To be Argued by:

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New York County Clerk's Index No. 652044/14

New York Supreme Court
Appellate Division – First Department

TCR SPORTS BROADCASTING HOLDING, LLP,

Petitioner-Appellant-Cross-Respondent-Respondent,

– against –

WN PARTNER, LLC; NINE SPORTS HOLDING, LLC;
WASHINGTON NATIONALS BASEBALL CLUB, LLC,

Respondents-Respondents-Cross-Appellants-Appellants,

THE OFFICE OF COMMISSIONER OF BASEBALL; and
THE COMMISSIONER OF MAJOR LEAGUE BASEBALL,

Respondents-Respondents-Cross-Appellants,

(For Continuation of Caption See Reverse Side of Cover)

JOINT BRIEF FOR APPELLANTS

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THE BALTIMORE ORIOLES BASEBALL CLUB and BALTIMORE ORIOLES LIMITED PARTNERSHIP, in its capacity as managing partner of TCR Sports Broadcasting Holding, LLP,

Nominal Respondents-Appellants-Cross-Respondents-Respondents.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

Scholarly Authorities

PRELIMINARY STATEMENT

This appeal arises from an order of the New York County Supreme Court, Commercial Division (Marks, J.), that correctly vacated an arbitration award due to the evident partiality of Major League Baseball ("MLB"). The underlying dispute concerns the amount of telecast rights fees payable by TCR Sports Broadcasting Holding, LLP ("TCR"), d/b/a Mid-Atlantic Sports Network ("MASN"), to the Washington Nationals (the "Nationals"), pursuant to a 2005 Settlement Agreement by and among all parties to this case. The award was issued by the Revenue Sharing Definitions Committee ("RSDC"), an MLB committee comprised of three MLB Club owners, each of whom is appointed by and at the sole discretion of the Commissioner of Baseball.

The trial court found that MLB, the institution under whose auspices the arbitration was held, "objectively demonstrate[d] an utter lack of concern for fairness of the proceeding" that was completely "inconsistent with basic principles of justice," in part because MLB took no steps whatsoever to address pervasive conflicts of interest, ignoring numerous objections in the process. R.41. However, the trial court failed to recognize that it had the authority under Section 10(b) of the Federal Arbitration Act ("FAA") to grant the remedy sought by the moving parties—removal of the dispute from the ambit of the partial institution, MLB, which exerted extensive control over the RSDC and the panel's decision-making

process. So complete was MLB's control over the RSDC that MLB actually wrote the award, which the arbitrators merely rubber-stamped.

Although the trial court held that it did not have the authority to order rehearing before a neutral arbitral panel independent of MLB, the court also emphasized in a subsequent order that its vacatur decision "did not … require the parties to return to arbitration under the RSDC." R.121.15. As the trial court aptly observed, the question of where the arbitration should be heard is a matter to be settled by this Court on this appeal. R.121.19-20.

That this dispute cannot be reheard by the RSDC is strikingly clear. Overwhelming record evidence demonstrates that MLB—under whose auspices any rehearing before the RSDC would take place—is incurably partial, irredeemably biased, and financially interested in the outcome.

Among other disqualifying factors, the Commissioner (who personally oversaw every aspect of the prior arbitration in his former role as MLB's Executive Vice President)[1] has already declared publicly that any rehearing before MLB's RSDC would be a *fait accompli* because "sooner or later" MASN will be required to pay the amounts reflected in the vacated award. At least one reason for the Commissioner's prejudgment is MLB's improper financial interest in the outcome.

[1] Robert D. Manfred, Jr., was elected the Commissioner of Baseball on August 14, 2014. He is referred to here as the "Commissioner" or the "current Commissioner." He succeeded Allan H. "Bud" Selig, referred to here as "Commissioner Selig."

The Commissioner, on behalf of MLB, executed a private agreement with the Nationals wherein MLB took *a $25 million stake in the outcome of the dispute*—a sum that MLB has paid out to the Nationals and can now recover *only if* the RSDC rules against MASN.

MLB's systemic bias is underscored by the steps it has taken to defend the award—and thus its partial conduct with respect to that award. MLB initially *tried to block judicial review* of the award, going so far as *to threaten* MASN and the Orioles with sanctions if MASN exercised its statutory right to seek vacatur. Then, when the trial court enjoined MLB from making good on that threat, MLB *actively litigated against* MASN and the Orioles. MLB asserted the correctness of the award and even defended its total failure to address the numerous conflicts of interest that undermined the integrity of the arbitration (most of which MLB also failed to disclose) that were a focal point of the trial court's vacatur order.

Moreover, in pleadings, affidavits, and arguments, MLB vigorously expressed positions on issues central to the outcome of a future rehearing, including the ultimate issue in the arbitration—the amount of telecast rights fees MASN should pay the Nationals. MLB has disparaged MASN's positions as "false," "groundless," "baseless," "inaccurate," and "misleading." And now, MLB seeks reinstatement of the award on appeal. MLB's advocacy in these proceedings exposes MLB's prejudgment, and its lack of objectivity and neutrality.

