To Be Argued By:
Mark S. Levinstein
(Time Requested: 25 Minutes)

APL-2021-00010
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COURT OF APPEALS
STATE OF NEW YORK

DARRELLE REVIS AND SHAVAE, LLC,

Plaintiffs-Appellants,

-against-

NEIL SCHWARTZ; SCHWARTZ & FEINSOD, LLC; JONATHAN FEINSOD; AND JOHN DOE,

Defendants-Respondents.

BRIEF FOR PLAINTIFFS-APPELLANTS DARRELLE REVIS and SHAVAE, LLC

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**Motion for admission *pro hac vice* in the Court of Appeals to be filed.

CORPORATE DISCLOSURE STATEMENT

Pursuant to 22 NYCCR 500.1(f), Appellant Shavae, LLC states that Darrelle Revis is the sole member of the limited liability company and no parents, subsidiaries, or affiliates exist.

STATEMENT OF RELATED LITIGATION

Pursuant to 22 NYCCR 500.13(a), Appellants state that, as of the date of the completion of this brief, there is no related litigation pending before any court. As further described below, Respondents Mr. Schwartz and Mr. Feinsod have filed two grievances before the National Football League Players Association, seeking to arbitrate certain issues presented in this action. That NFLPA arbitration has been stayed in its entirety pending resolution of this appeal.

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INTRODUCTION

This Court has long recognized that "a litigant ought not to be forced into arbitration and, thus, denied the procedural and substantive rights otherwise available in a judicial forum, absent evidence of an express intention to be so bound." *Schubtex, Inc. v. Allen Snyder, Inc.*, 49 N.Y.2d 1, 5–6 (1979). Despite this well-established principle, the Second Department held below that, by entering into *one agreement* with his attorney that provided for arbitration of disputes over that agreement only, former NFL player Darrelle Revis is forced to arbitrate and forgo judicial redress for disputes regarding unrelated misconduct by that attorney in connection with *entirely separate agreements*. That decision was wrong and warrants this Court's correction.

As the dissenters below explained, the Second Department's decision turned on a "misreading of the contract documents." A-301 (opinion of Dillon, J.). The decision cannot be reconciled with established New York law holding that where parties enter two separate contracts and the first contains an arbitration clause but the second does not, a dispute over the second contract is not arbitrable simply by virtue of the other agreement. And the majority's ruling that the *first contract's* provision for the arbitrator to determine threshold questions of arbitrability means that such questions as to the *second*

contract must also be submitted to the arbitrator is contrary to the general rule that "[i]t is of course for the *court* in the first instance to determine whether parties have agreed to submit their disputes to arbitration." *Sisters of St. John the Baptist, Providence Rest Convent v. Phillips R. Geraghty Constructor, Inc.*, 67 N.Y.2d 997, 999 (1986) (emphasis added). Finally, allowing the decision to stand risks stripping NFL players of their right to a judicial forum in a wide range of disputes. This Court should reverse.

* * *

This is an action for fraud, breaches of contract and duty, and various common law violations brought by Appellants Darrelle Revis and Shavae, LLC against Respondents Neil Schwartz, Jonathan Feinsod, and Schwartz & Feinsod, LLC. Mr. Revis is a former professional football player and Shavae is his wholly owned limited liability company. Mr. Schwartz is a licensed attorney in the State of New York and a contract advisor certified by the National Football League Players Association ("NFLPA") to serve on behalf of players in negotiating their playing contracts with NFL teams. Mr. Feinsod is Mr. Schwartz's business partner, and Schwartz & Feinsod is the entity through which they 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 personal and business financial matters, including advice about family law, tax, real estate, finances, and contract law and negotiations. In exchange for these legal services, Mr. Schwartz received ten percent (10%) of payments made to Mr. Revis and Shavae under marketing and endorsement contracts negotiated by Mr. Schwartz.

During this time, Mr. Schwartz also served as Mr. Revis's NFLPA contract advisor, negotiating every few years Mr. Revis's contracts to play for NFL teams. The detailed terms of this limited role, including Mr. Schwartz's separate fee for these services, were set out in a Standard Representation Agreement ("SRA") that Mr. Revis and Mr. Schwartz entered as is required by the NFLPA Regulations Governing Contract Advisors ("NFLPA Regulations"). The SRA's dispute-resolution clause provides for NFLPA arbitration for disputes over "this Agreement," meaning the SRA.

After years of serving in these multiple roles on behalf of Mr. Revis and Shavae, Mr. Schwartz negotiated and handled the drafting and execution of an endorsement contract between a soft drink company and Mr. Revis and Shavae. Without Mr. Revis's knowledge or consent, Mr. Schwartz unilaterally

decided to include a term in that contract to quintuple his typical, agreed-upon legal fee of ten percent (10%) to fifty percent (50%). Upon discovering this, Mr. Revis promptly terminated his professional relationship with Mr. Schwartz. Subsequently, Mr. Revis discovered additional malfeasance by Mr. Schwartz, including improper billing and misappropriation of funds in connection with endorsement agreements unrelated to the SRA.

After Mr. Revis and Shavae brought this action in the Supreme Court of Westchester County based on Mr. Schwartz's misconduct, Respondents moved to compel arbitration, arguing that this dispute was covered by the arbitration clause in the SRA. The trial court granted that motion, and over the dissent of two Justices, the Second Department affirmed.

The Second Department's decision was incorrect. "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 v. G & G Quality Clothing, Inc.*, 134 A.D.3d 898, 898 (2d Dep't 2015). Mr. Revis entered only one contract containing an arbitration clause (the SRA), and the dispute at hand does not concern that contract. Nothing in the NFLPA Regulations expands that limited arbitration agreement to cover this dispute

about Mr. Schwartz's unrelated attorney misconduct or vests an NFLPA arbitrator with the authority to decide such a dispute. The Second Department's contrary ruling is irreconcilable with the "plain language" of the parties' agreement, A-303 (Dillon, J., dissenting), is inconsistent with the well-established requirement that courts make the initial determination whether parties have agreed to arbitrate a dispute, threatens to dangerously expand NFLPA arbitration, and should be reversed.

QUESTIONS PRESENTED

1. Whether the Second Department erred in holding that Mr. Revis's and Shavae's fraud, breach of contract, and other common law claims regarding Mr. Schwartz's conduct as an attorney in connection with marketing and endorsement agreements that are unrelated to the only agreement Mr. Revis signed that provides for NFLPA arbitration (the SRA) are nonetheless subject to NFLPA arbitration.

Yes, the Second Department erred.

2. Whether the Second Department erred in holding that Mr. Revis and Mr. Schwartz's agreement that disputes over the SRA would be governed by the NFLPA Regulations Governing Contract Advisors and the Rules of the American Arbitration Association means that the parties agreed to arbitrate

gateway questions of arbitrability regarding disputes, such as this one, over entirely unrelated agreements.

Yes, the Second Department erred.

STATEMENT OF JURISDICTION

Under CPLR 5601(a), this Court has jurisdiction to hear this appeal because two justices dissented from the order of the Appellate Division on a question of law in favor of Appellants.

The issues on appeal have been preserved for this Court's review. *See* A-211–35[1] (Pls.' Opp. to Arb. Mot.); C-6–7[2] (Appellants' 2nd Dep't Opening Br.); C-92–96 (Appellants' 2nd Dep't Reply Br.).

STATEMENT OF FACTS AND THE CASE

A. Background

1. Mr. Revis Hires Mr. Schwartz

After announcing that he would leave college to be eligible for the 2007 NFL draft, Mr. Revis sought to hire someone to represent him in contract negotiations with teams and in various other matters that might arise, including legal matters. Mr. Revis and his family interviewed several

[1] Citations to A-__ herein are citations to the full record produced on appeal.

[2] Citations to C-__ herein are citations to the compendium of the briefing in the Second Department produced on appeal.

candidates for the role. A-191 (Revis Aff. ¶¶ 4–5); A-195 (Askew Aff. ¶ 5). It was important to Mr. Revis that his representative be an attorney so that the person could both serve as his contract advisor in negotiating with NFL teams and also represent him in his other legal matters.[3] As a result, Mr. Revis and his family interviewed only licensed attorneys for the position. *See* A-191 (Revis Aff. ¶ 4); A-196 (Askew Aff. ¶ 6).

In his presentation to Mr. Revis to win the position, Mr. Schwartz discussed his legal training and experience and represented that he was a licensed attorney.[4] A-191 (Revis Aff. ¶ 6); A-196 (Askew Aff. ¶ 6). According to Mr. Schwartz's former employee, Zachary Hiller, who often accompanied Mr. Schwartz on recruiting visits with prospective NFL players, Mr. Schwartz would typically tout to potential clients his legal experience, skills, and credentials. A-204 (Hiller Aff. ¶ 3).

Based on Mr. Schwartz's presentation, Mr. Revis decided to hire Mr. Schwartz to represent him as his attorney, including as his contract

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[3] To qualify as a contract advisor under the NFLPA Regulations, an individual must have a post-graduate degree, such as a law degree. A-46 (NFLPA Regs. § 2(A)).

[4] 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. *See* A-128.

advisor—often referred to as an "agent"—in negotiations with NFL teams. A-191 (Revis Aff. ¶ 7).

2. Mr. Revis and Mr. Schwarz Execute the SRA

Under the Collective Bargaining Agreement ("CBA") between the NFL and its players' union, the NFLPA, no person may negotiate a contract on behalf of a player with an NFL team unless he or she is (1) certified by the NFLPA to serve as a "contract advisor," and (2) signs a Standard Representation Agreement with the player. A-141 (CBA art. 48 § 1); A-46 (NFLPA Regs. § 1(A)). 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 negotiating contracts with NFL teams. *See* A-54 (NFLPA Regs. § 4(A)).

