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

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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.

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS DARRELLE REVIS and SHAVAE, LLC

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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

The Second Department's decision compelling arbitration of this dispute should be reversed for a simple reason: This dispute does not involve the SRA, the agreement defining the scope of Mr. Revis's and Mr. Schwartz's player–contract advisor relationship and the only arbitration agreement that Mr. Revis ever entered into with Mr. Schwartz. Rather, this dispute concerns Mr. Schwartz's misconduct as Mr. Revis's and Shavae's attorney in connection with matters wholly unrelated to the SRA, specifically, the misappropriation of funds related to Mr. Revis's and Shavae's agreements with other parties concerning sponsorship, marketing, and endorsements. Because the "plain language" of the SRA limits arbitration to disputes over "the SRA only," A-301 (Dillon, J., dissenting); *see* A-96 (SRA § 8), the foregoing conclusions are sufficient to reverse the judgment below and to allow this case to proceed normally through the courts. *See* Appellants' Opening Br. 25–38; A-301–05 (Dillon, J., dissenting).

"[T]elling[ly]," as they did below, Respondents now again "ignore[]" the SRA's "plain" limitation on arbitration, even though that limitation is "central and dispositive to this appeal." A-303 (Dillon, J., dissenting). Nor do Respondents dispute that, under longstanding precedent, parties to a single

limited arbitration agreement may not be forced to arbitrate disputes over separate agreements or unrelated misconduct. *See* Appellants' Opening Br. 34–38. And Respondents do not—and cannot—take issue with the well-established law making clear that, by holding himself out as an attorney and performing legal services, such as advising on and negotiating contracts and legal terms in contracts, for clients like Mr. Revis and Shavae, Mr. Schwartz was subject to New York's Rules of Professional Conduct and the ethical obligations of lawyers. *See* Appellants' Opening Br. 51–57.

Instead of addressing those core reasons, and all the others given in our opening brief, for why this dispute is not arbitrable, Respondents are able to muster only a handful of meritless and immaterial counterarguments. Respondents first raise a new, misplaced theory that this dispute about contract interpretation should instead be recharacterized as a factual dispute. Respondents waived this argument when they did not advance it before the Second Department, and that court said nothing that would permit raising it for the first time now. Respondents also baselessly take issue with a long line of New York judicial precedents concerning arbitration cited by Mr. Revis and Shavae. And Respondents' remaining contentions are based on generalized

assertions that lack support in the case law or the record. None of Respondents' arguments has merit.

One of Respondents' arguments in particular, however, provides this Court with an easy basis for reversal: Respondents contend that, under their reading of the SRA and the NFLPA Regulations, "any dispute" between Mr. Revis and Mr. Schwartz is "require[d]" to go to "arbitration." Respondents' Br. 36. Indeed, according to Respondents, "that is what arbitration agreements do." *Id.* at 35. Far from it. "Arbitration under the FAA is a matter of consent, not coercion," *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) (brackets omitted), and "[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). Mr. Revis never "agreed"—let alone "clear[ly]"—to arbitrate any disputes with Mr. Schwartz other than those concerning the SRA, and certainly he did not agree to arbitrate this dispute. A simple reading of the SRA makes that clear. Respondents' contrary reading not only has zero support in the language of the SRA—it would also render that binding language all but irrelevant.

This Court should reject Respondents' attempt to transform this case into an arbitrable dispute and reverse the judgment below.

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.

ARGUMENT

I. This Dispute Is About Mr. Schwartz's Attorney Misconduct Unrelated to the SRA or the NFLPA Regulations.

This case is about Mr. Schwartz's repeated misconduct, including breaches of contract and fiduciary duties, in the course of serving as

Mr. Revis's attorney over nearly a decade. The claims at issue do not involve the SRA, and thus Mr. Revis and Shavae may not be compelled to arbitrate this dispute under the SRA's arbitration clause, which provides for arbitration only of disputes involving "this Agreement," that is, the SRA. A-96 (SRA § 8). Nor is this dispute arbitrable under the NFLPA Regulations, as those provisions apply "only as to disputes involving 'this Agreement,'" that is—once again—the SRA. A-303 (Dillon, J., dissenting). Despite their stubborn effort to avoid these clear contractual terms, Respondents offer no persuasive counterarguments to the foregoing points or any coherent interpretation of the SRA that permits arbitration of this dispute.