No panel appointed by MLB could be fair and impartial either. The record demonstrates that MLB dominated and controlled every aspect of the arbitration. MLB not only wrote the award, but orchestrated the arbitrators' deliberations and injected itself directly into every aspect of the arbitral decision-making process. In practical effect, MLB functioned as the *de facto* fourth arbitrator:

- *The current Commissioner actively participated in the merits hearing*, questioned witnesses and counsel, and made substantive statements. He and nearly a dozen high-ranking MLB officials took part in the panel's meetings, telephone calls, and deliberations;

- *MLB wrote the award*, which the arbitrators adopted nearly word-for-word. The current Commissioner openly admitted that "*we* [*the Commissioner's Office*] *wrote the whole thing*";

- *MLB instructed the RSDC as to its charge*, which the current Commissioner later admitted failed to adhere to the express mandate in the arbitration clause;

- *MLB and the current Commissioner made critical procedural rulings, without informing the arbitrators*, including withholding from the arbitrators MLB's complete refusal to address flagrant attorney conflicts of interest to which MASN and the Orioles had objected;

- *MLB and the current Commissioner acted as the "gatekeeper"* and, unbeknownst to the Orioles and MASN, decided which documents and information to pass on to the arbitrators;

- *MLB assessed the evidence and analyzed information and data* uniquely in MLB's possession, which it withheld from MASN yet relied on in the award; and

- *MLB failed to disclose to MASN and the Orioles the full scope of its and the panel's relationships with the Nationals' lawyers in the arbitration*, who also represented MLB, the Commissioner and the interests of all three arbitrators, which only came to light through discovery.

When MASN and the Orioles agreed to arbitrate before the RSDC, they expected—and had a right to expect—a fair and impartial proceeding, as the trial court found. R.113, 118-19. They could not have anticipated that the Commissioner and MLB would exercise such pervasive control over every aspect of the arbitrators' deliberations and decision-making and be incurably biased, as the evidence shows. Nor could they have expected that MLB would take a financial interest in the outcome of the proceedings.

These and other disqualifying factors cannot be remedied by the Commissioner's appointment of new members to the RSDC, as MLB has proposed, or by any other internal measures. MLB and the RSDC are so completely entangled, and MLB's dominion and control over the panel's decision-making process is so extensive, that they cannot be separated. Nor can MLB's endorsement of the award, its financial interest in the outcome of the dispute, or its and the Commissioner's expressed predetermination be cured.

Worse yet, through the Commissioner's public pronouncements, MLB's public filings and affidavits, and internal MLB briefings, every Club effectively has been instructed regarding the Commissioner's and MLB's expected outcome of any rehearing. Given the Commissioner's plenary power over the Clubs, the well of potential RSDC arbitrators has been poisoned.

This Court should not accept that a party is condemned to return to a demonstrably partial, incurably biased, and financially interested institution, under whose auspices a rehearing would be nothing more than a show trial. To do so would be contrary to settled law. The courts of New York and the United States have held it "*obvious*[]" that after vacating an award for evident partiality, bias, or misconduct, a trial court has the power and duty to order a remedy that will ensure an impartial rehearing. *Hyman v. Potterberg's Ex'rs*, 101 F.2d 262, 265 (2d Cir. 1939) (L. Hand, J.); *accord Sawtelle v. Waddell & Reed, Inc.*, 304 A.D.2d 103, 117 (1st Dep't 2003); *see, e.g.*, *Stroehmann Bakeries, Inc. v. Local 776*, 969 F.2d 1436, 1446 (3d Cir. 1992); *Olan v. Allstate Ins. Co.*, 212 A.D.2d 362, 363 (1st Dep't 1995). And courts have exercised that authority even where it has the consequence of replacing arbitrators that the parties have specifically named in their agreement to arbitrate. *E.g.*, *Pitta v. Hotel Ass'n of N.Y.C., Inc.*, 806 F.2d 419, 423-24 (2d Cir. 1986). As these cases and others make clear, the courts' overriding concern has been to ensure that parties to arbitrations receive the most fundamental aspect of due process—a fair and impartial decision-maker.

The simple and undeniable truth is that MASN and the Orioles cannot receive a fair and impartial hearing under MLB's auspices. The time-honored principles of fairness, neutrality, and due process that underpin the FAA compel rehearing in an independent and neutral forum outside of MLB. To hold otherwise

in these circumstances would undermine the legitimacy of arbitration as a means of dispute resolution. For these and other reasons explained below, this Court should direct rehearing under the auspices of an independent and neutral institution outside of MLB and its compromising influence, or, alternatively, make clear that the trial court has authority to order such relief.

QUESTIONS PRESENTED

1. Whether a trial court that has vacated an arbitral award for evident partiality because the institution under whose auspices the arbitration was held demonstrated an utter lack of concern for fairness has the authority to order rehearing before a different and neutral panel outside that partial institution's ambit and control.

The trial court held that it lacked the authority to order such a remedy.

2. Whether the trial court abused its discretion in failing to order rehearing before a different and neutral panel outside of an institution's ambit and control, where the institution that administered the prior arbitration (i) controlled the arbitration and intertwined itself in the arbitrators' decisional process, including by drafting the award; (ii) actively opposed the petition to vacate the award; (iii) made public statements that the institution is predisposed against the parties that successfully vacated the award; and (iv) has a significant financial stake in the outcome of the arbitration.

The trial court held it that lacked authority to order such a remedy.

STATEMENT OF THE CASE

I. The Settlement Agreement Was Struck To Compensate The Orioles For The Nationals' Intrusion Into Its Historic Market And Exclusive Television Territory.

A. With MLB's Encouragement, The Orioles Spent More Than Three Decades Investing Heavily In The Washington, D.C. Market And Established A Regional Sports Network.

