To Be Argued By:
Mario Aieta
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Appellate Division, Second Department Docket No. 2017-07940

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 DEFENDANTS-RESPONDENTS

DUANE MORRIS LLP
Attorneys for Defendants-Respondents
230 Park Avenue, Suite 1130
New York, New York 10169
212-404-8755
maieta@duanemorris.com

Of Counsel:
Mario Aieta

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CORPORATE DISCLOSURE STATEMENT

Pursuant to 22 NYCCR 500.17(f), Respondent Schwartz & Feinsod LLC states that Neil Schwartz and Jonathan Feinsod are the sole members of the limited liability company and not parents, subsidiaries or affiliates exist.

STATEMENT OF RELATED LITIGATION

Pursuant to 22 NYCCR 500.13(a), Respondents state that, as of the date of the completion of this brief, there is no related litigation pending before any court. Respondents Mr. Schwartz and 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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PRELIMINARY STATEMENT

Plaintiff-Appellant Darrelle Revis, who used to be a professional football player, does not want to pay the fees that he owes to his agents pursuant to the Standard Representation Agreement that he signed with Respondent-Defendant Neil Schwartz in 2007. After signing the Standard Representation Agreement Revis earned over $100 million from contracts obtained for him by Defendants-Respondents. The Standard Representation Agreement contained an arbitration clause requiring Revis and Schwartz to arbitrate "any and all disputes" "involving the meaning, interpretation, application, or enforcement of this Agreement or the obligations of the parties under this Agreement." Revis, as an NFL Player subject to a collective bargaining agreement, and Schwartz and Feinsod, as Contract Advisors subject to NFL Players Association ("NFLPA") Regulations, were also bound by that part of the Regulations that mandates arbitration of any disputes regarding the "meaning, interpretation or enforcement of a fee agreement" between individuals subject to the Regulations, whatever may be the source of that dispute.

Revis fired Schwartz and Feinsod as his agents in 2016 and commenced this action claiming that Schwartz and Feinsod had charged him fees in excess of the amounts called for in the Standard Representation

Agreement, which Revis admits is the **only** written memorialization of the fee agreement on which his claims are based. Revis asserted eight causes of action, for each of which he sought as part of the remedy for the wrongs alleged the return of the agent fees paid under the Standard Representation Agreement. Defendants-Respondents moved to compel arbitration of Revis's claims; the trial court granted that motion and the First Department affirmed.

Revis now appeals, arguing that the First Department and the trial court erred by failing to recognize that there were two separate agreements evidenced by the SRA – an agreement to negotiate contracts between Revis and the teams of the National Football League and an agreement to act as Revis's attorney in connection with "marketing and endorsement" contracts – and that the arbitration clause in the SRA and the arbitration obligation in the NFLPA Regulations do not apply to his claim that Schwartz, acting as his lawyer, charged a higher-than-agreed-to fee on revenue generated by the "marketing and endorsement" agreement. Revis also argues that the Appellate Division erred in holding that parties had agreed to arbitrate gateway questions of arbitrability. In other words, while Revis acknowledges that the parties entered into an enforceable arbitration agreement in the SRA, and acknowledges that the NFLPA Regulations

obligate him to arbitrate certain disputes, and acknowledges that the SRA and the NFLPA Regulations incorporate the rules of the American Arbitration Association and therefore delegate questions of arbitrability to the arbitrator, and acknowledges that his claims are based on Schwartz's alleged failure to comply with the 10% fee that is memorialized in the SRA and **only** in the SRA, he argues that he does not have to arbitrate his claims against Schwartz because he has alleged that Schwartz acted as his attorney and that allegation alone magically transports the parties and their dispute outside of the scope of the acknowledged arbitration agreements.

Revis's argument fails for two simple reasons. First, the Federal Arbitration Act ("FAA") provides the controlling law (Revis does not argue otherwise) and the United States Supreme Court as well as this Court have held on facts nearly indistinguishable from the instant case that gateway questions of arbitrability, including whether or not an existing arbitration agreement applies to the dispute at bar and the scope of the arbitrator's authority, must be decided by the arbitrator. In light of this controlling authority, it is not surprising that Plaintiffs-Appellant's Brief on Appeal never once mentions the FAA.

Second, the trial court expressly resolved against Revis the question of fact on which Revis's argument entirely depends. The trial court held that

Schwartz was not Revis's attorney and that Schwartz never provided any legal advice to Revis. The Appellate Division affirmed the trial court's resolution of this question of fact; it did not reverse or modify the trial court and did not expressly or impliedly find new facts. Therefore, this Court's review is limited to questions of law only as that law applies to the relationship in which Schwartz acted only as Revis's agent, expressly subject to the SRA and the NFLPA Regulations. The alternate version of the facts on which Revis's argument depends has been rejected out of hand and cannot be revived on this appeal.

The trial court found, and the Appellate Division affirmed, the fact that the parties entered into an arbitration agreement that relates to the claims asserted by Revis. On these facts, the question of law presented to this Court by Revis's appeal are resolved by application of the FAA, as recently explained by the United States Supreme Court in *Henry Schien*, a case on all fours with the case at bar. Even if Respondents' contention that Revis's claims are subject to the arbitration clauses at issue were "wholly groundless" the trial court was compelled by the FAA to send the dispute to the arbitrator. Here, of course, the contention that Revis's claims are subject to the arbitration clauses is far from "wholly groundless;" both the trial court and the Second Department agreed that the arbitration clauses govern this

dispute. Therefore, as a matter of law, the Appellate Division properly affirmed the trial court's grant of Defendants-Respondents' motion to compel arbitration of Revis's claims and the order appealed from should be affirmed.

QUESTIONS PRESENTED

1. May this Court reject the trial court's determination of a question of fact where the appellate division has neither reversed nor modified the judgment of the trial court?

No. When the appellate division has neither reversed nor modified the judgment of the trial court, this Court reviews questions of law only.

2. Did the Second Department err in holding that the question of arbitrability is for the arbitrator where i) the contract memorializing the fee that is in dispute contains a broad arbitration provision, ii) the parties to the dispute are also subject to association regulations mandating arbitration of any dispute concerning a fee, iii) both the contract and the regulations delegate gateway questions of arbitrability to the arbitrator, and iv) the allegations underlying the claims at issue touch matters covered by the contract and the regulations?