On January 18, 2007, Mr. Revis and Mr. Schwartz signed an SRA in which they agreed that Mr. Schwartz would serve as Mr. Revis's contract advisor.[5] Section 3 of the SRA delineates the following specific and limited "Contract Services" covered by the SRA: "Player hereby retains Contract Advisor to represent, advise, counsel, and assist Player in the negotiation,

[5] Mr. Feinsod is not a party to the SRA and has never been authorized to serve as Mr. Revis's contract advisor. *See* A-96–98 (SRA & Addendum). Shavae and Schwartz & Feinsod are also not parties to the SRA. *See id.*

execution, and enforcement of his playing contract(s)." A-96 (SRA § 3). Section 3 further states that Mr. Schwartz agreed to be Mr. Revis's "exclusive representative for the purpose of negotiating player contracts for Player." A-96 (SRA § 3). In exchange, Mr. Revis agreed that, if he were drafted in the first round and Mr. Schwartz negotiated a team contract on his behalf, he would pay Mr. Schwartz two percent (2%) of the compensation he earned under that contract. A-97 (SRA § 4).

The SRA contains a dispute-resolution provision, Section 8, which provides: "Any 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). In turn, 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 NFLPA disciplinary action against contract advisors. A-56 (NFLPA Regs. § 5(A)(3)–

(6)). Relevant here, the only provision in Section 5 expressly governing disputes "between an NFL player and a Contract Advisor" is limited to disputes relating to contracts with NFL teams—specifically, 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 the contract advisor to identify the existence of any additional "agreements or contracts relating to services *other than the individual negotiating services*" covered by the SRA. A-96 (SRA § 3) (emphasis added). Section 3 is clear that the only reason it requires the player and the contract advisor to identify these other agreements for other services (such as providing investment advice, handling the player's money, or providing marketing services) is so that the parties can certify that those other agreements are entirely separate from the SRA and that the contract advisor's services negotiating the player's NFL contracts pursuant to the SRA were not "conditioned upon" the player agreeing to allow the contract advisor to provide the other services and vice versa. *See* A-96 (SRA § 3(B)).

When Mr. Revis and Mr. Schwartz executed the SRA, they indicated that they had one such separate agreement, which they described 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 by Mr. Schwartz in his role as Mr. Revis's attorney. Mr. Revis and Mr Schwartz certified, as required, that the agreement concerning those other services was entirely separate from the SRA and that that separate agreement and the SRA were not in any way conditioned on each other. *See* A-96 (SRA § 3(B)).

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

Mr. Revis was drafted in the first round of the 2007 NFL draft. From 2007 on, in addition to serving as Mr. Revis's contract advisor in negotiating player contracts with NFL teams pursuant to the SRA, Mr. Schwartz served as Mr. Revis's attorney, providing him with legal advice on a range of issues, including but not limited to family law, tax, real estate, finances, and contracts. *See* A-191 (Revis Aff. ¶¶ 7–8); A-196–97 (Askew Aff. ¶ 9); A-201 (Gargano Aff. ¶¶ 6–8). Mr. Schwartz also negotiated and drafted numerous other marketing and endorsement deals for Mr. Revis pursuant to their separate agreement. For instance, Mr. Schwartz acted as the attorney for Mr. Revis and Shavae,

Mr. Revis's wholly owned limited liability personal services company, on deals with Bose, Nike, and Electronic Arts, always billing Shavae and Mr. Revis for his ten percent (10%) contingent fee on amounts paid to Shavae or Mr. Revis pursuant to those deals. A-19 (Compl. ¶ 25).

In fall 2014, Mr. Hiller, who worked for Mr. Schwartz at the firm 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 the company Healthy Beverage. A-205 (Hiller Aff. ¶¶ 10–11). After an initial meeting with one of the owners of Healthy Beverage, Mr. Hiller turned over the role of negotiating and drafting the contract to Mr. Schwartz. A-206 (Hiller Aff. ¶ 12). Mr. Hiller did this because Mr. Schwartz, as Mr. Revis's lawyer, was responsible for formal contract negotiations. A-206 (Hiller Aff. ¶ 12). The parties to the contract that Mr. Schwartz ultimately negotiated and drafted—the Healthy Beverage Agreement ("HBA")—were Healthy Beverage, on one side, and Mr. Revis and Shavae, on the other. A-154 (HBA). Neither Mr. Schwartz nor Schwartz & Feinsod were parties to the HBA. A-154 (HBA).

In January 2015, as Mr. Revis, then on the New England Patriots, was preparing for the NFL playoffs, Mr. Schwarz presented him with the HBA,

which had already been signed by Healthy Beverage's CEO. A-21 (Compl. ¶ 32); A-192 (Revis Aff. ¶ 11). The HBA stated 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), but no such subsequent agreement was ever drafted or signed. Attached to the one-page contract was a five-page addendum titled "Schedule A," which listed numerous terms regarding the rights and obligations of the parties, including all of the provisions related to the compensation of Shavae. A-155–59. Mr. Schwartz asked Mr. Revis to sign the contract and specifically directed him to initial each page of Schedule A, which Mr. Revis did even though Healthy Beverage's CEO, who had already signed the contract, had not at the time initialed those pages herself. A-21 (Compl. ¶ 32); A-192 (Revis Aff. ¶ 11). Mr. Revis did not carefully read Schedule A before signing it, instead relying 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 on the HBA, Mr. Schwartz did not inform Mr. Revis that within Schedule A's five pages of densely worded legal provisions—specifically, in the final provision on the final page—Mr. Schwartz had unilaterally included a provision that quintupled his

longstanding ten percent (10%) contingent legal fee for identifying, negotiating, and memorializing marketing and endorsement contracts to fifty percent (50%) of the payments due to Shavae under the HBA. A-192 (Revis Aff. ¶ 11); *see* A-159 (HBA, Schedule A). Instead, Mr. Schwartz presented the HBA, including Schedule A, to Mr. Revis as a completed and good deal, and instructed him to approve it. *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 a provision in the HBA, Shavae had a right of last refusal to offer to buy the company at a five percent premium over the offer. A-154–59 (HBA, Schedule A); A-193 (Revis Aff. ¶ 12). While Mr. Revis declined on Shavae's behalf, around that time he realized that he did not have a copy of the HBA. A-193 (Revis Aff. ¶¶ 12–13). 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 his 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 Mr. Revis's request. A-193 (Revis Aff. ¶ 13). After reiterating his

request, Mr. Revis received only unreadably blurry photographs of the HBA sent to his cell phone via text message. A-193 (Revis Aff. ¶ 13).

After Mr. Revis finally was provided a legible copy of the HBA around April 2016, he and a colleague met with Mr. Schwartz and his partner, Mr. Feinsod. A-193 (Revis Aff. ¶ 14). Upon reviewing the contract's terms, Mr. Revis learned that Mr. Schwartz had included at the very end of Schedule A the provision requiring Healthy Beverage to send fifty percent (50%) of all amounts earned by Mr. Revis and Shavae to Schwartz & Feinsod. A-193 (Revis Aff. ¶ 14). Mr. Revis was shocked, as he had never agreed to this arrangement, which was five times the amount to which Mr. Schwartz was entitled under the terms of their fee agreement, and neither Mr. Schwartz nor Schwartz & Feinsod were parties to the HBA. A-193 (Revis Aff. ¶ 14).

Mr. Revis also learned that Mr. Schwartz had secretly hired a law firm to help Mr. Schwartz represent Mr. Revis and Shavae in negotiating and drafting the HBA and had Healthy Beverage pay the law firm and deduct those fees from the amounts owed to Shavae and Mr. Revis. A-194 (Revis Aff. ¶ 15). This arrangement clearly violated the HBA's provision that each party shall pay its own legal expenses. *See* A-154 (HBA § 3). Again, Mr. Revis was stunned by Mr. Schwartz's deception, as he had believed that Mr. Schwartz,

his longtime lawyer, was negotiating and drafting the HBA on behalf of himself and Shavae in exchange for his typical ten percent (10%) contingent fee, and that there was thus no reason for Mr. Schwartz to retain another attorney or for Shavae and Mr. Revis to be required to pay for not only Mr. Schwartz's services but other lawyers' as well. A-193–94 (Revis Aff. ¶¶ 14–15).

At that meeting, Mr. Revis terminated his professional relationship with Mr. Schwartz. A-194 (Revis Aff. ¶ 16). Because the SRA requires written notice to terminate a contract advisor's right to represent a player in negotiations with NFL teams, shortly after the meeting Mr. Revis sent a letter to Mr. Schwartz terminating the SRA and forwarded a copy to the NFLPA. A-107 (Letter).

4. Mr. Revis Discovers Mr. Schwartz's Additional Overbilling, Misappropriation of Funds, and Ethical Misconduct Related to His Role as Mr. Revis's Attorney

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 he was not entitled. A-26–27 (Compl. ¶ 47). For example, although Mr. Schwartz had no involvement in negotiating any agreements or performing other work related to royalty

payments received by Mr. Revis from the NFL for sales of Revis replica jerseys, Mr. Schwartz improperly billed and received payment of a ten percent (10%) fee on these royalty payments throughout his professional relationship with Mr. Revis. A-26–27 (Compl. ¶ 47).

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

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

In a clear 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 an arbitration of the proper distribution of amounts paid by Healthy Beverage under the HBA. Neither Shavae (an actual party to the HBA) nor Schwartz & Feinsod (the entity Mr. Schwartz chose to receive payment under the HBA) were identified as parties to the grievance. Mr. Revis moved to dismiss the grievance on the ground that the dispute—as it does not involve the SRA or pertain to Mr. Schwartz's

representation of Mr. Revis in contract negotiations with NFL teams—is not subject to NFLPA arbitral jurisdiction.[6] *See* A-161–76 (Revis Mot.).