After the Washington Senators left Washington, D.C. in 1972, the Baltimore Orioles were the exclusive MLB Club in the Mid-Atlantic region between Philadelphia and Atlanta. R.137 ¶ 41, R.753. The Orioles had the right to telecast (or license others to telecast) the Club's local games within that territory. Other than overlapping areas in the outermost fringes, no other Club had the right to telecast (or license others to telecast) its local games within that territory. R.138 ¶ 42 & n.9, R.3100. The Orioles' exclusive television territory extended to all of D.C., Virginia, Maryland, and Delaware, and parts of West Virginia, North Carolina, and Pennsylvania ("Television Territory"). *See* R.215, R.1041.

With MLB's encouragement and support, the Orioles expended considerable resources to cultivate fan loyalty and commercial backing throughout the D.C. area. R.137 ¶ 41. In 1992, the State of Maryland built a $200 million state-of-the-art ballpark at a site "selected specifically to allow easy access for baseball fans from the entire State [of Maryland] and Washington, D.C. region." R.1036.

In 1993, the Orioles' current owner, the Baltimore Orioles Limited Partnership (BOLP), acquired the Club for a then-record price of $173 million.[2] This price included not only the Club's exclusive Television Territory, but also the value of its current and reasonably anticipated revenues, fan loyalty, goodwill, and business opportunities in the Washington market. *See* R.138 ¶ 43, R.1907.

The Orioles succeeded in growing the Club's value and fan base. In 1996, the Orioles formed a regional sports network, or "RSN," called TCR, to telecast its games throughout the Orioles' exclusive Television Territory. Wholly owned by the Orioles, TCR operated as *O's TV* and the Orioles invested heavily in its development. R.138 ¶ 42; R.1041 ¶ 3; R.1042 ¶ 5. By 2004, the Washington area accounted for more than one-third of the Orioles' fan base and significant revenues, advertising, and sponsorships. R.1042 ¶ 6.

B. MLB Broke Its Promise Never To Locate An MLB Club In Washington Without The Orioles' Consent.

In 2002, MLB purchased the failing Montreal Expos for $120 million. R.138 ¶ 44. Rumors soon surfaced that MLB planned to relocate the Expos and then sell the Club. Concerned that MLB might seek to move the Expos to Washington, the Orioles sought and obtained assurances from MLB that it would never do so without the Orioles' consent. R.138-39 ¶ 44.

[2] Although BOLP and the Orioles have separate rights and interests under the Settlement Agreement, this brief refers to them together as "the Orioles" unless specificity is required.

Despite those promises, upon which the Orioles relied, on September 29, 2004, MLB announced that it intended to relocate the Expos and rename the Club the Washington Nationals. R.139 ¶ 44. The Orioles immediately objected, knowing that introducing a Club into Washington, D.C. would dilute the Orioles' market, cause fan attrition, diminish the value of its rights in its exclusive Television Territory, and undermine the Orioles' investments in the Washington area. R.139 ¶ 45. Experts retained by the Orioles estimated that the Orioles would suffer at least $21 to $30 million in lost revenues, rights, and opportunities *annually* if the Nationals gained access to the Washington market, wholly apart from harms to TCR separately estimated at $25 million *annually*. R.1042-43 ¶ 6. MLB never disputed those annual projections of financial harm. R.141 ¶ 50; R.1043 ¶ 8.

For MLB to maximize its profit from a sale of the Nationals and for that Club to be financially viable, the Nationals needed access to the Orioles' exclusive Television Territory and markets. *See* R.796-97 ¶ 8. To persuade the Orioles to grant that access, MLB needed to compensate the Orioles for the annual and recurring harms the Nationals' relocation would cause. R.140-41 ¶¶ 50-51. A solution proposed by MLB ultimately became the basis for the 2005 Settlement Agreement.

C. To Compensate The Orioles, MLB Proposed Converting TCR Into A Two-Club Network That Would Telecast Both Clubs' Games, With The Majority Of The Network's Profits Flowing To The Orioles.

To compensate the Orioles for those substantial harms and to allow the Nationals access to the Orioles' previously exclusive Television Territory and markets, the Orioles agreed to convert TCR into a partnership between the Orioles and the Nationals in which the Orioles would hold a supermajority interest. Rebranded as MASN, the RSN holds the exclusive right to telecast both Clubs' games throughout the Orioles' Television Territory. The Orioles' annual reparative compensation is derived through MASN's profits, which are distributed to the Orioles and the Nationals in proportion to each Club's respective ownership interest. *See* R.141-44 ¶¶ 51, 57-58; R.1043-47 ¶¶ 8, 13-17; R.797 ¶ 9, R.1031-34.

Because telecast rights fees (*i.e.*, fees the RSN pays to the Clubs to telecast their games) are MASN's single largest expense, the amount of those fees directly affects MASN's profitability and thus the amount available for the Orioles' annual reparative compensation. The more MASN pays in telecast rights fees, the less it has to distribute in profits; hence, any increase in telecast rights fees necessarily decreases the Orioles' compensation. *See* R.956, R.1046-47 ¶ 17, R.1225-26 ¶ 34.

Unsurprisingly, therefore, the negotiations leading up to the Settlement Agreement focused heavily on the methodology for determining the telecast rights fees. R.796-801 ¶¶ 6-24; *see* R.1046 ¶ 13. During those negotiations, MLB

proposed using a methodology for determining the fair market value of telecast rights fees that had been used by the RSDC for many years. Specifically, MLB proposed using "*the RSDC's established methodology for evaluating all other related party telecast agreements in the industry*." R.841 (emphasis added); *see* R.799 ¶ 19. To convince the Orioles to accept this methodology, MLB provided the Orioles with written precedent of the RSDC and a ruling by the Commissioner—issued by MLB contemporaneously with the settlement negotiations—expressing the meaning of "the RSDC's established methodology" and confirming that this methodology was the one and only methodology approved by the RSDC, the Commissioner, and MLB. R.800-01 ¶¶ 21-23; *see also* R.1169-70 ¶ 10.