No. The Second Department did not err.

COUNTER-STATEMENT OF THE FACTS

A. Schwartz and Feinsod Act as Agents for Revis

Plaintiff Darrelle Revis was a player in the National Football League (A-15).[1] As such, he was a member of the National Football League Players Association (the "NFLPA"), the union for professional football players (A-43-61). Plaintiff Shavae LLC is wholly-owned by Revis (A-15). Defendants Neil Schwartz and Jonathan Feinsod are certified NFLPA Contract Advisors (A-91). Schwartz & Feinsod, Inc., is a corporation organized under the laws of the State of New York, wholly-owned by Schwartz and Feinsod (A-91).

On January 18, 2007, Revis signed a Standard Representation Agreement ("SRA") with Schwartz in which the parties agreed that Schwartz would act as Revis's Contract Adviser (A-91, 96-97). As Revis's agents, Schwartz and Feinsod successfully negotiated contracts for Revis with the New York Jets, the Tampa Bay Buccaneers, and the New England Patriots (A-92). Revis was paid over $117 million on those contracts (A-92).

[1] Citations to "A-X" throughout this Brief are citations to the full record produced on appeal. Citations to "C-X" are citations to the Compendium produced on appeal. Citations to "BPA-X" are citations to the Brief for Plaintiffs-Appellants.

Schwartz never acted as Revis's lawyer (A-92). He never charged Revis for legal services; he never represented to Revis or to anyone else that he was acting as Revis's lawyer; and he never agreed to be Revis's lawyer (A-92).[2] The Supreme Court found "no merit in Revis' assertion . . . that Schwartz acted as his attorney. . . ." (A-8).

In 2014 Revis was introduced to the Healthy Beverage Company by his uncle, Shaun Gilbert, and Zachary Hiller (A-205).[3] Revis entered into a contract with the Healthy Beverage Company which had been negotiated between the President of the Healthy Beverage Company (who is not a

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[2] The Complaint and the affidavits submitted by Revis to the trial court fail to identify any specific matter in which Schwartz acted as Revis's lawyer and fail to identify any legal advice supposedly given to Revis by Schwartz (A:9). Before this Court, Revis badly mischaracterizes the record. For example, he asserts that Hiller "described Mr. Schwartz's general practice of providing legal services to his clients, A-204 (Hiller Aff. ¶¶ 3–4)" (BPA-53). In fact, Hiller's affidavit does not discuss Schwartz's "general practice." It refers to only a single phone call involving a client's domestic dispute, the substance of which Hiller clearly states he did not hear (A-204 ["Mr. Schwartz was on the call as well and he instructed me that I should hang up the phone and allow him to conduct the telephone call. . . ."]). As of the date of Hiller's affidavit he was Revis's then-current football agent (C:66) and he was suing Schwartz and Feinsod in federal court (his claims also were sent to arbitration).

[3] Plaintiffs-Appellants refer to Hiller as Schwartz's "employee." Hiller was never an employee of Schwartz or of Schwartz and Feinsod; over the two summers he interned part time for Schwartz and during the three years after he became a certified agent and attempted to recruit players with Schwartz's help he was never paid a penny in salary or wages by Schwartz and Feinsod and his "expenses" were never reimbursed by them (A-203).

lawyer) and Schwartz acting as Revis's agent, with the assistance of Gilbert, Revis's uncle (A-238, 241, 242).[4] The contract between Revis and the Healthy Beverage Company was not a simple marketing and endorsement agreement. In addition to allowing the Healthy Beverage Company to use Revis's name in marketing efforts, it required Revis to actively contribute marketing support (A-155), it provided for a marketing fee based on sales growth (A-155), it gave Revis the right to buy the Healthy Beverage Company under certain conditions (A-158), and it required the Healthy Beverage Company to pay a "termination fee" to Revis should it be acquired by anyone else (A-159). Revis and his personal representative, his uncle Sean Gilbert, were aware throughout the negotiations of the terms under negotiation and of the fact that the Wilentz law firm was representing Revis and his co-venturers in the Healthy Beverage deal (A-92, 238-239).

In the complaint and before the trial court in opposition to the motion to compel arbitration, Revis falsely alleged that Schwartz "brought" the Healthy Beverage Agreement to him for signature in Boston (A-21) and was present when it was signed (A-22); in fact, Schwartz was not in Boston

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[4] In their Brief on Appeal, Plaintiff-Respondents falsely state that Schwartz "drafted" the contract with the Healthy Beverage Company(BP-53). This false assertion has no support in record, and Revis cites none. The record shows that the contract was drafted by the Willentz law firm (A-241).

when Revis signed the agreement, he was in Arizona (A-248). Revis falsely alleged that he was not given a copy of the executed Healthy Beverage Agreement until May of 2016 (A-24); in fact, the executed agreement was emailed to Revis on January 8, 2015 (A-248). Revis also falsely alleged that he did not have time to read the Healthy Beverage Agreement or that its terms were not explained to him (A-21); in fact, Schwartz explained the Agreement to Revis at face to face meetings a week before he was asked to sign it and he had as long as he wanted to review it (A-247-48). And Revis falsely alleged that he did not know that a New Jersey law firm that he had previously retained in unrelated matters, Wilentz, Goldman & Sptizer, also represented him (and his co-venturers) in the Healthy Beverage transaction (A-23); in fact, Revis's uncle and personal representative was copied on the Wilentz firm's emails regarding the negotiations and Revis himself was copied on the request to pay the firm's invoice (A-238-39; A-248-49; A-263-64).[5]

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[5] Before this Court, Revis has abandoned the false narrative that he presented to the trial court, now asserting only that Schwartz "presented" him with a copy of the HBA (BPA-12), without claiming that the presentation happened face-to-face, and that Schwartz did not follow "his normal practice" of sending a copy of the agreement to Revis's mother, without denying that Revis himself received the HBA both in person and by email immediately after it was signed (BPA-14). Revis's palpably false representations to the trial court no doubt informed that court's weighing of

Four payments were made by The Healthy Beverage Company pursuant to its contract. The first three payments were distributed 50% to Revis, 12.5% to Schwartz, 12.5% to Feinsod, 12.5% to Diana Askew (Revis's mother) as directed by Sean Gilbert (Askew's brother), and 12.5% to Zach Hiller (who is also an NFLPA Contract Adviser) (A-92). Revis specifically approved of the split of the fees in this manner (A-92).