6. Mr. Revis and Shavae File This Action

On November 15, 2016, Mr. Revis and Shavae brought this action for fraud, breaches of contract and various duties, and other common law violations against Mr. Schwartz, Mr. Feinsod, and Schwartz & Feinsod in the Supreme Court of Westchester County. In their Complaint, Mr. Revis and Shavae seek: (1) injunctive relief requiring Mr. Schwartz to turn over Mr. Revis's legal file, which he has refused to do in 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

[6] Counsel for Mr. Schwartz and Mr. Feinsod subsequently agreed in a letter to stay the arbitration in its entirety pending resolution of the appeal in the Appellate Division. The Appellate Division granted a stay and that stay is still in effect.

unilaterally increasing his contingent fee in 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); (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); and, in the alternative, (8) damages for fraudulent inducement should Mr. Schwartz establish that he never intended to act as Mr. Revis's attorney, A-36–38 (Compl. ¶¶ 101–109).

B. Proceedings Before the Supreme Court

Respondents moved 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 the NFLPA Regulations. A-110–22 (Defs.' Mot.). Mr. Revis and Shavae opposed the motion, reasoning that this dispute arises out of Mr. Schwartz's work as Mr. Revis's and Shavae's attorney in negotiating marketing and endorsement contracts, particularly the HBA, and does not involve Mr. Schwartz's role in

negotiating Mr. Revis's contracts with NFL teams. *See* A-207–35 (Revis Opp.). This dispute thus cannot be subject to NFLPA arbitration under either the SRA or the NFLPA Regulations, both of which limit arbitration in the player–contract advisor context to only disputes arising out of NFL contract negotiations and associated fee agreements. *See* A-223–26 (Revis Opp.).

In conjunction with their opposition, Mr. Revis and Shavae also submitted to the trial court multiple sworn affidavits from individuals with personal knowledge of, and detailing, Schwartz's work as Mr. Revis's attorney, both generally—including as to issues relating to family law, tax, real estate, finances, and contracts—and specifically in connection with the HBA. *See* A-190–206 (Revis Aff.; Askew Aff.; 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. Schwartz and himself. Shavae, Mr. Feinsod, and Schwartz & Feinsod are not parties to the SRA, meaning that Shavae cannot be compelled to arbitrate under the SRA and Mr. Feinsod and Schwartz & Feinsod cannot use the SRA to compel arbitration. *See, e.g.*, A-214–15 n.2, 224 n.4.

Nonetheless, the trial court entered an order compelling Mr. Revis and Shavae to submit to NFLPA arbitration regarding all of their claims and

staying judicial proceedings pending arbitration. A-4–9. The court concluded 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. And despite the multiple affidavits that Mr. Revis had submitted showing that he and Mr. Schwartz had an attorney–client relationship, the court found that "absolutely nothing" in the record showed that such a relationship existed. A-8–9.

C. Proceedings Before the Second Department

Mr. Revis and Shavae appealed the trial court's order. Over the dissent of two Justices, the Second Department affirmed. *See* A-285–300.

The majority below recognized that, in determining whether to direct a matter to arbitration, "courts" must first determine whether there is a reasonable relationship between the subject matter of the dispute and the arbitration agreement. A-290 (quoting *Matter of Nationwide Gen. Ins. Co. v. Invs. Ins. Co. of Am.*, 37 N.Y.2d 91, 96 (1975)). Nonetheless, the court concluded that, because Mr. Revis "invok[ed] the broad umbrella of the NFLPA [R]egulations" by entering into the SRA, he was required to submit this dispute to arbitration. A-294–95. Relying on the Rules of the American Arbitration Association ("AAA"), which the NFLPA Regulations had incorporated to govern disputes arising out of the SRA, the court found that

Mr. Revis had "clear[ly] and unmistakabl[y]" agreed that arbitrability of this dispute would be resolved by an arbitrator. A-296–97. As a result, the court refused to consider whether the "facts alleged in the complaint" bore the reasonable relationship to the SRA that is required to direct this matter to arbitration under the SRA's arbitration provision. A-297.

The majority then held that, based on the "allegations in the complaint," the same conclusion applied to non-parties to the SRA: Mr. Feinsod, Schwartz & Feinsod, and Shavae. A-298–300. The court thus concluded that Mr. Feinsod and Schwartz & Feinsod could compel arbitration under the SRA and Shavae could be compelled to arbitrate under the SRA. A-298–300.

Justice Dillon, joined by Justice Cohen, dissented. A-301–05. As they explained, the "central and dispositive" issue is that the "plain language" of the SRA's arbitration clause is expressly limited to disputes over "this Agreement," meaning "the SRA only." A-301, 303. As a result, the dissenters continued, it is a "misreading of the contract documents" to apply the AAA Rules to mandate that the parties arbitrate arbitrability as to this dispute about unrelated agreements, for the simple reason that the AAA Rules are "not reached." A-301, 303. Finding that the trial court also erred in ignoring the "multiple affidavits" that established that Mr. Schwartz and Mr. Revis had

an attorney–client relationship, the dissenters would have remanded to the trial court to consider that issue in the first instance. A-304.

Mr. Revis and Shavae timely appealed to this Court. A-283.

ARGUMENT

MR. REVIS'S AND SHAVAE'S CLAIMS FOR FRAUD, BREACH OF CONTRACT AND DUTY, AND OTHER COMMON LAW VIOLATIONS ARE NOT SUBJECT TO NFLPA ARBITRATION.

"Arbitration is a matter of contract, and a party cannot be forced to arbitrate a dispute that it did not expressly agree to submit to arbitration." *Matter of Steyn v. CRTV, LLC*, 175 A.D.3d 1, 10 (1st Dep't 2019). Where parties have agreed to submit only a limited set of disputes to arbitration, "[i]t is for the courts" to decide "whether the particular dispute comes within the scope of their agreement." *Matter of Cnty. of Rockland (Primiano Constr. Co.)*, 51 N.Y.2d 1, 5 (1980). In making that determination, courts generally "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). "[T]he rule is clear that unless the agreement to arbitrate expressly and unequivocally encompasses the subject matter of the particular dispute, a party cannot be compelled to forego the right to seek judicial relief and instead submit to arbitration." *Bowmer v. Bowmer*, 50 N.Y.2d 288, 293–

94 (1980). Thus, "if the court concludes that, while the parties may have made a valid agreement to arbitrate, the particular agreement that they made was of limited or restricted scope and the particular claim sought to be arbitrated is outside that scope, there will . . . be . . . a denial of the motion to compel arbitration." *Primiano Constr.*, 51 N.Y.2d at 7.

In mandating that Mr. Revis and Shavae arbitrate this matter, the Second Department violated both these principles and the "plain language" of the parties' agreements, A-303 (Dillon, J., dissenting). The only agreement that Mr. Revis signed containing an arbitration clause—the SRA—is not at issue in this dispute. *See infra* Part A. Nor is this dispute arbitrable under the NFLPA Regulations, as it is not about Mr. Schwartz's work on behalf of Mr. Revis in negotiating contracts with NFL teams. Rather, this dispute involves Mr. Schwartz's work as Mr. Revis's and Shavae's attorney in connection with separate marketing and endorsement contracts. There is simply no basis for directing this matter to arbitration, and the Second Department's contrary decision threatens to dangerously expand NFLPA arbitral jurisdiction to a limitless range of player–contract advisor disputes. *See infra* Part B. Finally, the court also erred in holding that Mr. Revis "clearly and unmistakably" agreed to arbitrate gateway questions of

arbitrability in regard to this matter, *see infra* Part C, and in extending that holding to non-parties to the SRA: Shavae, Mr. Feinsod, and Schwartz & Feinsod, *see infra* Part D.

The Second Department's decision should be reversed.

A. The SRA Is Not Relevant to This Dispute.

This dispute does not involve the SRA. Rather, it involves Mr. Schwartz's conduct as an attorney representing Mr. Revis and Shavae in connection with marketing and endorsement agreements that have nothing to do with the narrow subject matter of the SRA or the limited obligations created by that agreement. The SRA thus cannot serve as a basis to arbitrate this dispute, as its arbitration provision is limited to matters involving "this Agreement"—the SRA—only. A-96 (SRA § 8).

1. The SRA Has a Limited Subject Matter and Provides for Arbitration Only of Disputes Involving the SRA.

Scarcely more than one page long, the SRA is by design an uncomplicated agreement. It is a form contract mandated by the NFLPA that governs a straightforward exchange of services (by the contract advisor) in return for a percentage payment (from the player). The SRA is "entered into pursuant to and in accordance with" the NFLPA Regulations, A-96 (SRA § 1), which, as discussed *infra* Part B, are limited by federal labor law to governing

player–contract advisor relationships only with respect to contract negotiations between players (employees) and NFL clubs (their employers). Thus, and by its own express terms, the SRA applies *only* to a contract advisor's role in negotiating contracts between players and NFL clubs.

By entering into the SRA, Mr. Revis and Mr. Schwartz agreed that, to "assure effective representation of [Mr. Revis] *in individual contract negotiations with NFL Clubs*," Mr. Schwartz would act as Mr. Revis's "exclusive representative *for the purpose of negotiating player contracts*." A-96 (SRA § 3) (emphases added). The scope of Mr. Schwartz's representation of Mr. Revis is thus limited to "the negotiation[] and enforcement of [Mr. Revis's] playing contract(s) in the National Football League." A-96 (SRA § 3). In return for Mr. Schwartz negotiating "an NFL Player contract" on his behalf, Mr. Revis agreed to compensate him with two percent (2%) of any payments he earned under that contract should he be drafted in the first round (as he was). A-96 (SRA § 4). That simple, bargained-for exchange defines the SRA's purpose and scope and the parties' obligations thereunder.