"[*T*]*he RSDC's established methodology*" is an accounting based profit margin analysis derived from an RSN's actual revenues and expenses, and is often referred to in the Commissioner's and the RSDC's written precedent as the "Bortz" methodology—so named for MLB's long-time consultant that developed it, Bortz Media and Sports Group, Inc. ("Bortz"). *See* R.1169-70 ¶ 10. Significantly, in the Commissioner's Ruling to the RSDC's Eighteenth Report issued in January 2005—in the midst of the settlement negotiations—Commissioner Selig unequivocally opined that the Bortz methodology is MLB's only authorized methodology for determining the fair market value of a related-party RSN's

telecast rights fees. R. 674. In that Ruling, Commissioner Selig stated that he was "unwilling to endorse *any material variation* from the objective and consistent Bortz methodology that has served the industry so well." R.676 (emphasis added). The Orioles relied on MLB's representations and MLB's and the RSDC's written precedent when accepting MLB's proposal to use the RSDC's well established and long-standing methodology to determine the fair market value of telecast rights fees in the Settlement Agreement.

Until the award in this case, the Commissioner consistently endorsed and the RSDC consistently applied that established (*i.e.*, Bortz) methodology for *all other* related-party RSNs in the industry. Indeed, on at least 19 occasions, over the decade and a half leading up to the award, Bortz applied "the RSDC's established methodology" to determine the fair market value of a related-party RSN's telecast rights fees, and the RSDC accepted that methodology and its determination of fair market value. R.147 ¶ 66; R.1169-70 ¶¶ 7, 11.

D. The Settlement Agreement Adopts "The RSDC's Established Methodology."

Consistent with MLB's proposal, the parties agreed to Section 2.J.3 of the Settlement Agreement, which mandates that the RSDC "*shall*" determine the fair market value of the Nationals' telecast rights fees "*using the RSDC's established methodology for evaluating all other related party telecast agreements in the industry*." R.203 (emphasis added). That language expressly mandates the non-

discretionary application of the longstanding and consistently applied methodology reflected in the written precedents of the RSDC and MLB, discussed above.[3]

For the years 2007-2011, the Settlement Agreement provides a fixed schedule of telecast rights fees. R.202 § 2.G. MLB determined these sums, which were consistent with financial projections prepared by its consultant. *See* R.145 ¶ 61, R.797-99 ¶¶ 10-15. MLB represented that the profit margins reflected in these financial projections were "industry norm," and that the telecast rights fees set forth in the Settlement Agreement were equal to their fair market value. *See* R.142-45 ¶¶ 52, 61; R.1044 ¶ 9; R.797-99 ¶¶ 11, 15.

For each subsequent five-year period, beginning in 2012, the Settlement Agreement contemplates that MASN and the Nationals will negotiate in good faith to arrive at a mutually agreeable fee amount. R.202 § 2.I. If no agreement is reached, the Settlement Agreement provides that the parties shall first attempt to mediate and then, if that is unsuccessful, arbitrate before the RSDC. In any such arbitration, Section 2.J.3 of the Settlement Agreement requires the RSDC to apply the non-discretionary mandate set forth therein to establish the fair market value of the Nationals' telecast rights fees.

[3] Before the ink was dry on the Settlement Agreement, prominent MLB Club owners serving on MLB's Executive Council (the League's highest governing body and chaired by the Commissioner) expressed their disdain for the settlement and were already discussing possible ways to change its terms to the Orioles' detriment. R.1031-34.

E. After Entering Into The Settlement Agreement, MLB Sold The Nationals For A Substantial Profit.

The Settlement Agreement cleared the path for MLB to sell the Nationals to the Lerner Group in 2006 for almost $450 million—over $300 million more than MLB had paid to acquire the Club just four years before.[4] R.144 ¶ 59; R.2996 ¶ 6.

From 2007 to 2011, MASN paid the fixed telecast rights fee amounts as determined by MLB and stated in the Settlement Agreement.[5] During this time, the value of the Nationals' franchise increased dramatically, reaching $1.3 billion by one recent estimate. R.3533-34, R.3586-92. MASN grew steadily in viewers and revenue, and the Orioles received the agreed-upon annual compensation for the Nationals' incursion into the Club's markets through its supermajority share of MASN's profits.

II. When A Telecast Rights Fee Dispute Arose Under The Settlement Agreement, MLB Conducted A Biased Arbitration That Reached An Illegitimate Result.

In autumn 2011, MASN, with MLB's consent, retained Bortz to determine the fair market value of the Nationals' telecast rights for the five-year period starting in 2012. R.1047 ¶ 19; R.1172 ¶ 18. Bortz prepared a five-year telecast rights fees *pro forma* using the methodology set forth in Section 2.J.3 of the

[4] The Lerner Group still owns the Nationals.

[5] Although the Nationals now claim that the telecast rights fees for that period were below market, MLB set those fees when it owned the Nationals and represented to the Orioles during the negotiations that they were at fair market value. *Supra* p. 14. According to Bortz, those fees were empirically at fair market value. R.1241 ¶¶ 5-7.

Settlement Agreement—the same methodology Bortz had developed for and consistently applied on behalf of the RSDC. R.1047-48 ¶¶ 19-21; R.1172-73 ¶¶ 18, 22. But, on January 4, 2012, when MASN presented the *pro forma* to the Nationals, the Nationals' representative literally ripped it apart, declaring that the Nationals "deserved more and would get more." R.1048 ¶ 23; R.1172-73 ¶ 19. The parties then submitted the dispute to arbitration before the RSDC, which commenced in early 2012.