B. Revis Fires His Agents and Schwartz and Feinsod Commence Arbitration Over a Disputed Fee

On May 12, 2016, Revis terminated his relationship with Schwartz and Feinsod in a letter that makes no mention of his supposed attorney/client relationship with Schwartz (A-93, 107).[6] Two months later, Revis's uncle and representative asked Schwartz and Feinsod to waive the fees owed to them under the SRA for the remaining life of the contract that Schwartz and Feinsod negotiated on Revis's behalf with the New York Jets (A-93). When

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the evidence and determination of the issues of fact presented to it. The trial court's resolution of those questions of fact is not subject to review by this Court.

[6] Revis has also abandoned the false assertion made to the Second Department that he sent the letter terminating Schwartz and Feinsod as his agents "[a]fter terminating Mr. Schwartz as his lawyer…." (C-9; *compare* A-93). Revis apparently now concedes that the termination letter in which he refers to Schwartz as his "agent," not as his lawyer, is the only communication in which Revis terminated any relationship with Schwartz.

Schwartz refused to give up those fees, Revis's representative told him that Revis would destroy Schwartz's reputation (A-93).[7]

The fourth and final payment from The Healthy Beverage Company was a "termination" payment and was made in July 2016 (A-93). Revis received his 50% directly from The Healthy Beverage Company (A-93). Schwartz was contacted by the NFLPA before the other 50% was received by Schwartz & Feinsod and was told that Revis was questioning the distribution of that part of the final payment (A-93). Schwartz and Feinsod deposited the other 50% into their attorneys' escrow account and offered to transfer the funds to an escrow account maintained by the NFLPA (A-93).

On August 12, 2016, Schwartz and Feinsod commenced an arbitration against Revis pursuant to the Regulations to resolve any issues with respect to amounts due to Revis under the Healthy Beverage Agreement (A-93). Revis responded to the grievance on September 6, 2016, and filed a counter-grievance asserting false allegations much like the false allegations in the Complaint (A-94).

The NFLPA regulates the relationship between contract advisors and NFL players through the NFLPA Regulations Governing Contract Advisors

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[7] Revis has never paid the fees he owes to Schwartz and Feinsod for the 2016-17 football season. Schwartz and Feinsod seek to recover those fees in arbitration.

(the "NFLPA Regulations"). The SRA executed between Revis and Schwartz is a standard form agreement issued by the NFLPA for representation between certified Contract Advisors and NFL players (A-54). Schwartz and Feinsod did not draft or modify the arbitration provisions of the SRA (A-96).

Paragraph 8 of the SRA states "Any and all disputes between the 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). Paragraph 10 of the SRA provides: "This Agreement, along with the NFLPA Regulations, sets forth the entire agreement between the parties hereto and cannot be amended, modified or changed orally. Any written amendments or changes shall be effective only to the extent that they are consistent with the Standard Representation Agreement as approved by the NFLPA" (A-96).

Section 5 of the NFLPA Regulations Governing Contract Advisors (the "Regulations") clearly provides that all disputes between players and contract advisors (not just disputes arising under the SRA) are subject to arbitration: "This arbitration procedure shall be the exclusive method for

resolving any and all disputes that may arise from the following: . . . . (2) Any dispute between an NFL Player and a Contract Advisor with respect to the conduct of individual negotiations by a Contract Advisor; (3) The meaning, interpretation or enforcement of a fee agreement and; (4) Any other activities of a Contract Advisor within the scope of these Regulations" (A-56). The "other activities within the scope of the Regulations" are defined in Section 1(B) the Regulations and 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, including the handling of player funds…" (A-46).

C. Revis Sues Schwartz and Feinsod in the Supreme Court, Westchester County

Revis filed his Complaint against Schwartz and Feinsod on November 15, 2016. While the Complaint is generously larded with false allegations about an attorney/client relationship between Revis and Schwartz (without ever mentioning a specific detail about the matters in which Schwartz supposedly represented Revis as a lawyer or the legal advice Schwartz supposedly gave) and vague hints at financial improprieties (again without ever identifying a specific payment or transaction that was not properly

accounted for), the eight causes of action are obviously addressed to the fee dispute between Revis and his agents and clearly touch upon the matters addressed in the SRA and the Regulations. The first cause of action seeks the production of documents. The next six causes of action expressly relate to either the Healthy Beverage Agreement or to the "2% contingent legal fee" and "10% contingent fee on marketing and endorsements" contained in the SRA and in various ways (without any detail) assert that Revis was injured by a supposed "misappropriation" of funds. The eighth cause of action asserts that Revis was "fraudulently induced" to enter into the SRA. (Revis signed the SRA with Schwartz eight years before the Complaint was filed and Revis made over $117 million from the contracts negotiated by Schwartz and Feinsod pursuant to the SRA.)

D. The Trial Court Grants Defendants-Respondents' Motion to Compel Arbitration and the Second Department Affirms

Defendants-Respondents moved to compel arbitration of the claims asserted by Revis in the Complaint. Defendants-Respondents supported their motion with, *inter alia*, affidavits from Schwartz and from Feinsod establishing that Schwartz never acted as an attorney for Revis, with emails showing that the Wilentz law firm represented Revis in the Healthy

Beverage deal, and with emails destroying Revis's credibility by demonstrating that Revis was lying when he claimed, in opposition to the motion, that he did not receive a copy of the Healthy Beverage agreement at the time it was executed. The trial court granted the motion to compel arbitration, holding that "the parties entered into a valid arbitration agreement and . . . the issues stated in the Summons and Complaint are encompassed within the SRA's broad arbitration clause" (A: 8). The trial court "[found] no merit in Revis' assertion . . . that Schwartz acted as his attorney and that the claims in this action are wholly separate from the rights and duties created under the SRA" (A: 8-9). "The mere fact that Schwartz is an attorney does not create an attorney/client relationship to get Revis out of the arbitration clause of the SRA. Further, Revis provided no documentation or other evidence to establish that the 10% agent fee was actually a legal fee for Schwartz's representation as an attorney" (A: 9).