A. This Dispute Arises from Mr. Schwartz's Misconduct in His Role as Mr. Revis's and Shavae's Attorney.

As we explained in our opening brief, the Complaint brought by Mr. Revis and Shavae centers on Mr. Schwartz's misconduct as Mr. Revis's and Shavae's attorney, a role entirely unrelated to the SRA or the NFLPA Regulations. *See* Appellants' Opening Br. 51–57. Even at this preliminary stage of the litigation, substantial evidence, including from non-parties, shows that Mr. Schwartz consistently served as Mr. Revis's attorney for nearly a decade. *See id*; A-191 (Revis Aff. ¶¶ 7–8); A-196–97 (Askew Aff. ¶ 9); A-201 (Gargano Aff. ¶¶ 6–8); A-204 (Hiller Aff. ¶¶ 3–4); A-304 (Dillon, J., dissenting)

(explaining that Mr. Schwartz and Mr. Revis's attorney–client relationship was supported by a "variety of … sources," including "multiple affidavits from persons with knowledge"); A-302 (Dillon, J., dissenting) (canvassing evidence). Mr. Schwartz's attorney role is significant, as neither the SRA nor the NFLPA Regulations 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).

Tellingly, despite seeking to cast doubt on that evidence and argue their case on the merits, Respondents' brief does not address or dispute the following critical points: First, that a lawyer performs legal work when he advises a client on a contract and negotiates terms of that contract on behalf of the client (as Mr. Schwartz did for his clients Mr. Revis and Shavae). Second, that New York's Rules of Professional Conduct apply to lawyers who hold themselves out as lawyers and perform mixed legal and nonlegal services for a client (as Mr. Schwartz did for his clients Mr. Revis and Shavae). And third, that under New York law, no written agreement or formal label is required to form an attorney–client relationship (as in the case of Mr. Schwartz and his clients Mr. Revis and Shavae).

1. While Respondents insist that, contrary to the Complaint brought by Mr. Revis and Shavae, Mr. Schwartz did not serve as Mr. Revis's or Shavae's lawyer, Respondents do not dispute that a lawyer performs legal work when he advises a client on a contract and negotiates contract terms on behalf of a client. This is significant, because Mr. Schwartz repeatedly drafted, negotiated, and provided advice about the terms of endorsement agreements for Mr. Revis and Shavae. *See* Appellants' Opening Br. 55–56; A-19 (Compl. ¶ 25). Those were legal services. *See 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"); *see also Matter of Rowe*, 80 N.Y.2d 336, 341–42 (1992); *Matter of Horak*, 224 A.D.2d 47, 52 (2d Dep't 1996); *Matter of Duncan & Hill Realty, Inc. v. Dep't of State*, 62 A.D.2d 690, 701 (4th Dep't 1978). Indeed, Mr. Schwartz recognized as much when he (secretly) hired a law firm to help him represent Mr. Revis and Shavae in negotiating and drafting the HBA. *See* A-194 (Revis Aff. ¶ 15).

In performing these contract-negotiation services, Mr. Schwartz was subject to the Rules of Professional Conduct and the ethical obligations of lawyers. And while Respondents complain (at 7 n.2) that Mr. Revis and Shavae have yet to "identify . . . specific matter[s]" in which Mr. Schwartz

served as Mr. Revis's or Shavae's lawyer, they cite no authority imposing such a requirement at this stage, and in any event the Complaint alleges—at length—that Mr. Schwartz served as Mr. Revis's and Shavae's attorney in connection with the "specific matter" of the Healthy Beverage Agreement. A-19–23 (Compl. ¶¶ 26–37).

2. Respondents also do not dispute that Mr. Schwartz was subject to the same obligations even to the extent that certain services that he performed for Mr. Revis could have been performed by a non-lawyer. Mr. Schwartz is a licensed New York lawyer and publicly holds himself out and advertises himself to clients as such. *See* A-128 (Schwartz promotional biography); A-204 (Hiller Aff. ¶ 3). As in many other jurisdictions, in New York 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, e.g.*, N.Y. Rules of Prof'l Conduct, 22 NYCRR 1200.0, Rule 5.7; *see also* Appellants' Opening Br. 56–57.

3. Finally, Respondents say not a word about the long line of New York precedent that has "consistently rejected the argument that indicia of a formal relationship are necessary" to show the existence of an attorney–client relationship. *First Hawaiian Bank v. Russell & Volkening, Inc.*, 861 F. Supp.

233, 238 (S.D.N.Y. 1994); *see also, e.g.*, *M.J. Woods, Inc. v. Conopco, Inc.*, 271 F. Supp. 2d 576, 585 (S.D.N.Y. 2003) (instructing that "a court must look to the general character of the relationship"); *Suffolk Roadways, Inc. v. Minuse*, 56 Misc. 2d 6, 10 (Sup. Ct. Suffolk Cnty. 1968) (attorney–client relationship may be "establish[ed]" by an "oral" agreement). Significant evidence shows 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).

In short, the alleged facts and substantial evidence show that Mr. Schwartz served as Mr. Revis's attorney in a number of matters over a significant period of time and as Shavae's attorney, and this dispute is about Mr. Schwartz's misconduct in that attorney role. To the extent that Respondents may seek to show that Mr. Schwartz did not serve as Mr. Revis's or Shavae's attorney or did not engage in misconduct, they may do so at trial. What they may not do is transform this dispute, which by its very nature does not involve the SRA and the NFLPA Regulations, into a dispute subject to arbitration under the SRA and the NFLPA Regulations.