The SRA's other provisions reflect this limited bargain. Section 3, for instance, provides that the SRA does not govern any "separate agreements" between the contract advisor and the player, such as an agreement relating to

marketing and endorsement deals. A-96 (SRA § 3). To ensure that the player's signing of the SRA is not "conditioned upon" his signing of any such separate agreements "relating to services *other than* the individual negotiating services" agreed upon in the SRA, Section 3 requires the parties to "[d]escribe the nature of the *other services* covered by the *separate agreements*." A-96 (SRA § 3) (emphases added). The SRA is clear that the only reason it requires identification of these separate agreements is for the parties to certify that those agreements were not conditioned upon the player's signing of the SRA and vice versa. A-96 (SRA § 3).

Likewise, Section 8, the SRA's dispute-resolution clause, provides for NFLPA arbitration only of 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*." A-96 (SRA § 8) (emphases added). In other words, Section 8's "plain language" limits arbitration to disputes regarding "the SRA only."[7] A-301 (Dillon, J.,

[7] As relevant here, then, the SRA's arbitration clause is not "broad." A-289 (decision below) (quoting A-8 (trial court decision)). By limiting its coverage to disputes over the SRA only, Section 8 excludes from its scope disputes, like this one, over other agreements. *See Matter of Massena Cent. Sch. Dist. (Massena Confederated Sch. Emps.' Ass'n, NYSUT, AFL-CIO)*, 82 A.D.3d 1312, 1315 n.2 (3d Dep't 2011) ("[E]ven when an arbitration clause is broadly

dissenting); *see Greenfield v. Philles Recs., Inc.*, 98 N.Y.2d 562, 569 (2002) (a contract "must be enforced according to the plain meaning of its terms"). As the dissenters below observed, Respondents' efforts throughout this litigation to "ignore[]" the SRA's clear terms are "curious and telling," as the contract's clear limitations on arbitration is "an issue that is central and dispositive to this appeal." A-303 (Dillon, J., dissenting).

In short, the SRA's subject matter is strictly limited to contract negotiations between players and NFL teams. The agreement has no application to other services for which a player might engage an NFLPA contract advisor. Accordingly, by the SRA's "plain language," the arbitration provisions of the NFLPA Regulations "are not incorporated for the resolution of disputes that arise outside of the SRA." A-301 (Dillon, J., dissenting).

2. This Dispute Does Not Involve the SRA and Instead Involves Entirely Separate Agreements.

The present dispute arises outside of the SRA. Mr. Revis and Shavae allege legal wrongdoing relating to Mr. Schwartz's improper conduct as Mr. Revis's and Shavae's attorney providing legal advice and negotiating and drafting separate marketing and endorsement contracts, particularly the

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worded, a matter may be excluded from its scope by language that clearly demonstrates such an intent.").

HBA. This dispute therefore does not implicate the "meaning, interpretation, application, or enforcement of [the SRA] or the obligations of the parties under [the SRA]." A-96 (SRA § 8). Specifically, this dispute and the duties at issue here lack a reasonable relationship to the SRA and the duties created therein. And the untenable consequence of the Second Department's holding—which deviates sharply from precedents of this Court and the Second Department—is that parties to agreements, no matter how limited, that contain arbitration provisions thereby waive their rights to judicial redress as to entirely unrelated disputes with their counterparties.

1. Initially, there is no "reasonable relationship between the subject matter of the dispute and the general subject matter of the [SRA]." *Matter of Bd. of Educ. of Watertown City Sch. Dist. (Watertown Educ. Ass'n)*, 93 N.Y.2d 132, 143 (1999). This dispute is therefore "not arbitrable." *Id.*

The claims here, which concern Mr. Schwartz's conduct as Mr. Revis's attorney and advisor with respect to marketing and endorsement contracts, lack a discernible relationship to the SRA's singular subject matter, which concerns Mr. Schwartz's representation of Mr. Revis in connection with NFL playing contracts. The HBA, for instance, confines the scope of its "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 the drafting of a product endorsement contract does not bear any relationship, much less a reasonable one, to the limited representation provided for under the SRA, which only concerns the negotiation of NFL team employment contracts.

The SRA's own terms reinforce this conclusion. The SRA specifically identifies Mr. Revis's general agreement with Mr. Schwartz regarding "marketing and endorsements" 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). Indeed, the Second Department here recognized that, by listing the marketing and endorsement agreement in the SRA, the parties expressly designated it as an "other agreement[]." A-291. "In other words, the reference to the M&E [marketing and endorsement contract] in [the SRA] was not to *include* it within the SRA, but to *distinguish* the M&E from the SRA, with each of the two contracts separate from the other." A-302 (Dillon, J., dissenting) (emphases in original). Under the terms of the SRA, then, the marketing and endorsement agreements at issue here—and particularly the HBA, which would not exist until nearly a decade after the parties executed the SRA—are distinct and

independent oral or written instruments unrelated to the limited services regarding the negotiation of employment contracts with NFL teams.

As the Second Department below recognized, this Court adheres closely to the principle that there must be a "reasonable relationship between the subject matter of the dispute and the general subject matter of the underlying" arbitration agreement before the parties to the dispute can be compelled to arbitrate under that agreement. A-290 (quoting *Matter of Nationwide Gen. Ins.*, 37 N.Y.2d at 96). Applying that principle, the Second Department has rejected arbitration on facts far closer than those here. *See Matter of Am. Centennial Ins. Co. v. Williams*, 233 A.D.2d 320 (2d Dep't 1996). In *American Centennial*, 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 policy's general subject matter regarding motorist claims, the court ordered a stay of arbitration because "there was no [arbitration] agreement with respect to underinsured motorist claims." *Id.*

Thus, the SRA's subject matter is not to be defined at a high level of abstraction, but rather by strict reference to the contract's terms. And those

terms extend only to Mr. Schwartz's representation of Mr. Revis in connection with "playing contract(s) in the National Football League." A-96 (SRA § 3).

2. Not only is there no relationship between the general subject matter of this dispute and that of the SRA, but there also is no relationship between the duties at issue in this dispute and those created by SRA. *See Primavera Labs., Inc. v. Avon Prods., Inc.*, 297 A.D.2d 505, 506 (1st Dep't 2002) (arbitration clause must be "read in context with the other requirements and obligations of the parties' agreements"). Consider the two agreements relevant here. First, under the HBA, Healthy Beverage agreed to pay Shavae to engage Mr. Revis as the spokesperson for Steaz and to participate in certain promotional activities. A-155 (HBA, Schedule A). Second, under Mr. Revis's agreement for Mr. Schwartz to serve as his attorney and to identify and negotiate marketing and endorsement agreements, Mr. Revis agreed to pay Mr. Schwartz ten percent (10%) of the payments he received under any such agreements.

By contrast, under the SRA, Mr. Schwartz agreed to represent Mr. Revis in negotiating playing contracts with NFL teams in exchange for a

percentage of any payments Mr. Revis received under those contracts.[8] That limited engagement bears no relationship to any of the duties at issue here.

Because the SRA is not relevant here, the Second Department erred in directing this matter to arbitration under its arbitration clause. Mr. Revis and Shavae do not assert any claim under the SRA or ask the court to interpret, apply, or enforce it. Instead, they allege that Mr. Schwartz and the other Respondents committed fraud, breaches of contract and various duties, and other common law violations related to separate marketing and endorsement agreements that do not contain arbitration provisions. Respondents have not argued, and could not reasonably argue, that those separate agreements incorporate the SRA or the NFLPA Regulations. And that the relief sought by Mr. Revis and Shavae may result in the return of fees paid to Mr. Schwartz

[8] Given this limited scope of engagement, the SRA did not create the attorney–client relationship between Mr. Schwartz and Mr. Revis. Though Respondents advanced this argument below, *see* C-76 (Respondents' 2d Dep't Br.), the Second Department rightly disregarded it. As the Complaint repeatedly alleges, the attorney–client relationship between Mr. Schwartz and Mr. Revis was created by the parties' "oral agreement" under which "Attorney Schwartz would provide legal services related to marketing and endorsement agreements." A-18 (Compl. ¶ 23); *see id.* (Compl. ¶ 24); A-32 (Compl. ¶ 78). By stating that the parties also agreed in the SRA that "Attorney Schwartz would represent Mr. Revis as his attorney and contract advisor," the Complaint simply explains that Mr. Schwartz was also acting as, and subject to the ethical rules of, an attorney in negotiating contracts with teams. *See infra* Part B.4.

under the SRA, *see* A-37–38 (Compl. ¶¶ 109, 110(C)), does not transform this into a dispute over the SRA. *See Shuffman v. Rudd Plastic Fabrics Corp.*, 64 A.D.2d 699, 699 (2d Dep't 1978) (arbitration clause "may not be extended" to dispute over separate agreement "merely because the resolution of that dispute will affect" the contract containing the arbitration clause); *UMG Recordings, Inc. v. Am. Home Assur. Co.*, 378 F. App'x 766, 767 (9th Cir. 2010) (per curiam) (that party "might not be obligated to perform" its duties under contract containing arbitration clause "does not transform [its] claims into disputes 'arising out of'" that contract).

In sum, far from "parsing" the claims at issue here, A-297 (decision below), Mr. Revis and Shavae submit that this case merely requires a straightforward application of the principle that "[a] party cannot be required to submit to arbitration matters that it has not agreed to arbitrate," *Credit Suisse First Bos. Corp. v. Cooke*, 284 A.D.2d 365, 366 (2d Dep't 2001).

3. Finally, if allowed to stand, the Second Department's decision compelling arbitration here will have profound effects. This Court has long recognized that, because "by agreeing to arbitrate a party waives in large part many of his normal rights under . . . procedural and substantive law," it is "unfair to infer such a significant waiver on the basis of anything less than a

clear indication of intent." *Matter of Marlene Indus. Corp. (Carnac Textiles)*, 45 N.Y.2d 327, 333–34 (1978). The Second Department's rule, however, amounts to a permanent waiver of judicial recourse for any disputes between parties simply because they entered into a single arbitration agreement for a narrow set of disputes. Such a result is extreme and unfair, which is why precedents from this Court and other New York courts forbid this reasoning.