A. Over Objections, MLB Permitted Its Outside Counsel To Represent The Nationals In The Arbitration While Representing MLB, All Three Arbitrators, And Their Interests.

When the arbitration commenced, the Nationals were represented by *MLB's* longtime outside counsel, Proskauer Rose LLP. R.153 ¶ 85; R.801 ¶ 27. MASN and the Orioles were immediately concerned because they knew Proskauer had a long-term relationship with MLB, having represented MLB in a variety of matters over the years, R.153-54 ¶ 85; R.1049 ¶ 26, and because they understood MLB would have some role in administering the RSDC arbitration, *see, e.g.*, R.858 (the Commissioner explained that the RSDC would be staffed by "[his] people … , members of [MLB's] finance department and [MLB's outside] auditor"). Based on that understanding, MASN and the Orioles objected to Proskauer's participation and sought complete disclosure of MLB's and the individual arbitrators'

relationships with Proskauer.[6] R.1244-52 ¶¶ 2-19; R.802-09 ¶¶ 29-51; *see* R.161-62 ¶ 109.

MLB responded that Proskauer had represented it "in the labor area for a number of years," provided "services … in connection with [a] Los Angeles Dodgers [management] matter and other matters," assisted in "a small number of seminars/conference calls for Club counsel … about ADA and DOJ enforcement," R.850, and possibly did "salary arbitration for [T]ampa." R.858; *see* R.162 ¶ 110. That was the *full extent* of MLB's disclosures. Later, when MASN and the Orioles requested leave to contact the arbitrators directly regarding any potential conflicts, MLB refused, saying it would be improper. R.2401 ¶ 25.

Proskauer's actual ties to both MLB and the arbitrators were far more extensive than MLB disclosed. Discovery in the vacatur proceeding revealed that during the pendency of the arbitration, Proskauer represented MLB, its executives, and closely related entities in *49* different engagements and it also represented "interests associated with all three arbitrators." R.112 (trial court order)[7]; *see* R.2568-69 ¶¶ 3-4; R.2903-05 (listing MLB representations). Remarkably, during the arbitration, Proskauer also represented Commissioner Selig in negotiations of

[6] While Proskauer had represented the Nationals during the short-lived negotiations leading up to the arbitration, those negotiations did not involve MLB and, thus, no conflict of interest was evident at that time.

[7] In its November 2015 order vacating the award, the trial court stated that the number of concurrent engagements was "nearly 30," but pointed to evidence demonstrating that the actual number is "nearly 50." *See* R.35.

his $22 million-per year employment contract extension with MLB. *See* R.2740; R.2902. As the trial court succinctly observed, Proskauer represented "virtually every participant in the arbitration *except for* MASN and the Orioles." R.37.

Based on the incomplete information then available, MASN and the Orioles objected strenuously to Proskauer's representation of the Nationals in the arbitration. *See* R.872-73. But at a prehearing conference in February 2012, the Commissioner refused to disqualify Proskauer, saying he did not believe he had that authority. R.2937-38 ¶ 5; R.807 ¶ 44; *see* R.19-20; R.159 ¶¶ 101-103. During the arbitration, MASN and the Orioles repeated their objections at least *eighteen* times. *See* R.2397-2406 ¶¶ 10-38 (detailing objections and responses). The Commissioner's only response was to grant MASN a continuing objection, R.2402-03, ¶¶ 26-29, and to promise that MLB would "never assert" that the objection had been waived, R.2493. As the trial court found, MLB simply failed to "take[] MASN's objections seriously, and actually do[] something about it." R.38.

B. MLB Made Procedural Rulings, Screened Party Submissions, Participated In The Deliberations, And Drafted The Award, Functioning In Effect As A *De Facto* Fourth Arbitrator.

During the arbitration, there were signs that MLB's role with the arbitrators went far beyond the administrative support historically provided to the RSDC, and crossed over into the merits. Discovery obtained in the vacatur action—over

MLB's strenuous opposition—showed the line between administrator and arbitrator had been thoroughly erased.

For instance, the Commissioner—not the arbitrators—conducted the prehearing conference, established the procedures for the arbitration, and refused to preclude Proskauer from participating. *See* R.2401-02 ¶¶ 23, 27.a; R.2949 ¶ 11; *supra* p. 18. None of the arbitrators were present when these rulings were made, *e.g.*, R.1852 ¶ 36, and discovery revealed that the Commissioner never informed them of these objections and decisions. He told MASN and the Orioles "to document your reservation of rights *by means of letters to me*," R.2476 (emphasis added), and MASN and the Orioles did precisely that, *see, e.g.*, R.850, R.873, R.1231, R.2482-83. The arbitrators aver that they have no recollection of these disclosure requests or objections. *See, e.g.*, R.1851-53 ¶¶ 34-39.[8]

The Commissioner—not the arbitrators—also denied MASN's requests for the RSDC's rulings and financial data for other Club-owned RSNs, despite the obvious relevance of this information to the proceedings, given the arbitrators' contractual mandate to apply "the RSDC's established methodology" applicable to "*all other* related party telecast agreements in the industry," and the positions being advanced by the Nationals. R.813-14 ¶ 69, R.1010. And the Commissioner even

[8] The arbitrators claim they do not recall *ever* learning of any objection to Proskauer's involvement, R.1851-53 ¶¶ 34-39; R.1861-62 ¶¶ 34-39; R.1869-71 ¶¶ 31-36, even though MASN and the Orioles reiterated their objection in their written submissions, R.883 n.1, and at the merits hearing itself, R.2942 ¶ 9; R.809 ¶ 53.

sat alongside the arbitrators at the merits hearing and directed factual and legal questions to counsel as though he were an arbitrator. R.2945 ¶ 4; R.2953-54 ¶ 12. Discovery would reveal that even this involvement in the merits was only the tip of the iceberg.