Revis appealed and the Second Department affirmed, holding that "When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. Under such circumstances and without more, a court possesses no authority to decide the arbitrability issue" (A: __). The Second Department did not modify the trial court's order in any way.

Two judges dissented from the majority opinion (hereinafter the "Dissent"), arguing that there were "questions of fact" that made the application of the arbitration clause in the SRA and the arbitration provisions of the NFLPA Regulations "at best, ambiguous" (A-303).[8]

STANDARD OF REVIEW

This Court does not review questions of fact, or generally mixed questions of law and fact (N.Y. Const., art. VI, § 3(b) ["The jurisdiction of the court of appeals shall be limited to the review of questions of law except where . . . the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding, finds new facts and a final judgment or a final order pursuant thereto is entered"]; CPLR § 5501(b) ["The court of appeals shall review questions of law only, except that it shall also review questions of fact where the appellate division, on reversing or modifying a final or interlocutory judgment, has expressly or impliedly found new facts and a final judgment pursuant thereto is entered"]).

[8] According to the Dissent, there was "a question of fact as to whether Schwartz's role in the [Marketing and Endorsement contract] was that of an attorney rather than a contract adviser" (A-303).

ARGUMENT

I. THE FEDERAL ARBITRATION ACT GOVERNS THIS DISPUTE

The Federal Arbitration Act, 9 U.S.C. Section 2 (1970) (the "FAA"), controls arbitration agreements in state court actions involving interstate commerce (*Cusimano v. Schnurr*, 26 N.Y.3d 391 [2015]). Revis does not dispute that this case involves interstate commerce. This Court has recognized that "The Supreme Court has been emphatic concerning the liberal federal policy favoring arbitration agreements applicable in State as well as Federal courts and requiring that they rigorously enforce agreements to arbitrate" (*Flanagan v. Prudential-Bache Securities, Inc.*, 67 NY2d 500, 506 [1986] [internal quotations and citations omitted]). "Questions of arbitrability are, therefore, to be addressed with a healthy regard for the federal policy favoring arbitration and any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration" (*id.* [internal quotations and citations omitted]).

The Federal Arbitration Act "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate" and the state courts of New York "are bound to apply the statute as interpreted by Supreme Court decision or, absent such, in accordance with the rule established by lower Federal courts if they are in agreement" (*Flanagan*, 67

NY2d at 505-506, *citing Alvez v. American Export Lines*, 46 NY2d 634, 639, *affd.* 446 U.S. 274 [1980]).

The FAA preempts State law on the subject of the enforceability of arbitration clauses, even if the dispute itself concerns claims under State law (*Fletcher v Kidder, Peabody & Co.*, 81 N.Y.2d 623, 630-31 [1993]). "Thus, regardless of what our own State's policies or case law might dictate in other circumstances, we are bound by the policies embodied in the Federal statute and the accompanying case law, and our prior State law holdings remain independently operative only to the extent that they have not been preempted by Federal law and policy" (*Fletcher*, 81 N.Y.2d at 631; *see Smith/Enron Cogeneration Ltd. Partnership, Inc. v. Smith*, 198 F.3d 88 [2nd Cir. 1999] ["When we exercise jurisdiction under Chapter Two of the FAA, we have compelling reasons to apply federal law, which is already well-developed, to the question of whether an agreement to arbitrate is enforceable"]).

The Second Department applied the FAA in affirming the trial court's order to compel arbitration. Strangely, in the Brief for Plaintiffs-Respondents Revis never once mentions the Federal Arbitration Act. Instead, Revis cites almost exclusively to older cases applying New York law on the enforceability of arbitration agreements. The Dissent also failed to address the FAA.

II. REVIS FAILED TO CARRY HIS BURDEN TO PROVE THAT THE CLAIMS ASSERTED IN THE COMPLAINT ARE NOT SUBJECT TO ARBITRATION

Revis and Schwartz have twice agreed to arbitrate: first when each of them (and Defendant-Respondent Feinsod) became subject to the NFLPA Regulations and second when Revis and Schwartz executed the SRA. Revis does not contest the fact that he is a party to both the SRA and the NFLPA Regulations. Governed, as they are, by the FAA, both the SRA and the NFLPA Regulations are presumed to be valid and enforceable (9 U.S.C. § 2; *Shearson/Am. Express v. McMahon*, 482 U.S. 220, 226 [1987]). Revis, as the party resisting arbitration, bears the burden of demonstrating that the arbitration agreements are invalid or do not encompass the claims at issue (*DeGraziano v. Verizon Communications, Inc.*, 325 F.Supp.2d 238, 243 [EDNY 2004], *citing Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 92 [2000]["the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration"]). Revis does not argue that either the SRA or the NFLPA Regulations are invalid. He argues that he cannot be compelled to arbitrate because neither the SRA nor the NFLPA Regulations encompass his claims against Schwartz. But, as the Second Department correctly determined, the arbitration provisions of both the SRA and the NFLPA Regulations apply to the claims asserted by Revis in his

Verified Complaint. And, since the parties have agreed to arbitrate issues of arbitrability, the FAA mandates that the arbitrability of Plaintiff-Appellants' claims must be decided by the arbitrator and the trial court's order compelling arbitration must be affirmed.

A. Schwartz Was Revis's Agent, Not His Attorney; Therefore, Revis's Arguments Based On a Supposed Attorney/Client Relationship Are Irrelevant to this Appeal.

Revis started this litigation because he does not want to pay the fees that he owes to his agents in connection with the last contract they negotiated for him with a professional football team. In order to avoid arbitration before the NFLPA arbitrator under the SRA and the NFLPA Regulations that expressly apply to any fee dispute between Revis and his NFLPA-regulated agents, Revis cooked up a preposterous story of attorney misconduct. That story was soundly rejected by the trial court: "Revis provides absolutely nothing to show how and when Schwartz acted as anything other than his agent…." (A-9). The Second Department affirmed the trial court's Decision and Order without modification. Therefore, the issue of fact regarding the role played by Schwartz in his dealings with Revis has been resolved. Schwartz was Revis's agent. Schwartz was not Revis's attorney.