Indeed, this Court has repeatedly rejected the proposition that parties to a contract containing an agreement to arbitrate disputes arising out of that contract can be forced to arbitrate a dispute over a distinct agreement or unrelated conduct. *See Bowmer*, 50 N.Y.2d at 292–96; *Matter of ITT Avis, Inc. v. Tuttle*, 27 N.Y.2d 571, 573 (1970). In *Bowmer*, a husband argued that his claim for a downward modification of his spousal and child support obligations was arbitrable under the separation agreement with his former wife. 50 N.Y.2d at 292. This Court rejected that argument, holding that the separation agreement's arbitration clause, though "broadly worded," "does not confer authority upon the arbitrator to pass on the husband's claim." *Id.* Declining to "reflexively attribute to the parties an intention to have every possible dispute go to arbitration," the Court refused to interpret the clause such that the arbitrator would be "completely unfettered by the terms of the contract in

resolving disputes." *Id.* at 294, 296. Likewise, in *ITT Avis*, this Court refused to order a dispute involving a stock option plan to be arbitrated under the arbitration provisions of a separate employment agreement, explaining that, even though the "employment contract makes mention of the stock option plan, there is absolutely no indication in the employment agreement that the parties ever contemplated arbitrating the disputes which might arise under the separate stock option agreement." 27 N.Y.2d at 573.

Likewise, before this case, the Second Department time and again had refused to force parties to arbitrate a dispute about one agreement merely because the parties agreed to arbitrate disputes about a separate agreement. *See, e.g.*, *Glauber*, 134 A.D.3d 898. While the majority below did not address its prior case law on this subject, even though Mr. Revis and Shavae brought it to the court's attention, this precedent is at the very least "[i]nstructive." A-302 (Dillon, J., dissenting); *see* C-32–35 (Appellants' 2d Dep't Opening Br.); C-99 (Appellants' 2d Dep't Reply Br.).

In *Glauber*, for instance, the court rejected the argument that a dispute about a severance agreement that "contain[ed] no arbitration clause" fell within the arbitration provisions of a separate shareholders' agreement, reasoning that those provisions did not amount to an "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." 134 A.D.3d at 898–99. *Glauber* followed a long line of Second Department precedent adhering to the same reasoning. *See Rahman v. Park*, 63 A.D.3d 812, 814 (2d Dep't 2009) (rejecting arbitration of dispute over a "side agreement" because the parties "did not agree to arbitrate issues arising under the side agreement as opposed to the operating agreement"); *Credit Suisse*, 284 A.D.2d at 366 (rejecting arbitration of dispute over a note and mortgage that existed "separate and apart from [a] subsequent agreement" containing an arbitration clause because "[t]he plaintiff never agreed to arbitrate any dispute regarding the note and mortgage"); *Salmanson v. Tucker Anthony Inc.*, 216 A.D.2d 283, 284 (2d Dep't 1995) (rejecting arbitration of dispute over an agreement that was "separate" and "distinct" from the contract containing an arbitration clause); *Matter of Binkow (Brickman)*, 1 A.D.2d 906, 906 (2d Dep't 1956) (rejecting arbitration of dispute over an agreement "unconnected with" the contract containing an arbitration clause).

Other New York appellate courts have reached the same conclusion. *See, e.g.*, *Lorentti-Herrera v. All. for Health, Inc.*, 173 A.D.3d 596, 596 (1st Dep't 2019) (rejecting arbitration under CBA of dispute "for breach of

contracts outside of the CBA"). Indeed, courts have rejected arbitration even where, unlike here, the separate agreement is expressly designated an "integral part" of the contract containing an arbitration clause. *Rosen v. Mega Bloks Inc.*, No. 06-cv-3474, 2007 WL 1958968, at *5–6 (S.D.N.Y. July 6, 2007).

* * *

The only agreements at issue here do not provide for arbitration, and the only agreement signed by Mr. Revis containing an arbitration clause (the SRA) is not at issue here. That Mr. Revis happened to enter into the SRA "does not operate to convert a nonarbitrable claim into an arbitrable one." *Gerling Glob. Reinsurance Corp. v. Home Ins. Co.*, 302 A.D.2d 118, 125–26 (1st Dep't 2002). It would be inconsistent with the terms of the parties' contract and established precedent, not to mention profoundly unfair, to mandate arbitration of this dispute.

B. The NFLPA Regulations Governing Contract Advisors Are Not Relevant to This Dispute.

The NFLPA Regulations are also not relevant to this dispute. Indeed, the conclusion that the SRA is not relevant here means that, *a fortiori*, the NFLPA Regulations are not either, as the SRA incorporated the NFLPA Regulations' arbitration provisions for the limited purpose of resolving disputes over the SRA only. The marketing and endorsement agreements at

issue here "do[] not reach the NFLPA Regulations." A-303 (Dillon, J., dissenting).

But the same result is dictated by the limitations on the NFLPA's authority under federal labor law and the terms of the NFLPA Regulations themselves. Under the CBA between the NFLPA and NFL teams, the NFLPA is authorized to negotiate only a limited set of provisions in NFL team contracts on behalf of players, and it is that authority that the NFLPA has delegated contract advisors. The NFLPA's jurisdiction over disputes between a player and a contract advisor is accordingly limited to disputes regarding contract negotiations with NFL teams and associated fee agreements. The arbitration provisions in the NFLPA Regulations on which the Second Department and Respondents relied below do not expand this limited jurisdiction or apply to this dispute, which involves Mr. Schwartz's conduct as an attorney in negotiating and drafting marketing and endorsement agreements that are entirely unrelated to NFL team employment contracts. The Second Department's contrary decision was error and threatens to dangerously expand NFLPA arbitration to a potentially limitless range of disputes between players and contract advisors.

1. The NFLPA's Jurisdiction Over Player–Contract Advisor Disputes Is Limited to Disputes Over Contract Negotiations and Contracts with NFL Clubs.

The NFLPA's authority to regulate contract advisors derives entirely from contract advisors' particular role in negotiating employment contracts between players and clubs. The NFLPA's jurisdiction over disputes between players and contract advisors is accordingly limited to disputes over contract negotiations and contracts between players and clubs.

"Under federal labor law, the NFLPA has exclusive authority to negotiate with NFL clubs on behalf of NFL players." *White v. Nat'l Football League*, 92 F. Supp. 2d 918, 924 (D. Minn. 2000); A-44–45 (NFLPA Regs., Introduction). Pursuant to this authority, the NFLPA could, on NFL players' behalf, negotiate every term related to wages, hours, and working conditions under players' contracts with NFL teams. And the NFLPA in fact does negotiate almost all such terms, which are set out in the standard form NFL Player Contract that, under the NFL's CBA, all NFL players must sign. *See* A-143–51 (CBA, App. A).

The NFLPA and NFL teams, however, have agreed that a limited set of terms in the NFL Player Contract may, in specific circumstances, be subject to individual negotiations between NFL players and teams. *See* A-134

(CBA art. 4 §§ 3–4). No NFL team or player is allowed to agree to any provision in a player contract that is inconsistent with the terms of the CBA. *See* A-134 (CBA art. 4 §§ 3–4); A-136 (CBA art. 4 § 5(f)).

In providing for these limited individual player negotiations, the NFLPA could have elected to have its own lawyers negotiate the contract terms on behalf of each NFL player. The NFLPA did not do that. Instead, the NFLPA, together with the NFL teams, agreed that the NFLPA would certify "contract advisors" to handle those individual negotiations on behalf of the NFLPA and the players. *See White*, 92 F. Supp. 2d at 924 ("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."). 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" or "contract advisors." A-44–45 (NFLPA Regs., Introduction); A-141 (CBA art. 48 § 1).

Due to the NFLPA's limited delegation of its negotiating authority to contract advisors, the NFLPA is authorized by the NFL's CBA to regulate contract advisors' conduct vis-à-vis their role in representing players in contract negotiations with teams. *See* A-141 (CBA art. 48 § 1). The NFLPA,

in turn, has promulgated the NFLPA Regulations, which provide: "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." A-44 (NFLPA Regs., Introduction). Upon certification by the NFLPA, a contract advisor "agree[s] to be bound by the[se] regulations." *Black v. Nat'l Football League Players Ass'n*, 87 F. Supp. 2d 1, 4 (D.D.C. 2000). The NFLPA Regulations limit the amounts that contract advisors are allowed to charge NFL players for services related to negotiating contracts with NFL teams. *See* A-44–45 (NFLPA Regs. § 4). The NFLPA Regulations also require players and contract advisors to enter into an SRA, which must be approved by the NFLPA. A-54 (NFLPA Regs. § 4(A)). Indeed, the player–contract advisor relationship with respect to the negotiation of player contracts with teams, 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. *See* A-46 (NFLPA Regs. § 1(A)).

In other words, the NFLPA Regulations are inherently defined by the NFLPA's limited power, first, to certify contract advisors and, second, to delegate to them the authority to represent NFL players vis-à-vis negotiations with NFL teams. Accordingly, while the NFLPA has broad authority to

regulate agent conduct as part of its internal disciplinary process, *see* A-51–54 (NFLPA Regs. § 3(B)) (enumerating categories of prohibited behavior that will subject the agent to disciplinary proceedings), 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.

This is the context through which the NFLPA Regulations' arbitration provisions must be interpreted. The NFLPA Regulations provide for arbitration of three general types of disputes: (1) disciplinary proceedings initiated by the NFLPA against contract advisors; (2) grievances by one contract advisor against another contract advisor related to player agreements with NFL teams; 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 depending on the nature of the dispute and the identity of the parties 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)). Likewise subject to arbitration are disputes between contract advisors involving claims that one interfered with another's agreement with an NFLPA player or concerning

their individual entitlement to fees owed by a jointly represented player. A-56 (NFLPA Regs. § 5(A)(5)–(6)).