In its initial pleadings, MLB downplayed its involvement with the RSDC and the arbitration. MLB argued that its relationship with Proskauer could not have tainted the proceedings because the Commissioner and his staff only provided the arbitrators with "administrative and other support." R.1762 ¶ 6. But when MASN and the Orioles sought discovery to test these assertions, MLB changed its tune. Seeking to block discovery, MLB claimed that it had been *deeply* involved in the arbitrators' substantive work, contending, for example, that "MLB attorneys, at times *including* [*the current Commissioner*], provide[d] *legal advice to the* [*RSDC*]" and "*assist*[*ed*] *in preparing draft decisions*." R.2922 ¶ 5 (emphasis added). MLB thus asserted that document discovery would invade the arbitrators' deliberative process and attorney-client privileges.

The court determined, however, that limited discovery was warranted. The post-discovery record, including MLB's privilege log, demonstrates that MLB, through the Commissioner and a number of high-ranking MLB staffers:

- *Wrote* the now-vacated award, *see* R.2955-56 ¶¶ 15, 19; R.2934 ¶ 26;
- *Participated* in a call with the arbitrators before the merits hearing and in the post-hearing arbitrators' deliberations, *see* R.3081, 3088 (emails

discussing call), R.3085-86 (attendance notes and emails regarding calls and meetings);

- *Instructed* the arbitrators as to their charge and the meaning of the Settlement Agreement, *see* R.2955-56 ¶¶ 15, 17; R.2987 ¶ 23; *cf.* R.2934 ¶ 27; *see also* R.1052 ¶ 38;
- *Selected* which information the arbitrators received, *see* R.2402-03 ¶ 27; R.2950 ¶ 11(a); R.2927 ¶ 20(a);
- *Provided* the arbitrators with confidential summaries of the parties' merits submissions and analyzed the evidence, *see* R.2898-2901 (MLB privilege log describing multiple "[c]onfidential summar[ies] of parties' submissions");
- *Obtained* financial information from MASN and analyzed it for the arbitrators "along with legal analysis performed by MLB in-house attorneys," *see* R.3151-52 ¶ 6; and
- *Analyzed* other financial information that was uniquely in MLB's possession, which MLB refused to provide to MASN yet relied upon in the award, *see* R.1765 ¶ 16.

MLB's production revealed that the Commissioner and his staff controlled the entire flow of information to the arbitrators and withheld correspondence, documents, and information provided by the parties from the arbitrators without disclosing to the parties that it was doing so.[9] In practical effect, MLB decided, in place of the arbitrators, what information was relevant, material, and germane to deliberations.[10]

[9] *Compare* R.2952-53 ¶ 11(f), *and* R.2958-71 (MASN was asked by MLB for specific information on Feb. 7, Mar. 2, Mar. 29, and June 19, 2012, which MASN provided on Feb. 13, Mar. 12, Mar. 30, and June 22, 2012), *with* R.3166 (MLB document production reveals only that it sent "more detailed information from MASN" to the arbitrators on April 2, 2012).

[10] The trial court erred in characterizing MLB's role as "generally akin to the support that a law clerk provides to a judge, or that the staff of an established arbitration organization may provide to its arbitral panels." R.30. The evidence shows MLB's influence and control ran far deeper.

MLB also performed legal and economic analyses that were presented to the arbitrators but never provided to the parties. *See* R.3151-52 ¶ 6; R.2898-2901. These analyses were evidently so extensive that documents produced by MLB demonstrate nearly a dozen high-ranking MLB officials contributed, joined in the task by additional outside consultants.[11] *See* R.2890-2901; R.3080-92.

Nor did MLB limit its involvement in the panel's deliberations to written communications. The record shows that these MLB officials and consultants joined calls with the arbitrators and participated in the arbitrators' meetings and deliberations. *See* R.3084-88. Precisely what MLB and its consultants told the arbitrators remains unknown because MLB asserted the deliberative process and attorney-client privileges in discovery. *See* R.2898-2901 (MLB privilege log). But those assertions alone make the point: MLB *concedes* it was integrally involved in the RSDC's decisional process.

Indeed, MLB even admits that it *wrote* the now-vacated award, which expressly deviated from the mandated methodology set forth in the arbitration clause. The Commissioner admitted that "MLB staff had prepared a draft decision for the RSDC's review." R.2934 ¶ 26. MLB and the arbitrators also appear to

[11] In addition to the Commissioner, these participants included Robert Starkey (now MLB CFO & Senior Advisor), Daniel Halem (MLB Chief Legal Officer), Christopher Marinak (MLB Senior VP, League Economics and Strategy), Christopher Park (MLB Senior VP, Growth and Strategy), Patrick Houlihan (MLB VP and Deputy GC, Labor Relations), Jonathan Mariner (MLB Chief Investment Officer), Kathleen Torres (MLB Executive VP, Finance), Robert Clark (MLB Senior VP, Accounting), and Tad Myoshi (MLB Director of Industry Financial Reporting).

have discussed MLB's "draft" on a call, but the only change from the call was to a single footnote. R.3081. Documents produced by MLB also indicate that two of the arbitrators subsequently made minor typographical edits to MLB's "draft"; it does not appear the third arbitrator made any changes or comments. *See* R.3090, 3092. Consistent with this evidence, the Commissioner later told the Orioles' counsel: "we wrote the whole thing." R.2956 ¶ 19. Despite ample opportunity to do so, he has never denied making this statement.