Long ago this Court held that the existence of an attorney client relationship is a question of fact (*Stout v. Smith*, 53 Sickels 25, 30 [1885]) and every Department has so held in numerous more recent decisions (*e.g.*, *Bloom v. Hensel*, 59 A.D.3d 1026, 1027 [4th Dept. 2009]["triable issue of fact whether there was an attorney-client relationship"]; *Tropp v. Lumer*, 23 A.D.3d 550, 551 [2nd Dept. 2005] ["the plaintiff raised a triable issue of fact as to whether Abady had an attorney-client relationship with her"]; *Talansky v. Schulman*, 2 A.D.3d 355, 358 [1st Dept. 2003]; *McLenithan v. McLenithan*, 273 A.D.2d 757 [3rd Dept. 2000];). The Dissent agreed that it is "a question of fact as to whether Schwartz's role in the [Marketing and Endorsement contract] was that of an attorney rather than a contract adviser" (A-303).

There can be no question that there is evidentiary support in the record for the trial court's determination that Schwartz was not acting as an attorney for Revis. In fact, Revis did not argue below that that there was no support in the record for the trial court's finding. To the contrary, Revis himself characterizes the record below as presenting "genuine questions of material fact concerning whether this dispute arises from rights and duties created by an attorney–client relationship," and (incorrectly) asks this Court

to remand "so the trial court can consider these questions of fact under the proper standard" (BPA-57).

This Court has repeatedly held that "any arguments based on a characterization of the facts [different from the trial court's findings] are unavailable to us given the Appellate Division's affirmance of the findings of fact" (*e.g.*, *Verizon New England Inc. v Transcom Enhanced Servs.*, Inc., 21 N.Y.3d 66, 72 [2013] [rejecting arguments made by appellant and by two dissenting justices]; *id.* at 70-71, *citing* Arthur Karger, *Powers of the New York Court of Appeals* § 13:10 at 489 *71 [3d ed rev 2005] [facts affirmed by the Appellate Division with evidentiary support are "conclusive and binding on the Court"]; *Bates Adv. USA, Inc. v 498 Seventh, LLC*, 7 N.Y.3d 115 [2006] ["We may not Revisit Supreme Court's affirmed factual findings underpinning the determination of breach, which are supported by the record"]; *L. Smirlock Realty Corp. v Title Guar. Co.*, 63 NY2d 955, 957-58 [1984] ["Issues of fact with respect to which the determinations of Supreme Court were affirmed by the Appellate Division are beyond the reach of our review, there being evidence in the record for the support of such determinations"]).

This Court does not review issues of fact. It reviews only issues of law. Nonetheless, Revis largely bases his argument to this Court on the

"fact" that Schwartz was his attorney[9] and even posits the "Question Presented" to this Court as one concerning "claims regarding Mr. Schwartz's conduct as an attorney" (BPA-5).

The Dissent also identified the "question of fact as to whether Schwartz's role in the [Marketing and Endorsement contract] was that of an attorney rather than a contract adviser" as central to its disagreement with the majority and key to its contention that the obligation to arbitrate was ambiguous: "[T]he direct application of Section 5 of the NFLPA Regulations to the M & E is not a pure question of law, as it is instead intertwined with and dependent upon the factual issue of whether Schwartz was acting as a Contract Advisor for the M & E subject to Section 5

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[9] *E.g.*, "Nothing in the NFLPA Regulations expands that limited arbitration agreement to cover this dispute about Mr. Schwartz's unrelated attorney misconduct" (BPA-4-5); "This dispute does not involve the SRA. Rather, it involves Mr. Schwartz's conduct as an attorney representing Revis" (BPA-25); "The claims here, which concern Mr. Schwartz's conduct as 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 Revis in connection with NFL playing contracts" (BPA-29); "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…." (BPA-39); "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" (BPA-51); "Mr. Schwartz's attorney role is significant, as the NFLPA Regulations do not apply to disputes with "private attorneys for a player misconduct" (BPA-51-52).

arbitration or, alternatively, as an attorney not subject to NFLPA arbitration" (A-304).[10]

This question of fact has been resolved by the trial court and affirmed by the Second Department. This Court must accept that Schwartz acted as Revis's agent, not as Revis's attorney. Given that fact, any dispute between Revis and his agent – and in particular a dispute about the amount of the fees paid by Revis to his agent for services as agent – clearly touches matters covered by the the SRA (a contract governing the fee to be paid by Revis to his agent) and the NFLPA Regulations (governing the conduct of Schwartz as Revis's agent).

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[10] Even if Revis had entered into an attorney-client relationship with Schwartz, his claims would be arbitrable. Revis concedes before this Court that his alleged decision to hire Schwartz as his attorney and the decision to sign the SRA with Schwartz were one and the same: "It was important to Revis that his representative [to "represent him in contract negotiations with teams"] be an attorney. . . .In his presentation to Revis. . . Mr. Schwartz. . .represented that he was a licensed attorney. . . .Based on Mr. Schwartz's presentation, Revis decided to hire Mr. Schwartz to represent him as an attorney, including as his contract advisor – often referred to as an "agent" – in negotiations with NFL teams" (BPA-6-8; A-91). Revis alleges that he hired Schwartz "as his attorney" by signing the SRA (A-17-18). There can be no question, therefore, that **if** Schwartz had acted as Revis's attorney, the SRA touches upon that relationship. And a malpractice claim, if Revis had one, is arbitrable under New York law (*Thies v. Bryan Cave LLP*, 35 A.D.3d 252 [2006]).