B. This Dispute Is Not About the SRA.

Because this dispute is about Mr. Schwartz's conduct as an attorney unrelated to the SRA, it is not arbitrable under the SRA's arbitration clause. That clause provides for arbitration only of disputes involving "this Agreement," that is, the SRA. A-96 (SRA § 8); *see* Appellants' Opening Br. 25–38; A-301 (Dillon, J., dissenting) (the SRA's "plain language" limits arbitration to disputes regarding "the SRA only"). Thus, regardless whether or not Mr. Schwartz served as Mr. Revis's and Shavae's attorney, a dispute over his agreement to provide contract negotiation services unrelated to the SRA would not be arbitrable under the SRA's arbitration clause.

Before the Second Department, Respondents entirely "ignore[d]" the SRA's limitation on arbitration, which the dissenting Justices observed was "curious and telling," as that limitation is "an issue that is central and dispositive to this appeal." A-303 (Dillon, J., dissenting). Now, before this Court, Respondents repeat their studious effort to ignore the SRA's plain language in favor of a series of counterarguments designed to distract the Court from that central issue, and for a simple reason: When correctly interpreted, the plain language of the SRA precludes arbitration of this dispute. The Court should apply the SRA as written, and reject Respondents'

effort to force this nonarbitrable dispute into arbitration.

1. As we explained in our opening brief, a long line of precedent—both New York and federal—has repeatedly held that a party's agreement to arbitrate disputes arising out of a single contract does not permit a court to force him to arbitrate disputes over a distinct contract or unrelated conduct. *See Bowmer v. Bowmer*, 50 N.Y.2d 288, 292–96 (1980); *Matter of ITT Avis, Inc. v. Tuttle*, 27 N.Y.2d 571, 573 (1970); *Glauber v. G & G Quality Clothing, Inc.*, 134 A.D.3d 898, 898–99 (2d Dep't 2015); *Rahman v. Park*, 63 A.D.3d 812, 814 (2d Dep't 2009); *Credit Suisse First Bos. Corp. v. Cooke*, 284 A.D.2d 365, 366 (2d Dep't 2001); *Salmanson v. Tucker Anthony Inc.*, 216 A.D.2d 283, 284 (2d Dep't 1995); *Matter of Binkow (Brickman)*, 1 A.D.2d 906, 906 (2d Dep't 1956); *Rosen v. Mega Bloks Inc.*, No. 06-cv-3474, 2007 WL 1958968, at *5–6 (S.D.N.Y. July 6, 2007); *see also* Appellants' Opening Br. 34–38. This is so because, as this Court has explained, it is "unfair" to infer that a party has waived his "normal rights under . . . procedural and substantive law" based on "anything less than a clear indication of intent." *Matter of Marlene Indus. Corp. (Carnac Textiles)*, 45 N.Y.2d 327, 333–34 (1978).

2. Rather than grapple with that precedent, Respondents contend that this non-SRA-related dispute is arbitrable under the SRA because it

"touch[es] matters" covered by the SRA. Respondents' Br. 25 (quoting *Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 99 (2d Cir. 1999)). That is incorrect. For one thing, the "touch matters" standard cited by Respondents applies only to "broad" arbitration clauses.[1] *See Smith/Enron*, 198 F.3d at 99; *see also JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 172 (2d Cir. 2004) (cited at Respondents' Br. 31–32) (a "collateral matter" is arbitrable only where the arbitration clause is "broad"). The SRA's arbitration clause, however, is narrowly limited to disputes over "the SRA only." A-301 (Dillon, J., dissenting); *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"); *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) (similar).

[1] Further, the Second Circuit itself has more recently questioned the validity of the "touch matters" standard. *See JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 172–73 (2d Cir. 2004) ("[W]e have found that 'touch matters' . . . do[es] not 'yield a principled way of deciding whether claims should be sent to arbitration.'" (alterations omitted)).

Even on its own terms, however, Respondents' contention that this dispute over Mr. Schwartz's attorney misconduct "touch[es] matters" covered by the SRA is without merit. Respondents initially focus (at 30, 33) on Section 3 of the SRA and claim that, because that provision "memorializ[es] the 10% fee" agreement between Mr. Revis and Mr. Schwartz related to marketing and endorsement contracts, the SRA and that separate agreement are "tightly intertwined." Nothing could be further from the truth. Respondents' reading turns Section 3 on its head.

Section 3, as we explained in our opening brief, is a contract independence provision. *See* Appellants' Opening Br. 10–11, 26–27. Specifically, Section 3 serves to ensure that other agreements between the contract advisor and the player "relating to services *other* than the individual negotiating services" covered by the SRA are *independent of* the SRA. A-96 (SRA § 3(A)) (emphasis added). To that end, Section 3 requires the parties to "[d]escribe the nature of the *other services* covered by the *separate agreements*" before certifying that those separate agreements are independent of the SRA. A-96 (SRA § 3(A)) (emphases added).

