *See* A-96 (SRA § 8); A-56 (NFLPA Regs. § 5(A)(2)).

B. Section 5(A)(3) Does Not Apply to this Case.

Against this background, Defendants-Respondents' claim that Section 5(A)(3) applies to the present dispute must fail. The NFLPA's limited authority over the player-contract advisor relationship dictates that a player-contract advisor dispute is arbitrable under Section 5(A)(3) only where the dispute arises from the meaning, interpretation or enforcement of a fee agreement *related to the contract advisor's representation of the player in negotiations with NFL clubs*.

Were this Court to consider Section 5(A)(3) without context, as the Defendants-Respondents urge, the provision would be boundless and the results absurd. Section 5(A)(3) contains no reference to the parties to the dispute, the parties to or nature of the "fee agreement," or the general subject matter of the

[10] Indeed, that relationship, as reflected in and defined by the SRA, is the necessary predicate to the NFLPA exerting any control over the player's dealings with his contract advisor. A-46 (NFLPA Regs. § 1(A) (stating that the NFLPA Regulations do not apply unless the contract advisor has signed and filed a valid SRA).

controversy. Understood only on its plain terms, a contract advisor with a second job as an investment advisor, insurance broker, or real estate agent (or lawyer) could compel NFLPA arbitration under Section 5(A)(3) of a dispute brought against him by an NFL player for fraudulently overcharging on an agreed commission, even though such a dispute would have nothing to do with the NFL, the NFLPA, or the player-agent relationship. That would quite clearly be an unreasonable application of the NFLPA Regulations.[11]

Thus, because the present dispute arises from agreements that are wholly unrelated to Mr. Schwartz's work on behalf of Mr. Revis as his contract advisor in negotiations with NFL teams, the NFLPA's dispute resolution authority over its contract advisors does not apply.

III. The Trial Court Clearly Erred in Finding No Evidence of Mr. Revis's Attorney-Client Relationship with Mr. Schwartz.

Defendants-Respondents offer no response to the substantial record evidence submitted to the trial court demonstrating the attorney-client relationship between Mr. Revis and Mr. Schwartz. They simply repeat the trial court's facially preposterous conclusion that Mr. Revis and Shavae "provide[d] absolutely nothing to show how and when Schwartz acted as anything other than [Mr. Revis's agent]." Defendants-Respondents' Br. at 23. For the reasons set forth in the opening brief,

[11] Defendants-Respondents' also mistakenly assert that Section 5 of the NFLPA Regulations is a "classic broad arbitration clause." Defendants-Respondents' Br. at 20. It is plainly not, as it is limited to a list of specific dispute categories that further depend on the parties to the dispute.

the trial court clearly erred in its premature resolution of a question concerning the merits of this dispute. *See* Plaintiffs-Appellants' Br. at 44–50.

Rather than respond to the record evidence, Defendants-Respondents repeat their incorrect claim that Mr. Revis's attorney-client relationship with Mr. Schwartz "is governed by the SRA." Defendants-Respondents' Br. at 23. As explained in Section I.B., even a cursory review reveals that this argument rests on a distortion of the Complaint.

Defendants-Respondents also make the puzzling claim that if Mr. Schwartz had agreed orally with Mr. Revis to act as his attorney, such an agreement would constitute a violation of the SRA's prohibition of oral modification and its prohibition of acceptance conditional upon entering another agreement. Defendants-Respondents' Br. at 23. As an initial matter, the SRA's prohibition of oral modification refutes decisively Defendants-Respondents' earlier claim that the SRA somehow creates the alleged attorney-client relationship. It does not, and, because of Section 10, it could not. As for Section 3(B), there is no evidence or claim in this case that entry into the SRA was conditioned on acceptance of the attorney-client agreement, or vice versa, such that the bar on conditional acceptance could even be implicated. In any event, Defendants-Respondents fail

to mention that Section 3(B) applies only to protect the *NFL player*, not the contract advisor. *See* A-96 (SRA § 3(B)).[12]

IV. Defendants-Respondents' Alternative Request that the NFLPA Arbitrator Determine Arbitrability Should Be Rejected.

Defendants-Respondents request that this Court refer the matter to the NFLPA arbitrator to determine the arbitrability of the present dispute. They rely on Section 5(E) of the NFLPA Regulations, which references the Voluntary Labor Arbitration Rules of the American Arbitration Association ("AAA Rules"). A-104 (NFLPA Regs. § 5(E)).

There are several problems with Defendants-Respondents' request. First, as noted previously, neither Mr. Feinsod nor Schwartz & Feinsod entered into an SRA with Mr. Revis to represent him as a certified contract advisor such that the NFLPA Regulations could apply to them. *See* A-46 (NFLPA Regs. § 1(A)) (conditioning application of the NFLPA Regulations on signing an SRA "with *the* player" (emphasis added)). Second, even for Mr. Schwartz as a party to the SRA

[12] Defendants-Respondents also haphazardly posit under *Thies v. Bryan Cave LLP*, 35 A.D.3d 252 (1st Dep't 2006), that a hypothetical legal malpractice claim would be arbitrable under New York law. Defendants-Respondent's Br. at 23. In addition to not being relevant, that claim is incorrect. *Thies* involved an action against a law firm for "legal malpractice, breach of fiduciary duty, and breach of contract." *Thies v. Bryan Cave LLP*, 13 Misc.3d 1220(A), *2 (N.Y. Sup. Ct., N.Y. Cty. 2006). The arbitration agreement under scrutiny explicitly encompassed "any alleged claims *for legal malpractice, breach of fiduciary duty, [and] breach of contract*." Mem. of Law ISO Bryan Cave LLP's Mot. to Stay Pending Arbitration, *Thies v. Bryan Cave LLP*, 13 Misc.3d 1220(A) (N.Y. Sup. Ct., N.Y. Cty. 2006) (No. 601036/05) (emphasis added). Unsurprisingly, the plaintiffs in *Thies* did not raise any argument that the dispute at bar was beyond the scope of arbitration. *Thies*, 13 Misc. 3d 1220(A) at *2.