B. The Claims Asserted in the Complaint Must Be Arbitrated Because the Allegations Underlying Those Claims Touch Matters Covered By the SRA and the NFLPA Regulations

Where a party subject to an arbitration obligation governed by the FAA contends that his claims are not covered by the arbitration provisions to which he is a party, the court must "consider whether a particular claim falls within the scope of the parties' arbitration agreement, . . . focus[ing] on the factual allegations in the complaint rather than the legal causes of action asserted. If the allegations underlying the claims 'touch matters' covered by the parties' ... agreements, then those claims must be arbitrated, whatever the legal labels attached to them" (*Smith/Enron*, 198 F.3d at 99 [citations and internal quotation marks omitted]; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 624 n. 13 [1985][rejecting the argument that an arbitration clause applied only to certain matters referenced in the contract; "insofar as the allegations underlying the statutory claims touch matters covered by the enumerated articles, the Court of Appeals properly resolved any doubts in favor of arbitrability"]). An order to arbitrate "should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute" (*AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475

U.S. 643, 650 [1986]). "Doubts should be resolved in favor of coverage" *WorldCrisa Corp. v. Armstrong*, 129 F.3d 71, 74 [2d Cir. 1997]).

Revis cites *Bowmer v. Bowmer* (50 N.Y.2d 288 [1980]) for the proposition that a party cannot be "compelled to. . .submit to arbitration" "unless the agreement to arbitrate expressly and unequivocally encompasses the subject matter of the particular dispute" (BPA-23). *Bowmer*, which, like the Brief for Plaintiffs-Appellants, never mentions the FAA, has no application to the case before this Court. In any event, more recent decisions of this Court cast serious doubt on the continuing viability of the "rule" in *Bowmer*:

> "[T]he courts below assessed the Associations' claims and ruled that they were not arbitrable . . . . [I]n the face of broad arbitration clauses, they addressed the nature of the dispute, and, acting as would an arbitrator, interpreted the scope of the substantive provision of the contract. They then found the grievances to be outside of the parties' agreement to arbitrate. This was error. A court confronted with a contest of this kind should merely determine whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA [the agreement containing the arbitration obligation]. If there is none, the issue, as a matter of law, is not arbitrable. If there is, the court should rule the matter arbitrable, and the arbitrator will then make a more exacting interpretation of the precise scope of the substantive provisions of the CBA, and whether the subject matter of the dispute fits within them (*Matter of Board of Educ. of Watertown City School District*, 93 N.Y.2d 132, 143 [1999]).

In the case at bar, the trial court's role in determining whether or not to grant a motion to compel arbitration is further limited by the parties' agreement to arbitrate gateway questions of arbitrability. The Second Department correctly stated the controlling federal law:

> The United States Supreme Court has recently reiterated that "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract" (*Henry Schein, Inc. v. Archer & White Sales, Inc.*, ––– U.S. ––––, 139 S. Ct at 529 [2019]; Unanimous Opinion by Kavanaugh, J.]). "In those circumstances, a court possesses no power to decide the arbitrability issue" (––– U.S. ––––, 139 S. Ct at 529). "That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless" (––– U.S. ––––, 139 S. Ct at 529). In other words, "if a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue" (––– U.S. ––––, 139 S. Ct at 530) (*Revis v. Schwartz*, 192 A.D.3d 127, ___, [2020]; A-291).

In light of the controlling federal law as set forth in *Henry Schein* and its predecessors cited above, the Second Department correctly concluded that "[u]nder these circumstances, neither the Supreme Court, nor this Court, nor any court, has the authority to decide whether and to what extent these parties' disputes are arbitrable" (A-297). "Given the foregoing, there is no occasion for this Court to apply the arbitration clause at issue here to the facts alleged in the complaint, or to otherwise determine whether the numerous causes of action asserted by Revis fall within its scope. Those

questions were delegated to the arbitrator. It would thus be error to inquire into the scope of the arbitration agreement, under state and federal law" (*id.)*.

In addition to ignoring the FAA and citing outdated cases applying only New York law, Revis advances three reasons for reversing the Second Department's decision affirming the trial court's grant of the motion to compel arbitration: first, that his claims concern a "separate agreement" that does not include an obligation to arbitrate; second, that the record does not establish that he clearly and unmistakably delegated the gateway issue of arbitrability to the arbitrator; and third, that by naming in his Complaint parties that did not sign the SRA, he has avoided the obligation to arbitrate. All three arguments are unavailing.

i. Revis's Claims Touch Matters Covered by the SRA and the NFLPA Regulations.

On its face, the Complaint makes allegations that clearly touch matters covered by the SRA. In fact, the Complaint alleges as one of its causes of action a breach of the SRA. In the Fourth Cause of Action for "Breach of Contract Against Defendant Attorney Schwartz" (A-32), Revis identifies the contract allegedly breached as "The agreement between Attorney Schwartz and Revis and Shavae concerning the provision of legal services in return for a 10% contingent fee on marketing and endorsement deals handled by Attorney Schwartz **and a 2% contingent legal fee on**

compensation from employment by National Football League teams. . . ." (A:32 at ¶ 78). Only one contract is alleged in the Fourth Cause of Action and that is the contract that provides for **both** the 10% fee on marketing and endorsement deals **and** the 2% fee compensation from employment by NFL teams. That contract is the SRA, the only contract between Revis and Schwartz that provides for the 2% fee based on Revis's employment by NFL teams.[11] Any doubt – there cannot be any doubt on this record – is put to rest by the demand for relief in the Fourth Cause of Action, which includes "a declaration that no further amounts are due to any of the Defendants from any of the Plaintiffs" (A-33 at ¶ 83). At the time that the Complaint was filed the only contract under which Revis had any continuing obligation to pay amounts to Mr. Schwartz was the SRA.

In the addition to the plain language of the allegations in the Verified Complaint, the conclusion that the claims asserted by Revis touch matters covered by the SRA is mandated by Revis's own testimony before the trial court concerning "the day I hired him [Schwartz]" (A-191). Revis swore that the decision to enter into the SRA with Schwartz and the decision to enter

[11] Revis ignores the allegations of his own **Verified** Complaint when he argues to this Court that "Revis and Shavae do not assert any claim under the SRA or ask the court to interpret, apply, or enforce it" (BPA-33).

into the 10% marketing and endorsement agreement with Schwartz were one and the same:

> I agreed to have Mr. Schwartz represent me as my lawyer, including as my representative in contract negotiations with sponsors and NFL teams. At no time did I ever believe that Mr. Schwartz was simply my agent and was not my lawyer as well. Indeed, Mr. Schwartz's status as a licensed attorney was one important reason **I decided to hire him to negotiate my contracts with sponsors** [the 10% marketing and endorsement agreement] **and NFL teams** [the SRA] (A-191 [emphasis added]; A-196).