Thus, in simply identifying the existence of their marketing and endorsement agreement in Section 3, Mr. Revis and Mr. Schwartz did "not . . .

include it within the SRA," rather, they "*distinguish[ed]* the M&E from the SRA, with each of the two contracts separate from the other." A-302 (Dillon, J., dissenting) (emphases in original). While Respondents stubbornly insist (at 32) that Section 3 "does not distinguish" between the two agreements, even the majority below recognized that in Section 3 the parties expressly designated their agreement as an "other[] agreement." A-291. This interpretation of Section 3 makes good sense. Nothing in the provision—which provides only a few lines for the parties to list all separate agreements between them—requires the parties to list *any* of the *terms* of those agreements. Rather, a contract advisor is merely asked to identify if he has separate agreements with the player, such as agreements related to marketing, financial services, investment advising. Thus, while in their SRA, Mr. Revis and Mr. Schwartz additionally noted that Mr. Schwartz's fee for their separate marketing and endorsement agreement was "Ten (10%) Percent – Cash Only," A-96 (SRA § 3(A)), they were not asked or required to provide that information or any other information beyond the existence of the

separate agreement. Nothing in this case—which requires a straightforward application of the clear language of the SRA—turns on their choice to do so.[2]

Respondents next contend (at 32) that "[t]here is *nothing in the SRA to suggest* that the 'additional agreements' [listed in Section 3] are not 'covered' by the arbitration clause in the SRA" (emphasis added). That is an admission by Respondents against their position, not an argument for their case. Even if Respondents were correct that there is "nothing in the SRA to suggest" that this unrelated dispute was not arbitrable (as explained just above, they are just plain wrong), that would still require denying Respondents' motion to compel arbitration. "[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); *see Stolt-Nielsen*, 559 U.S. at 682 (when interpreting an arbitration agreement, courts "must 'give effect to the contractual rights and expectations of the parties'" (citation omitted)). If there is "nothing . . . to suggest" that the parties agreed or did not agree to arbitrate a dispute, the dispute is not arbitrable. *See Matter of Cnty. of Rockland*

[2] In any event, even under Respondents' reading of Section 3, there is no credible argument that the *HBA*—in which Mr. Schwartz quintupled his usual 10% fee to 50%—was entered into pursuant to the SRA. *See* A-154–59 (HBA).

(Primiano Constr. Co.), 51 N.Y.2d 1, 7 (1980). Respondents' contrary approach "applies the law backwards." A-303 (Dillon, J., dissenting).

In short, just as with the SRA's arbitration clause, Respondents' reading of Section 3 simply cannot be reconciled with the language of the provision.

3. Finally, in a last-ditch effort to tie this dispute to the SRA, Respondents insist (at 28–29) that Count 4 of Mr. Revis and Shavae's Complaint alleges a "breach of the SRA." Not so. Count 4 alleges that Mr. Schwartz breached the separate marketing and endorsement agreement between Mr. Revis and Mr. Schwartz. *See* A-32–33 (Compl. ¶¶ 77–83). Indeed, in describing those breaches, Count 4 specifically incorporates the allegations "set forth . . . herein," A-32 (Compl. ¶ 78), which describe Mr. Schwartz's conduct resulting in his breaches of the marketing and endorsement agreement. A-17–26 (Compl. ¶¶ 20–45). Nowhere does the Complaint allege that Mr. Schwartz breached the SRA. And despite Respondents' contention (at 29 & n.11), the fact that certain relief sought in the Complaint may result in Mr. Schwartz returning fees paid or forfeiting fees otherwise due under the SRA does not transform this into a dispute over the "meaning, interpretation, application, or enforcement of [the SRA] or the obligations of the parties under [the SRA]." A-96 (SRA § 8); *see Shuffman v. Rudd Plastic Fabrics Corp.*, 64

A.D.2d 699, 699 (2d Dep't 1978); Appellants' Opening Br. 33–34.

C. This Dispute Is Not About the NFLPA Regulations.

Because this dispute does not involve the SRA, it also does not involve the NFLPA Regulations. That is because, as explained in our opening brief, the SRA incorporates the NFLPA Regulations' arbitration provisions for the limited purpose of resolving disputes over the SRA only. *See* A-96 (SRA § 8); Appellants' Opening Br. 38–51. As relevant to Mr. Revis, then, if the SRA does not apply, neither do the NFLPA Regulations.

This limited incorporation of the NFLPA Regulations, moreover, is consistent with the NFLPA's limited jurisdiction over only those player–contract advisor disputes that concern NFL team negotiations and associated fee agreements. *See* Appellants' Opening Br. 40–43; A-44 (NFLPA Regs., Introduction) ("[P]ursuant to federal labor law, the NFLPA will regulate the conduct of agents who represent players in individual contract negotiations with Clubs."). As a result, the NFLPA Regulations "are not incorporated for the resolution of disputes that arise outside of the SRA." A-301 (Dillon, J.,

dissenting). Where, as here, the dispute arises outside the SRA, there is no need to even "reach the NFLPA Regulations." A-303 (Dillon, J., dissenting).