But as to the only category of arbitrable disputes relevant here—grievances by players against contract advisors—the NFLPA's authority is limited to disputes either over the "conduct of individual negotiations by a Contract Advisor" with respect to contract negotiations between players and NFL teams or over a "fee agreement" related to those contract negotiations. A-56 (NFLPA Regs. § 5(A)(2)–(3)). Thus, as relevant here, Section 5(A)'s arbitration provision is not "broad[]," A-292 (decision below), but rather is narrow, *see Silverstein Props., Inc. v. Paine, Webber, Jackson & Curtis, Inc.*, 65 N.Y.2d 785, 787 (1985) (arbitration clause is "narrow" where it "limit[s] the arbitrator's powers to a particular dispute"). And Section 5(A)'s limitation is consistent with the SRA, which provides for arbitration only of disputes involving "this Agreement [the SRA]." A-96 (SRA § 8); *see* A-96 (SRA § 1) (SRA is intended to be read "in accordance with the" NFLPA Regulations).

Put differently, the NFLPA lacks jurisdiction under federal labor law over disputes regarding any agreement between the player and the contract advisor (or anyone else) for other services. For instance, 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.

2. Section 5(A)(3) of the NFLPA Regulations Does Not Apply to This Dispute.

Ignoring those limitations on NFLPA jurisdiction, Respondents argued below that Section 5(A)(3), which applies to disputes over a "fee agreement" related to a contract advisor's representation of a player in negotiations with an NFL club (such as the SRA), applies here even though this case does not involve such an agreement. *See* C-79–82 (Respondents' 2nd Dep't Br.). The Second Department notably, and correctly, ignored Respondents' invitation to direct this matter to arbitration under Section 5(A)(3).

Section 5(A)(3) provides for arbitration of disputes involving the "meaning, interpretation or enforcement of a fee agreement." A-56 (NFLPA Regs. § 5(A)(3)). Like any contractual term, Section 5(A)(3) "must" be "[r]ead[] . . . in the context of the entire contract." *Thomas Crimmins Contracting Co. v. City of New York*, 74 N.Y.2d 166, 172 (1989). And in context, Section 5(A)(3) plainly applies only to disputes, unlike this one, involving a "fee agreement" related to the contract advisor's representation of the player in negotiations with NFL clubs.

The NFLPA's authority to decide disputes under Section 5(A)(3) stems from the NFLPA's authorization of a contract advisor to serve as the NFLPA's delegate to negotiate limited provisions in NFL team employment contracts for NFL players. Under the NFLPA Regulations, the NFLPA is authorized to regulate contract advisors "with respect to" their role in "negotiations *with the member Clubs*." A-44 (NFLPA Regs., Introduction) (emphasis added). That role has nothing to do with this litigation and therefore neither does Section 5(A)(3).

Interpreting Section 5(A)(3) divorced from this context would create absurd results and boundless NFLPA arbitral jurisdiction. Section 5(A)(3)'s mere nine words contain no reference to the parties to the dispute, the nature of the relevant "fee agreement," or the general subject matter of the controversy. *Any* contract that a player has with an agent, for whatever purpose, can be characterized as a "fee agreement." Thus, reading the clause to apply to a dispute, like this one, about a fee agreement entirely unrelated to an NFL team contract would mean that a contract advisor who also served as a player's investment advisor, insurance broker, real estate agent, or lawyer could compel NFLPA arbitration under Section 5(A)(3) of a dispute brought against him by the 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 be an unreasonable application of the NFLPA Regulations and inconsistent with the NFLPA's limited jurisdiction.

3. Section 5(A)(4) of the NFLPA Regulations Does Not Apply to Player–Contract Advisor Disputes.

While the Second Department correctly declined to find that this dispute is covered by Section 5(A)(3), the court nonetheless determined that Section 5(A)(4) requires arbitration of this dispute. *See* A-291–97. This was error. Section 5(A)(4) applies to disputes regarding "[a]ny other activities of a Contract Advisor within the scope of these Regulations." A-56 (NFLPA Regs. § 5(A)(4)). Basic principles of contract interpretation and reason establish that Section 5(A)(4) applies only to disciplinary proceedings against contract advisors and does not apply to any disputes between a player and a contract advisor.

Let's start with the language of the contract. Initially, and as discussed *supra* Part A, *the SRA is the only agreement Mr. Revis signed containing an arbitration provision*, and that provision is limited to disputes over the SRA only. For other disputes, like this one, "the NFLPA Regulations are not

incorporated." A-301 (Dillon, J., dissenting). As a result, it is unnecessary to even "reach the NFLPA Regulations." A-303 (Dillon, J., dissenting).

Regardless, and as discussed *supra* Part B.1–2, Sections 5(A)(2) and 5(A)(3) are the only provisions in the NFLPA Regulations that apply to disputes between an NFL player and a contract advisor, and they provide for arbitration only of the limited category of disputes involving contract negotiations with NFL teams and associated fee agreements. A-56 (NFLPA Regs. § 5(A)(2)–(3)). As a matter of contract law, these specific provisions control over Section 5(A)(4)'s general, catchall language. *See Muzak Corp. v. Hotel Taft Corp.*, 1 N.Y.2d 42, 46 (1956) (where there is an "inconsistency between a specific provision and a general provision of a contract . . . , the specific provision controls"). Thus, Sections 5(A)(2) and 5(A)(3)—not Section 5(A)(4)—define the scope of arbitrable player–contract advisor disputes. *See Morton v. Steinberg*, No. G037793, 2007 WL 3076934, at *6 n.1 (Cal. Ct. App. Oct. 22, 2007) (unpublished; available at A-183–89) ("[R]egulations stating that arbitration is required for one specific type of dispute between a player and contract advisor . . . tend to show other disputes between a player and agent are not.").

That Section 5(A)(4) is, in the words of the Second Department, a broad provision covering a "wide variety of disputes" only confirms this point. A-292 (decision below). Again, the provision applies to disputes over "[a]ny other activities of a Contract Advisor within the scope of these Regulations." A-56 (NFLPA Regs. § 5(A)(4)). Plainly, any contract advisor "activities" related to contract negotiations with NFL clubs (covered by Section 5(A)(2)) or an associated fee agreement (covered by Section 5(A)(3)) are "within the scope of" the NFLPA Regulations. Thus, reading Section 5(A)(4) to require arbitration of all player–contract advisor disputes involving contract advisor activities "within the scope of these Regulations" would render meaningless Sections 5(A)(2)'s and 5(A)(3)'s specific provisions for such disputes. That result would violate the principle that contracts should be interpreted in a manner that "gives effect to all the[ir] terms." *U.S. Bank Nat'l Ass'n v. GreenPoint Mortg. Funding, Inc.*, 157 A.D.3d 93, 100 (1st Dep't 2017).

Section 5(A)(4)'s breadth also shows why applying the provision to a player–contract advisor dispute would unreasonably expand NFLPA arbitral jurisdiction and create perverse incentives and 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. Those activities, as the Second Department recognized, "go far beyond the negotiation of a player's individual contract with the NFL club." A-292–93 (citing A-49–50 (NFLPA Regs. § 3(A)(6), (9)). Indeed, the "Activities Covered" under the NFLPA Regulations include "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)).

The range of conduct that potentially may bear on a contract advisor's integrity, competence, or ability to represent NFL players is exceptionally broad. Indeed, it is hard to imagine any contract advisor conduct that could serve as the basis for a legal dispute that would not so qualify. Below, Respondents contended that, under Section 5(A)(4), "*all* disputes between players and contract advisors . . . are subject to arbitration." C-78 (Respondents' 2d Dep't Br.) (emphasis added). That is a remarkable statement—but it is effectively the result of the Second Department's decision ordering arbitration of this dispute. Affirming that decision would all but completely debar NFL players from judicial redress of claims against their contract advisors. While it is difficult to predict the full of extent of the risks that would accompany such impunity, it suffices to note, as merely one

example, that a contract advisor who provides investment advice in violation of the Investment Advisor Act, absconds with a player's funds held in trust, or commits civil fraud or theft against his or her player entirely unrelated to contract negotiations with teams would escape judicial recourse. It defies reason to believe that the drafters of the NFLPA Regulations—let alone Mr. Revis when he signed the SRA—intended such an outcome.

Under Section 5(A)(4), NFLPA contract advisors are subject to arbitration in disciplinary actions for any activities bearing on their integrity, competence, or ability. But nothing in Section 5(A)(4) compels an NFL player—let alone the company he owns—to arbitrate claims of attorney misconduct about agreements entirely unrelated to the player's engagement of the contract advisor as his representative in negotiating with NFL clubs.

4. This Dispute Arises from Mr. Schwartz's Work as an Attorney That Falls Outside the NFLPA Regulations.

An additional reason that this matter does not fall within the ambit of the NFLPA Regulations is because it arises from Mr. Schwartz's misconduct as an attorney providing legal representation and counsel to Mr. Revis and Shavae in connection with the negotiation and drafting of marketing and endorsement agreements. Mr. Schwartz's attorney role is significant, as the NFLPA Regulations do not apply to disputes with "private attorneys for a

player on matters unrelated to an NFL contract, such as an endorsement deal." A-305 (Dillon, J., dissenting). The trial court, however, incorrectly held that "absolutely nothing" showed that Mr. Schwartz was acting as an attorney, ignoring the substantial record evidence showing that Mr. Schwartz and Mr. Revis had an attorney–client relationship. A-8–9. And the Second Department, in directing this matter to arbitration under the NFLPA Regulations, declined to disturb that ruling.[9] A-288, 292–97. This was error and provides a further basis to reverse and remand so that the trial court can properly consider this issue.