The two agreements were negotiated at the same time, they were entered into simultaneously, the SRA is the only writing memorializing the 10% fee, and both agreements have a common objective – to obtain Schwartz's services as agent on behalf of Revis in connection with Revis's professional football career. Clearly, the SRA and Revis's claims for breach of the 10% marketing and endorsement agreement are "reasonably related" to each other and Revis's claims "touch" matters addressed in the SRA (*see Gomery v. Versatile Mobile Systems (Canada), Inc.*, 2009 WL 159200 [M.D. Pa. 2009][applying the FAA and holding that the commonalities between two agreements, one with an arbitration clause and on without, require arbitration].

This Court and many others have held that language effectively identical to the arbitration clause in the SRA is broad (*compare* SRA [A-96

at ¶ 8: "Any and all disputes between the Player and Contract Advisor involving the meaning, interpretation, application, or enforcement of this Agreement or the obligations of the parties under this Agreement"] *and Board of Educ. of Watertown City School District*, 93 N.Y.2d at 136 ["The CBA contained a broad arbitration clause which provided that "any alleged violation of this Agreement, or any dispute with respect to its meaning or application" was arbitrable."]).

When the arbitration clause governed by the FAA is broad, its coverage extends to "collateral matters" (*JLM Industries, Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 172 [2nd Cir. 2004]). "We have made it plain . . . that where the arbitration clause at issue is a broad one, it is presumptively applicable to disputes involving matters going beyond the interpretation or enforcement of particular provisions of the contract which contains the arbitration clause" (*id*. [internal citations and quotations omitted).[12] In *JLM Industries* the Second Circuit held that plaintiffs' "claims regarding a conspiracy among the [defendants] in violation of the Sherman Act are arbitrable" under contracts between individual owners and individual plaintiffs for ocean charter services at specified prices. The court found that

[12] The cases cited by Revis in support of a narrow, exclusive reading of the arbitration clauses in the SRA and the NFLPA Regulations do not address the FAA and so are not controlling.

a claim alleging a conspiracy to impose "artificially high" prices touched matters covered by the charter contracts containing the arbitration agreements. Here, Revis's claims rest on the allegation that Schwartz charged him more than the 10% fee that is found in the SRA (and in no other writing). Clearly, Revis's claims touch on matters covered by the SRA.

Revis argues that "the SRA's subject matter is strictly limited to contract negotiations between players and NFL teams" (BPA-28). But the SRA contains no such limiting language. Contrary to Revis's assertion, Section 3 of the SRA does not "direct[] 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" (BPA-_) (emphasis added). Section 3 does not distinguish between the additional agreements and the agreement "covered" by the SRA. It distinguishes between the additional agreements and the agreement "**described in this paragraph"** (A-96). There is nothing in the SRA to suggest that the "additional agreements" are not "covered" by the arbitration clause in the SRA.

And the SRA does not, contrary to Revis's contention, require the player and the contract advisor to "certify" that the "additional agreements" are "entirely separate from the SRA." Far from it. Section 3 does not say a

word about "entirely separate". The NFLPA Regulations prohibit an agent from conditioning his agreement to the SRA on the player's acceptance of other agreements with the agent. The inclusion of the "other agreements" list in Section 3 the of SRA demonstrates how tightly intertwined are the SRA and any other agreements between the player and the agent, all of which are subject to the same Regulations governing the agent's conduct.

Revis does not dispute the fact that he and Schwartz are subject to the arbitration agreement found in the NFLPA Regulations. Section 5(A) of the NFLPA Regulations provides "This arbitration procedure shall be the exclusive method for resolving any and all disputes that may arise from the following: . . . . (2) Any dispute between an NFL Player and a Contract Advisor with respect to the conduct of individual negotiations by a Contract Advisor; (3) The meaning, interpretation or enforcement of a fee agreement and; (4) Any other activities of a Contract Advisor within the scope of these Regulations" (A-56).

Section 5(A)(3) obviously applies to Revis's claims, which focus on the "meaning, interpretation or enforcement of" the 10% marketing and endorsement fee agreement. Revis attempts to avoid this obvious conclusion by arguing that Section 5(A)(3) applies **only** to "negotiations with the member Clubs" because "Under the NFLPA Regulations, the NFLPA is

authorized to regulate contract advisors "with respect to" their role in "negotiations with the member Clubs" (BPA-46). That reading of the NFLPA Regulations makes no sense. First, the NFLPA Regulations are by no means limited to regulating contract advisors "with respect to" their role in "negotiations with the member Clubs". The Second Department reviewed in some detail the myriad responsibilities of contract advisors that are addressed by the NFLPA Regulations (A-292-293). The Introduction to the NFLPA Regulations – which is Revis's only textual support of his bizarre reading of Section 5(A)(3) – does not set forth the scope of the NFLPA's authority over contract advisors; it merely identifies who those contract advisors are: "the NFLPA will regulate the conduct of agents who represent players in individual contract negotiations with clubs…." (A-44). Moreover, Revis's reading of Section 5(A)(3) would make that section completely redundant. Section 5(A)(2) already addresses "individual negotiations," the phrase used in both the NFLPA Regulations and the SRA to identify negotiations on behalf of a player with the clubs (*see* A-44 [*supra*], A-96 at ¶ 7 [SRA: "individual negotiations. . .conducted pursuant to this Agreement"]).

Section 5(A)(4) of the NFLPA Regulations compels arbitration of disputes arising from "Any other activities of a Contract Advisor within the

scope of these Regulations" (A-56). Revis complains that this provision is so broad that it would require players to arbitrate a wide range of claims against their contract advisors. Indeed, that is what arbitration agreements do. It is not a reason to interpret them narrowly (*Fletcher v Kidder, Peabody & Co.*, 81 N.Y.2d 623, 638 [1993] [enforcing U-4 Form mandatory arbitration even though the "categories of disputes [to be arbitrated] undoubtedly implicate important public policies"]).