Seeking to avoid these fundamental problems in their effort to transform this into an arbitrable dispute, Respondents reprise a series of misplaced counterarguments they made below. Each is without merit. But the most important point is their striking admission (at 36) that, under their reading, "*the NFLPA Regulations* . . . apply to both Revis and Schwartz and *require arbitration of any dispute between them*" (emphases added). Such a drastic expansion of NFLPA arbitral jurisdiction is entirely inconsistent with basic principles of contract interpretation, the relevant contractual language, and the reasonable expectations of the parties. Unsurprisingly, neither the trial court nor the Second Department adopted Respondents' unmoored approach, and neither should this Court.

Start with principles of contract interpretation. It is a "fundamental tenet[] of contract interpretation that a court should seek an interpretation which does not render any term or phrase of a contract meaningless or superfluous." *Landmark Ventures, Inc. v. H5 Techs., Inc.*, 152 A.D.3d 657, 659 (2d Dep't 2017). Rather, a court should interpret a contract in a way that "gives effect to all [its] terms." *U.S. Bank Nat'l Ass'n v. GreenPoint Mortg.*

Funding, Inc., 157 A.D.3d 93, 100 (1st Dep't 2017). Respondents' reading would violate this basic principle. No party disputes that Sections 5(A)(2) and 5(A)(3) of the NFLPA Regulations direct arbitration of a certain limited category of disputes, inapplicable here, between NFL players and their contract advisors. *See* A-56 (NFLPA Regs. § 5(A)(2)–(3)). Were Respondents correct (at 36) that the NFLPA Regulations "require arbitration of any dispute between" Mr. Revis and Mr. Schwartz, Sections 5(A)(2) and 5(A)(3) would be entirely superfluous.

Turn next to the contractual language. As we explained in our principal brief, no provision of Section 5 of the NFLPA Regulations applies to this dispute. *See* Appellants' Opening Br. 43–51; A-56 (NFLPA Regs. § 5(A)). Sections 5(A)(2) and 5(A)(3) are the only provisions that apply to grievances by players against contract advisors, and they limit arbitration 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)). This dispute is neither.

Respondents try mightily to shoehorn this dispute into Section 5, but their arguments cannot withstand scrutiny. Respondents first claim (at 33)

that "Section 5(A)(3) obviously applies" here, but that is simply wrong. Even the Second Department below declined to apply Section 5(A)(3) to this dispute. Rightly so, as Section 5(A)(3) applies only to disputes over a "fee agreement" related to a contract advisor's representation of a player in negotiations with an NFL club. *See* A-56 (NFLPA Regs. § 5(A)(3)); Appellants' Opening Br. 45–47. Because virtually any contract can be characterized as a "fee agreement," under Respondents' reading *every* contractual dispute between a player and his agent, whatever the subject matter of the contract, would be covered by Section 5(A)(3). Respondents offer no reason for this Court to so dramatically expand the scope of NFLPA arbitral jurisdiction.

Section 5(A)(4) also does not apply to this dispute. Section 5(A)(4) covers disciplinary proceedings against contract advisors regarding "[a]ny other activities of a Contract Advisor within the scope of these Regulations." A-56 (NFLPA Regs. § 5(A)(4)). This provision indeed encompasses a "wide variety of disputes," A-292 (decision below), as contract advisors have "myriad responsibilities," Respondents' Br. 34. But that only reinforces why Section 5(A)(4) is a disciplinary provision that addresses disputes between contract advisors and the NFLPA, the organization that permits them to serve in that role, and does not apply to any disputes between players and contract advisors.

Needless to say, any "activities" by a contract advisor related to a player are "within the scope of these Regulations." A-56 (NFLPA Regs. § 5(A)(4)). Thus, if Section 5(A)(4) applied to *any* disputes between players and contract advisors, it would apply to *all* such disputes, rendering meaningless Section 5(A)(2) and Section 5(A)(3) and violating the rule just discussed requiring that each term in a contract be given effect. *See also 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").

Finally, in addition to unjustifiably expanding NFLPA arbitral jurisdiction, reading Section 5 to cover this dispute would fail to give effect to the reasonable expectations of the parties. Were Section 5 to apply here, the practical consequence is that NFL players would be all but completely stripped of judicial recourse for any claims they may have against their contract advisors. It defies reason to think that Mr. Schwartz and Mr. Revis (or the drafters of the NFLPA Regulations) intended such a result. Indeed, directing arbitration of this dispute under Section 5 would violate the "basic objective" under the FAA that arbitration agreements be enforced "according to the intentions of the parties." *First Options of Chi., Inc. v. Kaplan*, 514 U.S.