Before the trial court, Mr. Revis and Shavae presented substantial evidence from a "variety of . . . sources" that Mr. Schwartz and Mr. Revis had an attorney–client relationship. A-304 (Dillon, J., dissenting). This evidence included "not only . . . Revis's own affidavit submitted to the Supreme Court, but also . . . affidavits from his business manager Diana Gilbert Askew, his tax advisor Martin Gargano, and Schwartz's former employee Zachary Hiller." A-302 (Dillon, J., dissenting). Those documents describe Mr. Schwartz's

[9] Though the dissent below indicated that Respondents may have waived the issue whether the NFLPA Regulations independently apply to disputes over marketing and endorsement agreements, A-303–04 (Dillon, J., dissenting), the majority determined that the issue was properly before that court, A-288 n.1. Mr. Revis and Shavae do not ask this Court to revisit that determination.

agreement to act as Mr. Revis's attorney at the start of their professional relationship in 2007, and Mr. Schwartz's provision of legal services to Mr. Revis from 2007 to 2016, including but not limited to advice about issues relating to family law, tax, real estate, finances, and contracts, including the HBA. *See* A-191 (Revis Aff. ¶¶ 7–8); A-196–97 (Askew Aff. ¶ 9); A-201 (Gargano Aff. ¶¶ 6–8). Indeed, the final HBA that Mr. Schwartz drafted and negotiated contained several complicated provisions—such as "Insurance and Indemnification" and "Change of Control and Right of Last Refusal"—that non-lawyers routinely, and reasonably, rely on their lawyers to draft and negotiate. *See* A-256–61 (HBA). Further, the sworn statement of Mr. Hiller—who had "direct knowledge of Schwartz's attorney role in connection with the M&E [marketing and endorsement] deal with Healthy Beverage," A-302 (Dillon, J., dissenting)—described Mr. Schwartz's general practice of providing legal services to his clients, A-204 (Hiller Aff. ¶¶ 3–4). And Mr. Revis and Shavae presented additional evidence that Mr. Schwartz publicly advertised 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 supra* n.4.

Overlooking that evidence, the trial court concluded that no attorney–client relationship existed and that Mr. Revis "provide[d] absolutely nothing

to show how and when Schwartz acted as anything other than his agent." A-9. For reasons just discussed, that is plainly incorrect: "[I]n actuality, there were multiple affidavits from persons with knowledge" showing that Mr. Schwartz and Mr. Revis enjoyed an attorney–client relationship. A-304 (Dillon, J., dissenting). But the trial court also rested its conclusion on the fact that Mr. Revis's "letter terminating the relationship between Schwartz and Revis . . . makes no mention of an attorney/client relationship." A-9. That reasoning was legal error.[10] New York law does not attribute dispositive legal significance to how parties refer to the attorney–client relationship. Indeed, "courts . . . have consistently rejected the argument that indicia of a formal relationship are necessary." *First Hawaiian Bank v. Russell & Volkening, Inc.*, 861 F. Supp. 233, 238 (S.D.N.Y. 1994). 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), including whether the client had a reasonable belief that the attorney was representing him as legal counsel, *First Hawaiian Bank*, 861 F. Supp. at 238. The record evidence, including

[10] For one thing—and needless to say—no letter was necessary for Mr. Revis to terminate his attorney–client relationship with Mr. Schwartz. The letter was sent for the limited purpose of satisfying the SRA's requirement that Mr. Revis provide Mr. Schwartz with written notice before terminating him as his contract advisor. *See* A-96 (SRA § 12).

sworn statements by non-parties, establishes that the general character of the nearly decade-long relationship between Mr. Schwartz and Mr. Revis was that of attorney and client, and that Mr. Revis reasonably so believed. *See, e.g.*, A-191 (Revis Aff. ¶¶ 7–8); A-198–99 (Askew Aff. ¶ 16); A-201 (Gargano Aff. ¶ 8).

Further, drafting, negotiating, and providing advice about the terms of an endorsement agreement—as Mr. Schwartz did with the HBA and other agreements, including with Bose, Nike, and Electronic Arts, *see* A-19 (Compl. ¶ 25)—is the provision of legal services, regardless whether Mr. Schwartz was referred to as an agent, a lawyer, 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."); *Casita, L.P. v. MapleWood Equity Partners (Offshore) Ltd.*, 34 A.D.3d 251, 252 (1st Dep't 2006) ("drafting and negotiating" a contract is "legal work"); *Matter of Horak*, 224 A.D.2d 47, 52 (2d Dep't 1996) (overturning finding that no attorney–client relationship existed and rejecting attorney's argument that "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 Matter of Duncan & Hill Realty, Inc. v. Dep't of State*, 62 A.D.2d 690, 701 (4th

Dep't 1978) (real estate broker "must refrain from inserting" into an agreement "any provision which requires the exercise of legal expertise" to "protect himself from a charge of the unlawful practice of law").

The same reasoning applies even to the extent that Mr. Schwartz provided services that could have been performed by a non-lawyer. Mr. Schwartz is, and holds himself out to be, a licensed member of the bar of the State of New York, and substantial evidence shows that Mr. Revis reasonably believed that Mr. Schwartz was his lawyer. Under the law of New York and perhaps every jurisdiction to address this issue, when a lawyer is retained to provide legal services, he is bound by the ethical and legal duties applicable to lawyers even if certain of the services could be performed by a non-lawyer. *See* N.Y. Rules of Prof'l Conduct, 22 NYCRR 1200.0, Rule 5.7 (defining lawyers' "[r]esponsibilities regarding nonlegal services");[11] *Eric M. Berman, P.C. v. City of New York*, 25 N.Y.3d 684, 692 (2015) (Rule 5.7

[11] Rule 5.7 provides that the Rules of Professional Conduct apply where the nonlegal services either are not distinct from legal services being provided or are distinct from such services but the client could "reasonably believe that the nonlegal services are the subject of the client–lawyer relationship," and further provides that "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" to the contrary. 22 NYCRR 1200.0, Rule 5.7.

represents the "exercise[]" of "authority over nonlegal services provided by attorneys"); *see also, e.g.*, *William H. Raley Co. v. Superior Court*, 149 Cal. App. 3d 1042, 1046 (1983) ("Professional responsibilities do not turn on whether a member of the State Bar acts as a lawyer.").

Ultimately, though, the fatal flaw in the trial court's conclusion is its prematurity. Before the court were genuine questions of material fact concerning whether this dispute arises from rights and duties created by an attorney–client relationship. This Court should reverse and remand so the trial court can consider these questions of fact under the proper standard.

* * *

In sum, the NFLPA Regulations provide no basis for mandating arbitration of this dispute. The Second Department's contrary decision should be reversed.

C. The Second Department Erred in Concluding That the Parties "Clearly and Unmistakably" Agreed to Arbitrate Arbitrability.

The foregoing discussion shows, first, that this dispute does not involve any agreement that contains an arbitration clause and, second, that the only agreement between any of the parties that does contain an arbitration clause (the SRA) is not relevant to this dispute. The Second Department thus erred

in holding that, by providing that disputes over the SRA would be governed by the NFLPA Regulations and the AAA Rules, the parties "clearly and unmistakably" agreed that an arbitrator would determine gateway issues of arbitrability as to this dispute over unrelated agreements.

As an initial matter, establishing that parties agreed to arbitrate arbitrability requires a *heightened* showing. While courts typically resolve questions about whether a particular merits dispute falls within an arbitration clause in favor of arbitration, this "presumption" is "reverse[d]" where there is "ambiguity about the question '*who* . . . should decide arbitrability.'" *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944–45 (1995). "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence that they did so." *Id.* at 944.

As Mr. Revis and Shavae argued below, the SRA's arbitration clause clearly and unmistakably does not encompass any disputes, like this one, that are unrelated to the SRA. *See supra* Part A; A-301 (Dillon, J., dissenting) ("By the plain language of the SRA, the NFLPA Regulations are not incorporated for the resolution of disputes that arise outside of the SRA."). Performing this straightforward matter of contract interpretation is a quintessential and mandatory task for the courts. *See Matter of Smith Barney Shearson Inc. v.*

Sacharow, 91 N.Y.2d 39, 46 (1997) ("examin[ing]" the contract to "determine whether the parties . . . envinced a 'clear and unmistakable' agreement to arbitrate arbitrability"). The Second Department, however, deemed that interpretive "function" for the arbitrator and ruled that Mr. Revis and Mr. Schwartz's incorporation of the AAA Rules into the SRA was clear and unmistakable evidence that they intended to arbitrate *all* "'gateway' issues of arbitrability," even as to disputes unrelated to the SRA. A-296–97.

This was error. The antecedent—and here dispositive—question is whether this dispute involves a contract containing an arbitration agreement. This question is for the courts, as it is black-letter law that "[n]o one is under a duty to resort to arbitration unless by clear language he has so agreed." *Matter of Rosenbaum (Am. Sur. Co. of N.Y.)*, 11 N.Y.2d 310, 314 (1962). And here the answer is: No. This dispute does not involve the SRA, which is the only contract between the parties that contains an arbitration agreement. That ends the analysis. Because the parties only agreed to arbitrate certain gateway issues of arbitrability *in the context of a dispute over the SRA*, the "gateway's existence" requires a "dispute involving the SRA itself." A-303 (Dillon, J., dissenting). Where, as here, the dispute does not involve the SRA, then "the terms of the AAA Rules," including any provision for the arbitration

of gateway issues therein, are "not reached." A-301 (Dillon, J., dissenting).