with Mr. Revis, the NFLPA Regulations do not "clearly and unmistakably provide" that an NFLPA arbitrator—and not, as is typical, the court—should determine arbitrability. *See AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986). The NFLPA Regulations incorporate the AAA Rules only for the limited purpose of governing the arbitral hearing. A-57 (NFLPA Regs. § 5(E)). By contrast, none of the preceding sections—those addressing arbitrable disputes, grievance filing, the answer, or selection of an arbitrator—incorporate the AAA Rules. *See* A-56–57 (NFLPA Regs. § 5(A)–(D)). It is therefore unclear whether the AAA Rules are intended to govern arbitrability, which the AAA Rules indicate is typically a preliminary matter. A-70 (AAA Rule 3(c)) ("A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim *no later than the filing of the answering statement* to the claim or counterclaim that gives rise to the objection." (emphasis added)). This suggests that the NFLPA Regulations contemplate that arbitrability will be decided by a court as a preliminary matter, after which any arbitration hearing would be governed by the AAA Rules. At the very least, the NFLPA Regulations do not "clearly and unmistakably provide" that the AAA Rules govern arbitrability.

Finally, the NFLPA arbitrator assigned to the present dispute recently declined jurisdiction over a related controversy brought against Defendants-Respondents by Zachary Hiller. Mr. Hiller, who worked for Schwartz & Feinsod

at all relevant times and is also a certified contract advisor, submitted an affidavit in the trial court in this case describing Defendants-Respondents' repeated "failure to pay [him] agreed-upon amounts for wages and expense reimbursement." A-203–04 (Affidavit of Zachary Hiller). Mr. Hiller stopped working for Defendants-Respondents and subsequently brought an action against them in the United States District Court for the Southern District of New York based on their failure to pay.

Mr. Hiller's legal claims, like Mr. Revis's and Shavae's here, were based in part on Mr. Hiller's oral fee agreement with Mr. Schwartz that Mr. Hiller would receive a percentage of the revenue received by Defendants-Respondents from a particular football player client that Mr. Hiller helped recruit. Complaint at 7, *Hiller v. Schwartz*, No. 16-CV-5447 (VB)(LS) (S.D.N.Y. July 7, 2016), ECF No. 1 (describing fee agreement). Mr. Hiller's claims also involved allegations of intentional misconduct by the Defendants-Respondents of the sort that would "directly bear upon [their] integrity, competence or ability to properly represent individual NFL players and the NFLPA in individual contract negotiations." *Id.* at 9–16 (alleging "intentional" and "willful" misconduct and seeking punitive damages).

Defendants-Respondents moved to compel arbitration under the same arbitration provisions of the NFLPA Regulations relied upon here. Mem. in Supp. Defs.' Mot. to Compel Arbitration at 5, *Hiller v. Schwartz*, No. 16-CV-5447

(VB)(LS) (S.D.N.Y. Sept. 19, 2016), ECF No. 11 (citing Sections 5(A)(3) and 5(A)(4)). Notably, they argued that Mr. Hiller's claims "very clearly" present "a dispute over the meaning of a fee agreement subject to arbitration under Section 5(A)(3)." *Id.* at 12 n.5. They also argued that the NFLPA arbitrator should determine the question of arbitrability. *Id.* at 10. The federal district court agreed, and the case was referred to NFLPA arbitrator Roger Kaplan. Opinion and Order, *Hiller v. Schwartz*, No. 16-CV-5447 (VB)(LS) (S.D.N.Y. May 23, 2017), ECF No. 28.

On October 5, 2017, roughly two weeks after Mr. Revis and Shavae submitted their opening brief in this appeal, Arbitrator Kaplan entered an Order stating: "After considering all of the evidence admitted into the record at hearing and the arguments made by the parties, I find that I do not have jurisdiction over Hiller's claims under [federal and New York labor law], against Schwartz, Feinsod, and [Schwartz & Feinsod]." Order of Arbitrator Declining Jurisdiction at 3, *Hiller v. Schwartz*, No. 16-CV-5447 (VB)(LS) (S.D.N.Y. Oct. 5, 2017), ECF No. 32-1. Arbitrator Kaplan therefore ordered "that Hiller's claims against Schwartz, Feinsod, and [Schwartz & Feinsod] be remanded to federal court to be litigated." *Id.*

Arbitrator Kaplan also was assigned to the present dispute, should the parties be made to proceed in NFLPA arbitration. Arbitrator Kaplan's refusal to exercise

jurisdiction over Mr. Hiller's claims—involving both a fee agreement and allegations of contract advisor misconduct within the scope of the NFLPA Regulations—is simply further confirmation that the NFLPA's arbitration process is designed to resolve disputes only under specific circumstances. For disputes between an NFL player and his contract advisor, those circumstances are limited to ones involving the contract advisor's representation of the player in negotiations with NFL teams.

CONCLUSION

The SRA and the NFPLA Regulations provide for arbitration of player-contract advisor disputes only where the dispute arises from NFL contract negotiations. This case is not about Mr. Schwartz's work as Mr. Revis's contract advisor. It is about Mr. Schwartz's misconduct as an attorney negotiating and drafting endorsement deals with third parties. Defendants-Respondents' efforts to twist the factual allegations to save the trial court's decision are unpersuasive and must fail. Mr. Revis and Shavae did not expressly and unequivocally agree to arbitrate this dispute, as required under New York law. This Court should reverse the trial court's Order compelling arbitration.

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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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