938, 947 (1995). In signing the SRA, Mr. Revis and Mr. Schwartz agreed to arbitrate "only . . . disputes involving 'this Agreement,'" that is, "the SRA only." A-301, -303 (Dillon, J., dissenting).

Respondents' contention (at 19) that Mr. Revis "twice agreed to arbitrate" by not only (1) signing the SRA but also (2) "bec[oming] subject to the NFLPA Regulations"[3] reflects a fundamental misunderstanding of how the NFLPA Regulations work. The single relevant arbitration agreement that Mr. Revis signed, and thus the only agreement that he could be directed to arbitrate under, is the SRA. "By the plain language of the SRA, the NFLPA Regulations are not incorporated for the resolution of disputes outside of the SRA." A-301 (Dillon, J., dissenting). The NFLPA Regulations do not bind or operate against Mr. Revis independent of his signing the SRA. Thus, where, as here, the dispute does not involve the SRA, the dispute "does not reach the NFLPA Regulations." A-303 (Dillon, J. dissenting).

II. Respondents' Remaining Counterarguments Are Unavailing.

As shown by the discussion in Part I and in our opening brief, the "plain language" of the SRA—the only contract that Mr. Revis entered into with Mr.

[3] As a player, Mr. Revis was a member of the NFLPA, the union that represented him, but he was not subject to the NFLPA Regulations *Governing Contract Advisors*.

Schwartz containing an arbitration clause—does not apply to require Mr. Revis and Shavae to arbitrate this dispute. A-303 (Dillon, J., dissenting); *see* Appellants' Opening Br. 24–51. Faced with this insurmountable textual problem, Respondents offer a smattering of secondary arguments for nonetheless applying the SRA's arbitration clause here. Specifically, Respondents contend that (a) the question before this Court, though one of straightforward contract interpretation, requires review of facts found by the trial court; (b) the precedential New York arbitration decisions cited by Mr. Revis and Shavae are somehow inconsistent with the Federal Arbitration Act; (c) this dispute is somehow resolved by a U.S. Supreme Court decision that Respondents make absolutely no effort to explain; and (d) the SRA may be enforced by and against non-parties. The Court should reject each of these arguments.

A. The Issue Before This Court Is a Legal Issue of Contract Interpretation.

Because their arguments cannot be reconciled with the contractual language, Respondents try to seek refuge in a new theory (at 3, 20–24) that the trial court "expressly resolved" the factual question whether Mr. Schwartz acted as Mr. Revis's attorney, and that this finding either narrows or precludes this Court's review. This argument is waived, and in any event, Respondents'

effort to turn this appeal into a factual dispute is a red herring. As the Second Department recognized below, the issue before this Court is one of contract interpretation—a classic question of law.

As a preliminary matter, Respondents have waived this argument by failing to raise it before the Second Department. Nowhere in their brief below did Respondents argue that the trial court made findings of fact or that those findings are determinative of the questions on review. *See* C-58–87 (Respondents' 2d Dep't Br.). This argument is therefore waived. *See Henry v. Wetzler*, 82 N.Y.2d 859, 862 (1993); *Sea Trade Mar. Corp. v. Coutsodontis*, 111 A.D.3d 483, 486 (1st Dep't 2013). Further, when Mr. Revis and Shavae filed their notice of appeal to this Court, citing as the jurisdictional basis the two dissents "on the law" in the Second Department, *see* A-275, Respondents never indicated that they disagreed.

In any case, and as shown *supra* Part I.B–C, this appeal involves a straightforward issue of contract interpretation, namely, whether Mr. Revis and Shavae must be forced to arbitrate this non-SRA-related dispute under the arbitration provisions of the SRA and the NFLPA Regulations. As we have shown, the answer is "No." But regardless, that is a classic legal question subject to de novo review. *See T.Co Metals, LLC v. Dempsey Pipe & Supply,*

Inc., 592 F.3d 329, 344 (2d Cir. 2010) (in interpreting an arbitration clause, courts generally "should apply ordinary state-law principles that govern the formation of contracts"); *White v. Cont'l Cas. Co.*, 9 N.Y.3d 264, 267 (2007) (interpreting clear contractual provisions "is a question of law"); *MPEG LA, LLC v. Samsung Elecs. Co.*, 166 A.D.3d 13, 17 (1st Dep't 2018) ("When engaging in contract interpretation, 'the standard of review is for this Court to examine the contract's language de novo.'").