C. During The Arbitration, MLB Paid The Nationals $25 Million Under Then-Undisclosed Terms That Allow MLB To Recover The Funds Now Only Through An Award That Favors The Nationals.

The MLB-written award was issued in June 2014, two years after the arbitration began. Throughout this period, MASN was paying the Nationals the fees calculated by Bortz using the contractually mandated methodology, just as MASN continues to do today. The Nationals, however, had been told by MLB that there was a draft award granting the Nationals roughly $20 million more *per year* than the Bortz-calculated amount, and the Nationals began pushing for the award's release. R.1929-33 ¶¶ 51, 55-62.

In response, MLB made a stunning decision. In August 2013, unbeknownst to the Orioles or MASN, MLB paid the Nationals a $25 million "make whole" payment to cover the difference between the Bortz-calculated fees MASN was paying the Nationals and the higher fees set forth in the then-still-unissued award.

R.2917-18. MLB documented this payment in a letter agreement that it made with the Nationals.

Under this agreement, "*if the RSDC issues a decision that covers 2012 and/or 2013, any payments from MASN* otherwise due to the Nationals *will be made first to [MLB]* to cover" the $25 million, plus interest. R.2918 (emphasis added).[12] MLB's counsel informed the trial court that the Nationals will "*never* have to repay these funds [the $25 million] … no matter what happens with the RSDC"; rather, "the funds would [be] paid, *by MASN, to* [*MLB*], to recoup what [MLB] had laid out." R.2844 (emphasis added).[13]

The Orioles and MASN are not parties to this agreement and long were kept in the dark about its terms. At the time of the 2013 advance, they only knew that MLB was considering a payment of approximately $7.5 million to encourage the Nationals to participate in negotiations. R.2407 ¶ 40. MLB first asked MASN to fund that payment, and MASN refused. *Id.* The current Commissioner then wrote to the Orioles' counsel, saying:

> I believe that *I have resolved* 2012 and [20]13 in a way that will allow [us] to move ahead. *We will fund the entire cost of the resolution*. I will not ask Peter [Angelos, owner of the Orioles,] for the [$]7.5 million previously discussed.

[12] The letter agreement provided in the alternative that MLB could recover the $25 million if MASN was sold to a third party, R.2918, which did not happen.

[13] The trial court's suggestion that *the Nationals* would repay the $25 million, *see* R.33-34, was mistaken. It was undisputed below that the payment was *non-recourse* to the Nationals. R.2844.

R.2496 (emphasis added). Thus, far from disclosing the actual terms of the MLB-Nationals deal, the current Commissioner said that *MLB* would "fund the entire cost of the resolution." MASN and the Orioles first learned the actual *amount* of the payment ($25 million, not $7.5 million as MLB previously represented) in late 2013. *See* R.2408 ¶¶ 42, 44-45. They did not know that there were any *repayment terms*, or learn the substance of those terms, until March 2014. R.2409-10 ¶¶ 48-49. And they did not *receive a copy* of the MLB-Nationals' agreement until the Nationals produced it in discovery. R.2570 ¶ 12.[14]

D. The MLB-Authored Award Ignored The Contractually-Mandated Methodology, Threatening MASN And The Orioles With Considerable Financial Harm.

Commissioner Selig delivered the award on June 30, 2014. R.216. Despite the arbitrators' non-discretionary contractual mandate to apply "the RSDC's established methodology" applicable to "*all other* related party telecast agreements in the industry," the award gave the Nationals over *one hundred million dollars* more than the amount Bortz had calculated using the same methodology the RSDC had used every time before. *See* R.234, R.1182. Indeed, the award expressly failed to treat MASN like "*all other*" related-party RSNs in the industry, declaring

[14] The trial court was thus mistaken to suggest that the $25 million payment "was not undertaken in secret." R.34. Nearly every material fact about the payment was concealed from MASN and the Orioles—including that MLB and the Nationals expected MASN to repay it.

that the award "shall not constitute precedent of the RSDC" in future telecast rights fees determinations for other Clubs. R.217 n.2.

The MLB-drafted award dispensed with the Bortz methodology's two bedrock premises uniformly made applicable to *"all other"* related-party RSNs in the industry: a profit margin of at least 20% from baseball programming, and a historically-accepted allocation of revenues and expenses between baseball and other programming.[15] *See* R.1170-74 ¶¶ 12, 26. Instead, in the words of the consultant who originally developed the Bortz methodology for the RSDC and MLB, the award deployed "outside the norm assumptions" and "cherry picked data" and was so "grossly different" from the established methodology that it "completely corrupt[ed] the established methodology." R.1180 ¶ 38 (affidavit of Mark Wyche).[16] Moreover, according to a well-respected media rights economist, the award relied on "assumptions and approaches that are so outside the norms of accepted economic standards that the resulting valuation of the Nationals' telecast

[15] Because the trial court found it was bound to uphold "even a barely colorable justification" of the arbitrators' interpretation of the contract under the manifest-disregard standard for vacatur, it "decline[d]" MASN's and the Orioles' "invitation to review extrinsic evidence," including MLB's and the RSDC's written precedent expressing the RSDC's established methodology. R.29. This and other evidence demonstrates that the award clearly failed to apply the methodology applicable to "all other" related party RSN's in the industry as mandated in the Settlement Agreement. *See* R.638-77; *see also* R.1174-80 ¶¶ 25-38.