The authorities relied on by the Second Department merely reflect the principle that *where the dispute concerns an agreement containing an arbitration clause* that delegates gateway issues, such as the existence, validity, or scope of the arbitration agreement, to the arbitrator, the resolution of those issues is for the arbitrator. *See, e.g.*, *Contec Corp. v. Remote Sol., Co.*, 398 F.3d 205, 209 (2d Cir. 2005) (issue whether party's "rights under the . . . [a]greement . . . fall outside the arbitration clause"); *Garthon Bus. Inc. v. Stein*, 30 N.Y.3d 943, 944 (2017), *rev'g* 138 A.D.3d 587, 593 (1st Dep't 2016) (issue whether agreement with arbitration clause "nullif[ied]" forum-selection clauses in earlier agreements); *Life Receivables Tr. v. Goshawk Syndicate 102 at Lloyd's*, 14 N.Y.3d 850 (2010), *aff'g* 66 A.D.3d 495, 498 (1st Dep't 2009) (dispute over "the validity of the arbitration agreement"); *Matter of WN Partner, LLC v. Balt. Orioles Ltd. P'ship*, 179 A.D.3d 14, 15 (1st Dep't 2019) (dispute "ar[o]se[] under . . . agreement" with an arbitration clause); *Skyline Steel, LLC v. PilePro LLC*, 139 A.D.3d 646, 647 (1st Dep't 2016) (dispute whether "the parties manifested an intent that the arbitration clause survive termination of the settlement agreement containing it and whether the agreement was induced by fraud" (citation omitted)). Those cases do not

require arbitration of gateway issues where, as here, the dispute concerns only separate agreements. Unless and until the court has determined that this dispute is about the SRA, the AAA Rules and the arbitrator's role thereunder are "not reached." A-301 (Dillon, J., dissenting). To start with the SRA and the AAA Rules is to abdicate the court's responsibility to make the initial determination whether this dispute is about the SRA or instead about separate contracts in which the parties never agreed to arbitrate.

This is a case in which the relevant contracts do not include any agreement to arbitrate. It is therefore not a case involving a claim that the argument for arbitration is "wholly groundless." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019); *see* A-291, 296–97 (decision below). In *Schein*, the dispute involved a single "relevant contract" containing an arbitration clause and the parties disagreed whether the "arbitration agreement applie[d] to [their] particular dispute." 139 S. Ct. at 528–29. The Supreme Court held that because the parties agreed to delegate that question to the arbitrator, that agreement should be enforced even if, "under the contract," the argument for arbitration is "wholly groundless." *Id.* at 529. Mr. Revis and Shavae's claim, however, is not that the argument for arbitration is frivolous "under the contract," but rather that this case does not involve "the

contract" containing an arbitration clause at all. There is thus no arbitration clause, nor any agreement to arbitrate gateway issues, to be enforced.

In addition, the AAA Rules' delegation clause does not apply for the separate reason that the parties only incorporated the AAA Rules for the purpose of "conduct[ing]" the arbitration "hearing." A-57 (NFLPA Regs. § 5(E)). The parties did not agree that the AAA Rules or the delegation clause contained therein would apply to issues, like those here, prior to any hearing. Indeed, the NFLPA Regulations themselves spell out procedures for initial arbitration matters, including for filing and answering grievances. *See* A-56–57 (NFLPA Regs. § 5(B)–(C)).

Put simply, this dispute "does not reach the NFLPA Regulations or the AAA Rules." A-303 (Dillon, J., dissenting). "[R]el[ying] upon the NFLPA Regulations and the AAA Rules" to mandate that the parties arbitrate arbitrability of this matter thus "puts the cart . . . before the horse." A-303 (Dillon, J., dissenting). The Second Department's decision should be reversed.

D. The Second Department Further Erred in Applying Its Arbitration Holding to Non-Signatories to the SRA.

Finally, the Second Department compounded its error by allowing non-parties to the SRA, Mr. Feinsod and Schwartz & Feinsod, to compel arbitration and by forcing non-party Shavae to submit to arbitration. A-298–

300. Both rulings were incorrect and should be reversed. It is well-established that non-parties to arbitration agreements are generally not subject to their terms, and none of the limited exceptions to that rule applies here.

Because arbitration is a matter of contract, it is "clear" that parties "may specify *with whom* they choose to arbitrate their disputes." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010). "As a consequence, . . . nonsignatories are generally not subject to arbitration agreements" except in "limited circumstances." *Matter of Belzberg v. Verus Invs. Holdings Inc.*, 21 N.Y.3d 626, 630 (2013) (citations omitted). "Under New York law, the right to compel arbitration does not extend to a party that has not signed the agreement pursuant to which arbitration is sought unless the right of the nonsignatory is expressly provided for in the agreement." *Greater N.Y. Mut. Ins. Co. v. Rankin*, 298 A.D.2d 263, 263 (1st Dep't 2002). Likewise, "[n]onsignatories to an arbitration agreement generally may not be compelled to arbitrate except in limited circumstances where the intent to arbitrate may be imputed upon the nonsignatory." *Matter of All. Masonry Corp. (Corning Hosp.)*, 178 A.D.3d 1346, 1347 (3d Dep't 2019).

Even if the SRA were relevant here (it is not), that agreement is "between Darrelle Revis (hereinafter 'Player') and Neil S. Schwartz

(hereinafter 'Contract Advisor')," and its arbitration provision applies only to "disputes between Player and Contract Advisor." A-96 (SRA § 8). The SRA thus provides zero basis to allow non-parties Mr. Feinsod and Schwartz & Feinsod to compel arbitration or to force non-party Shavae to submit to arbitration. *See Matter of Waldron (Goddess)*, 61 N.Y.2d 181, 185 (1984) ("Absent clear language to the contrary, this arbitration agreement . . . may not be so extended . . . to include a[] [person] not a party to the agreement[.]"). In ruling otherwise, the Second Department erred on each front.

As to Mr. Feinsod and Schwartz & Feinsod, the Second Department held that, because the Complaint alleges that the work done by those parties was done on behalf of Mr. Schwartz, they may compel arbitration under a line of precedent allowing agents of corporations to enforce arbitration agreements entered into by those corporations. *See, e.g.*, *Hirschfeld Prods., Inc. v. Mirvish*, 88 N.Y.2d 1054, 1056 (1996). This was error. To begin, Schwartz & Feinsod is plainly not the agent of Mr. Schwartz; rather, it is the company he co-owns with Mr. Feinsod. In any event, "[a] nonsignatory to an arbitration agreement cannot compel arbitration merely because he or she is an agent of one of the signatories." 1 *Domke on Commercial Arbitration* § 13:3 (rev. Dec. 2020). *Hirschfeld* and its progeny involve the distinct

situation where the *corporation* is party to an arbitration agreement and its agents seek to enforce it "in their capacities as agents of the corporation." *Hirschfeld*, 88 N.Y.2d at 1056. Because the only relevant corporation—Schwartz & Feinsod—is not a party to the SRA, those cases do not apply.

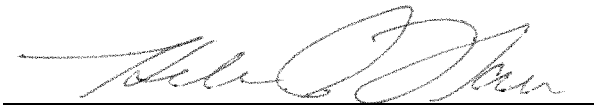
As to Shavae, the Second Department held that that entity, though not a party to the SRA, could be forced to arbitrate under its provisions based on the "direct benefits theory of estoppel." A-299 (quoting *Matter of Belzberg*, 21 N.Y.3d at 631). Under that narrow theory, a nonsignatory may be compelled to arbitrate if it "knowingly exploits" the benefits of an agreement containing an arbitration clause and receives benefits "flowing directly" from the agreement. 21 N.Y.3d at 631, 635. That theory has no application here. For one thing, the Second Department is simply incorrect that the Complaint's fourth claim alleges a "breach of the SRA," A-300—rather, that claim alleges a breach of the separate marketing and endorsement contract between Mr. Revis and Mr. Schwartz, A-32–33 (Compl. ¶¶ 77–83). And to the extent that the sixth claim may result in recovery of amounts paid to Mr. Schwartz under the SRA, that is a far cry from Shavae "knowingly exploit[ing]" the SRA for its "direct benefit[]." *Belzberg*, 21 N.Y.3d at 631.

CONCLUSION

This Court should reverse the Second Department's decision and remand for further proceedings.

Respectfully submitted.

Dated: March 9, 2021

By: 

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**Motion for admission *pro hac vice* in the Court of Appeals to be filed.

CERTIFICATE OF COMPLIANCE

I hereby certify under 22 NYCRR § 500.13(c) that this brief was prepared on a computer by a word-processing system (Microsoft Word) using a proportionally spaced typeface as follows:

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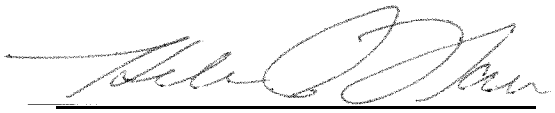
Dated: March 9, 2021



Helen A. Nau

STATEMENT PURSUANT TO CPLR 5531

Court of Appeals
of the
State of New York

DARRELLE REVIS and SHAVAE, LLC,

Plaintiffs-Appellants,

- against -

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

Defendants-Respondents.

1. The Index Number in the trial court was 67097/2016. The Appellate Division assigned docket number is 2017-07940.

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. The appeal is now from the Opinion and Order of The Supreme Court of The State of New York, Appellate Division, Second Judicial Department, filed on December 30, 2020.

7. The appeal is being perfected on the full record method.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
)
COUNTY OF WESTCHESTER)

Ivan Diaz, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age, and resides at 2160 Holland Avenue, Bronx, New York 10462.

That on the 8th day of March, 2021, deponent served the within:

BRIEF FOR PLAINTIFFS-RESPONDENTS

upon designated parties indicated herein at the addresses provided below by means of Federal Express Standard Overnight Delivery of 3 true copies of the same at the addresses of said attorney/parties with the names of each represented party:

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Sworn to before me this
8th day of March, 2021

Notary Public

Ivan Diaz

ERIC R. LARKE
Notary Public, State of New York
No. 01LA5067236
Qualified in Westchester County
Commission Expires March 5, 2023

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