Below, both the majority and the dissenting Justices recognized that this case presents a quintessential legal question of contract interpretation. While Respondents assert (at 4) that the "Appellate Division affirmed the trial court's resolution of this question of fact," the Second Department did no such thing. The majority resolved this case on "general contract principles" and held (albeit incorrectly) that Respondents had established their burden "as a matter of law." A-285–86, A-294. Indeed, the issue was so clearly legal in nature that the majority expressly found "no occasion" to review the "facts alleged in the complaint." A-297. Likewise, the dissent, which was expressly "on the law," focused almost entirely on the majority's "misreading of the contract documents." A-301; *contra* Respondents' Br. 16. While Respondents may prefer to defend the trial court's decision on this issue, they have

essentially nothing to say about these aspects of the Second Department's decision, even though it is the latter decision that is on review here.

Finally, the trial court did not even make factual findings that warrant deference from this Court. The trial court was not issuing a final judgment on a full record. *Cf.* CPLR § 4213(b) (in the "decision of the court," the court "shall state the facts it deems essential"). Rather, before the court was a motion to compel arbitration on the basis of a Complaint and competing affidavits—including Respondents' own self-serving affidavits that were submitted only with their reply brief, *see* A-236–39, A-247–50. Appellants never had any opportunity to respond to Respondents' affidavits. No live witness testimony was heard. That is not a remotely sufficient record on which to make factual findings that this Court "must accept," Respondents' Br. 24—much less findings about core issues in this litigation related to Mr. Schwartz's service as Shavae's and Mr. Revis's attorney. To the extent the trial court prejudged this case on the basis of such a preliminary record, that is not a factual finding warranting deference, but rather an independent basis for reversal.

In this case, as in most, there are unresolved genuine disputes of fact. But the narrow question before this Court is one of law: whether the relevant

contract, the SRA (including the NFLPA Regulations to the extent that they were incorporated into the SRA), requires arbitration of this dispute. The Court should answer that question "No" and remand so that the trial court can consider the remaining factual questions, including as to Mr. Schwartz's attorney role, in the first instance and under the proper standard.

B. Precedents from this Court and Other New York Appellate Courts Apply Here and Are Consistent with the Federal Arbitration Act.

Respondents next take issue with Mr. Revis and Shavae's reliance on longstanding precedents from this Court and other New York appellate courts, claiming (at 18) that such reliance is "[s]trange[]" and faulting (at 3) our opening brief for not expressly citing the Federal Arbitration Act ("FAA"). In so doing, Respondents try to distract this Court from their inability to offer *any* substantive response to the overwhelming weight of authority, discussed above and in our opening brief, forbidding arbitration in circumstances such as these. *See supra* p. 11; Appellants' Opening Br. 23–24, 31, 34–38. In any event, Respondents' FAA argument is meritless and should be rejected.

It is well-established that the FAA applies "in state as well as federal courts." *Southland Corp. v. Keating*, 465 U.S. 1, 15–16 (1984). This Court has expressly recognized that "the provisions of the FAA are controlling" and "we

are bound by the policies embodied in the Federal statute and the accompanying case law." *Fletcher v. Kidder, Peabody & Co.*, 81 N.Y.2d 623, 630–31 (1993) (quoted at Respondents' Br. 18); *see Flanagan v. Prudential-Bache Sec.*, 67 N.Y.2d 500, 505–06 (1986) ("[E]nforcement of the Federal Arbitration Act 'is left in large part to the state courts[.]'"); *N.J.R. Assocs. v. Tausend*, 19 N.Y.3d 597, 601 (2012) ("The Federal Arbitration Act applies to any arbitration provision in a contract that affects interstate commerce." (citation omitted)).

As a result, whether or not a court expressly invokes the statute, New York state cases applying arbitration provisions in contracts affecting interstate commerce are decided against the backdrop of, and thus are presumptively consistent with, the FAA. This makes sense, because the FAA simply embodies the common-sense principle, long adhered to in New York, that "courts must place arbitration agreements on equal footing with other contracts, and enforce them according to their terms." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (citation omitted). Every single case cited in our opening brief postdates the FAA's enactment in 1925. *See* Pub. L. 68-401, 43 Stat. 883. And our opening brief cites both state and federal cases expressly applying the FAA, *see, e.g.*, *Matter of Smith Barney Shearson Inc.*

v. Sacharow, 91 N.Y.2d 39, 48 (1997); *Matter of Steyn*, 175 A.D.3d at 9–10; *Gerling Glob. Reinsurance Corp. v. Home Ins. Co.*, 302 A.D.2d 118, 125 (1st Dep't 2002); *T.Co Metals*, 592 F.3d at 344—undercutting the very premise of Respondents' argument.

C. The Parties Did Not Clearly and Unmistakably Agree to Arbitrate Arbitrability as to Disputes Unrelated to the SRA.

While Respondents also attempt to rely on the delegation clause in the AAA Rules, they crucially do not dispute the following key point: that a party will not be deemed to have agreed to arbitrate threshold questions of arbitrability "unless there is 'clear and unmistakable' evidence" of such an agreement. *First Options*, 514 U.S. at 944 (brackets omitted); *see Matter of Smith Barney Shearson*, 91 N.Y.2d at 46 (same); Appellants' Opening Br. 57–62. This clear-statement rule comports with the general principle 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). Respondents' concession of the proper standard is sufficient to resolve this appeal in Mr. Revis and Shavae's favor, as there is no evidence here of such a "clear and unmistakable" agreement. Rather, the only agreement entered into by Mr. Revis that contains a

delegation clause limits arbitration to disputes over "the SRA only." A-301 (Dillon, J., dissenting). Because the SRA is not at issue here, "the terms of the AAA Rules," including any provision for the arbitration of gateway issues therein, are "not reached." A-301 (Dillon, J., dissenting).