Finally, Revis argues that his claims "do not fall within the ambit of the NFLPA Regulations" because "This Dispute Arises from Mr. Schwartz's Work as an Attorney That Falls Outside the NFLPA Regulations" (BPA-51). But Schwartz did not act as an attorney for Revis (*supra* at p. 20). Schwartz was Revis's agent and contract advisor. Therefore, Revis's claims based on the services provided to him by Schwartz fall within the ambit of the NFLPA Regulations.

As the Second Department correctly held, "Penetrating definitive analysis of the scope of the agreement must be left to the arbitrators whenever the parties have broadly agreed that any dispute involving the interpretation and meaning of the agreement should be submitted to arbitration" (A-290, *quoting Matter of Nationwide Gen. Ins. Co. v Investors Ins. Co. of Am.*, 37 N.Y.2d 91, 96 [1975]). The foregoing analysis of the

NFLPA Regulations is sufficient to demonstrate that the claims asserted by Revis touch matters covered by the SRA and the NFLPA Regulations, whether or not one agrees with the final conclusion reached through that analysis. Therefore, the gateway issue of arbitrability must be decided by the arbitrator.

ii. Revis Has Clearly and Unmistakably Agreed to Delegate the Gateway Issue of Arbitrability to the Arbitrator

The Second Department found that the SRA and the NFLPA Regulations, which incorporate by reference the Voluntary Labor Arbitration Rules of the American Arbitration Association, evidence the parties' "clear and unmistakable" intent to delegate gateway issues of arbitrability to the arbitrator (A-293-297). Revis claims that this holding was in error because "This dispute does not involve the SRA, which is the only contract between the parties that contains an arbitration agreement" (BPA-59). This is a surprising contention, coming as it does after twenty pages of argument regarding the scope of the NFLPA Regulations (BPA-38 *et seq.*), which apply to both Revis and Schwartz and which require arbitration of any dispute between them (*supra at* p. 33).

Given that this Court must accept as fact that Schwartz acted as Revis's agent, not as Revis's attorney, Revis's attempt to deny the existence of the arbitration provisions of the NFLPA Regulations – which expressly

govern the activities of Schwartz as agent for Revis and which compel arbitration of disputes between a player and an agent concerning fees – is hopeless. The NFLPA Regulations exist, they apply to Revis and to Schwartz, and the trial court properly sent to the arbitrator any further questions on the arbitrability of Revis's claims as alleged in the Complaint.

Even without the FAA's strong mandate in favor of arbitration, this Court has held that where, as here, one party contends that an arbitration agreement applies to the dispute and other party contends that there is no contract governing the dispute, it is for the arbitrators to decide whether or not the dispute is subject to arbitration. "In our view, the question whether the contract lacked mutuality of obligation [and therefore was void], depending as it does primarily on a reading and construction of the agreement, and involving, as is obvious from the disagreement amongst the judges of this court and the courts below, substantial difficulties of interpretation, is to be determined by the arbitrators, not the court" (*Exercycle Corp. v. Maratta,* 9 N.Y.2d 329, 334 [1961]).

iii. Shavae LLC Is Bound to Arbitrate and the Co-Defendants, Alleged to Be Schwartz's Agents, Can Compel Arbitration

The Second Department correctly held that Defendants-Respondents Feinsod and Schwartz & Feinsod LLC, although non-signatories to the SRA,

can compel Revis to arbitrate his claims because the allegations against them "relate solely to work that "was done on behalf of . . . Schwartz"" (A-299, *see* A-17 [Complaint at ¶ 16: "all work done by Jonathan Feinsod and Schwartz & Feinsod that related to Revis and Shavae was done on behalf of Attorney Schwartz"]). Revis's only response is to assert that the SRA does not apply to this dispute. The trial court and the Second Department put that argument to rest by finding that Schwartz acted as Revis's agent, not has his attorney. Further, Revis ignores the fact that Feinsod is also a certified NFLPA Contract Advisor subject to the arbitration provisions of the NFLPA Regulations and therefore is a party with Revis to the same arbitration agreement that compels Revis to arbitrate.

The Second Department also correctly held that Shavae, although not a signatory to the SRA, can be compelled to arbitrate its claims, applying the direct benefits theory of estoppel to the fact that "Shavae seeks the same relief as Revis in each of the eight causes of action asserted in the complaint" (A-300). Revis argues the direct benefits theory of estoppel does not apply to Shavae, citing *Matter of Belzberg v Verus Invs. Holdings Inc.* (21 N.Y.3d 626 [2013]). *Belzberg* makes it clear that Revis is wrong. "The guiding principle is whether the benefit gained by the nonsignatory is one that can be traced directly to the agreement containing the arbitration

clause. The mere existence of an agreement with attendant circumstances that prove advantageous to the nonsignatory would not constitute the type of direct benefits justifying compelling arbitration by a nonparty to the underlying contract" (21 N.Y.3d at 633). Here Shavae expressly asserts a breach of contract claim based on the SRA (*see supra* at pp. 28-29). "Numerous courts have found that non-signatory parties are estopped from denying arbitration when they rely on or seek direct benefits under an agreement by, for example, bringing suit under that agreement" (*Mobile Real Estate, LLC v. NewPoint Media Group, LLC*, 460 F.Supp.3d 457, 479 [SDNY 2020]).

CONCLUSION

For the foregoing reasons, the order of the Second Department affirming the Supreme Court's grant of Defendants-Respondents' motion to compel arbitration in accordance with the express terms of the SRA and the NFLPA Regulations should be affirmed.

Dated: New York, New York
April 26, 2021

Duane Morris LLP

by_____
Mario Aieta
230 Park Avenue
Suite 1130
New York, NY 10169
(212) 818-9200

Attorneys for
Defendants-Respondents

CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 500.13(c) that the foregoing brief was prepared on a computer.

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Dated: New York, New York
April 26, 2021

Duane Morris LLP

by_____
Mario Aieta
230 Park Avenue
Suite 1130
New York, NY 10169
(212) 818-9200

Attorneys for
Defendants-Respondents