Rather than address those dispositive points, Respondents instead generally assert (at 3–4) that this case is resolved by the U.S. Supreme Court's decision in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019). But that case, as we explained in our principal brief, does not speak to a situation, like that here, where the parties entered multiple agreements but only one contains an arbitration clause. *See* Appellants' Opening Br. 61–62. Rather, *Henry Schein* addressed the entirely distinct question whether a single "relevant contract" between the parties "applie[d] to [their] particular dispute." 139 S. Ct. at 528–29. Remarkably, despite claiming (at 3–4) that *Henry Schein* has "facts nearly indistinguishable" from those here and is "on all fours" with this case, Respondents make no attempt to identify *anything* about *Henry Schein* that is similar to this case. Indeed, other than quoting (at 27) a portion of the decision below citing *Henry Schein*, Respondents say essentially nothing about the case at all. Put simply, even Respondents can

muster up no argument for why *Henry Schein* applies here or is relevant in any way to the issues in this case.

D. Non-Parties to the SRA May Not Enforce and Are Not Bound by the SRA's Arbitration Clause.

Finally, as we explained in our opening brief, under well-established New York law, there is no basis to allow SRA non-parties Schwartz & Feinsod and Mr. Feinsod to compel arbitration under the SRA or to force SRA non-party Shavae to arbitrate under that contract. *See* Appellants' Opening Br. 62–65. In response, Respondents rehash their primary argument that this dispute involves the SRA (it does not) and entirely fail to offer any compelling theory for applying the SRA's arbitration clause to non-parties.

First, Respondents contend (at 38) that our "only" argument for not applying the clause to Schwartz & Feinsod and Mr. Feinsod is "to assert that the SRA does not apply to this dispute." This is completely incorrect. As we explained, and as Respondents ignore, even if the SRA did apply here (it does not), the general rule is that "[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); *see* Appellants' Opening Br. 64–65. The narrow exception to that rule relied on by the Second Department (but, tellingly, not by Respondents) does not apply to

this situation. *See* Appellants' Opening Br. 64–65 (distinguishing *Hirschfeld Prods., Inc. v. Mirvish*, 88 N.Y.2d 1054, 1056 (1996)).

In addition, Respondents' contention (at 38) that because *Mr. Feinsod*—with whom Mr. Revis never entered into *any* agreement—happens to be a certified NFLPA contract advisor in his own right, Mr. Feinsod "therefore is a party with Revis to the same arbitration agreement that compels Revis to arbitrate," is utterly irreconcilable with black letter contract law. *See Stonehill Capital Mgmt., LLC v. Bank of the W.*, 28 N.Y.3d 439, 448 (2016) ("To form a binding contract there must be a 'meeting of the minds.'"). Respondents offer not a single citation to support this argument. And the record here supports the exact opposite conclusion: the SRA reveals that Mr. Schwartz tried to add Mr. Feinsod as a party to the SRA, but Mr. Revis, insistent that he be represented in his NFL contract negotiations by an attorney, crossed out the name of Mr. Feinsod (a non-attorney). *See* A-98 (SRA Addendum). In other words, Mr. Revis made it clear that he was *unwilling* to contract with Mr. Feinsod. In any event, there is certainly no basis for claiming he agreed to arbitrate disputes with Mr. Feinsod.

Second, this Court's decision in *Matter of Belzberg v. Verus Invs. Holdings Inc.*, 21 N.Y.3d 626, 631 (2013), forecloses Respondents' attempt to

extend the SRA's arbitration clause to Shavae. *See* Appellants' Opening Br. 65. Respondents' argument for applying *Belzberg's* "direct benefits" theory (at 38–39) hinges entirely on their repeated, erroneous insistence that this suit asserts a breach of contract claim under the SRA. As we have explained, it does not. *See* Appellants' Opening Br. 33–34; *supra* pp. 16–17. And this Court has held that "[w]here the benefits are merely 'indirect,' a nonsignatory cannot be compelled to arbitrate a claim." *Belzberg*, 21 N.Y.3d at 631. Respondents offer no compelling reason why *Belzberg* does not preclude enforcement of the SRA's arbitration clause against Shavae, because there is none.

CONCLUSION

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

Respectfully submitted.

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By: 

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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: May 11, 2021

Helen A. Nau

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 10th day of May, 2021, deponent served the within:

REPLY 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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