[16] Mark Wyche is a Managing Director of Bortz and was MLB's principal consultant at that firm for over a decade and a half prior to the award. R.1168-69 ¶¶ 2, 7. MLB ended its relationship with Wyche (and Bortz) after Wyche submitted evidence on MASN's behalf in the arbitration as to the meaning and consistent application of the telecast rights fees methodology that he and Bortz had developed for the RSDC.

rights is illegitimate and unreliable." R.1212 ¶ 5. If allowed to stand, the resulting telecast rights fees would have crippled MASN financially and deprived the Orioles of its annual reparative compensation under the Settlement Agreement.[17] R.1055 ¶ 49.

III. MLB's Actions After Issuing The Award Contradict Any Claim Of Impartiality Or Neutrality.

A. MLB Issued Threats Of Coercive Sanctions To Prevent MASN and the Orioles From Seeking Judicial Review of MLB's Conduct.

After Commissioner Selig delivered the award, MLB immediately sought to quash any judicial review. Commissioner Selig initially threatened the principal owners of both Clubs with "the strongest sanctions available … under the Major League Constitution" if either Club, or MASN, invoked its legal right to challenge the award in court. R.569. MASN nevertheless petitioned to vacate the award under the FAA and sought rehearing in a neutral forum outside MLB's control. The Nationals sought confirmation.

In response, Commissioner Selig again threatened MASN with sanctions "not limited to monetary penalties," R.577, and demanded "the immediate withdrawal" of MASN's vacatur petition, R.570. He also ordered MASN to pay

[17] Although the Nationals claim that the Orioles were to derive the full extent of the Club's compensation through supposedly "below-market" telecast rights fees for 2007-2011, that assertion is nowhere to be found in the Settlement Agreement and is expressly contradicted by record evidence, including the minutes of a March 28, 2005 MLB Executive Council meeting, wherein the Settlement Agreement was ratified by MLB. Those minutes confirm that the Settlement Agreement was intended to compensate the Orioles for ongoing harms, R.1031-34, and to do so "in perpetuity," R.1033.

the amounts ordered in the award, despite the pending litigation regarding the award's validity. R.574. These threats (and others from the Nationals) forced MASN to seek and obtain a temporary restraining order and a preliminary injunction against the Nationals and MLB. The trial court explained that absent such relief, the "[C]ommissioner's directive … would permit possible extortion of one side by the other" before the court could "examin[e] [] the propriety of the [arbitral] process." R.511-12.

B. MLB Vigorously Sought To Defend Its Award.

After its sanctions threats failed, MLB vigorously defended its award, urging confirmation and opposing rehearing in a neutral forum. In filings, arguments, and affidavits in the vacatur action, MLB, the Commissioner, and other high-ranking MLB officials expressed settled views on the dispute, including positions that are central to the ultimate issue—the fair market value of telecast rights fees. They also disputed MASN's factual account of the underlying events. For example, the current Commissioner called MASN's claims and factual assertions "false," "groundless," "baseless," "inaccurate," and "misleading." R.3170-84 ¶¶ 11, 20, 38, 41. He also attested that MASN's and the Orioles' consistent interpretation of the Settlement Agreement "did not conform to the text." R.3181 ¶ 40.

C. MLB's Commissioner Publicly Rebuked MASN And The Orioles For Pursing Their Vacatur Petition, And Revealed His Predetermination Of Any Rehearing.

In addition to providing written testimony to the trial court, the Commissioner—who appoints the RSDC members—made public statements at press conferences disparaging MASN's and the Orioles' positions, further evidencing MLB's predetermined views of the merits.

For example, on May 22, 2015, only three days after the trial court hearing on the vacatur petition and before the decision was rendered, the Commissioner publicly attacked MASN's efforts to protect its rights in court. At a press conference during a quarterly MLB Club Owner's meeting, he said that the award had been correctly decided and that MASN could expect the same result in any future arbitration under MLB's control, stating: "I think the agreement's clear"; "the RSDC was empowered to set rights fees," and "that's what they did"; and "*sooner or later MASN is going to be required to pay those rights fees*" as set out in the now-vacated award. R.3426 (emphasis added); *accord* R.3427. And in May 2016, again during an Owners' meeting, the current Commissioner publicly accused the Orioles of "engag[ing] in a pattern of conduct designed to avoid th[e settlement] agreement being effectuated." R.3702.

IV. The Trial Court Vacated The Award For Evident Partiality.

A. The Court Found That MLB Displayed An "Utter Lack of Concern For Fairness" In The Arbitral Process.

The trial court vacated the award on November 4, 2015, due to MLB's evident partiality. *See* 9 U.S.C. § 10(a)(2). The court found that MLB allowed Proskauer to represent (in many cases, simultaneously) everyone involved in the RSDC arbitration *except* MASN and the Orioles, including MLB itself. *See* R.34-37; *supra* pp. 16-18. The court held that MLB's total failure to address these conflicts was "unquestionably inconsistent with impartiality" and "objectively demonstrates an utter lack of concern for fairness of the proceeding" that was "so inconsistent with basic principles of justice" as to require vacatur. R.41.

Nonetheless, the court declined to order rehearing before arbitrators outside of MLB's ambit, stating only (in a footnote) that to remove the dispute from the RSDC lay "outside of [the court's] authority" and would require "re-writing the parties' Agreement." R.42 n.21. Subsequently, the court explained that its vacatur decision did not "require the parties to return to arbitration under the RSDC." R.121.15.

MASN and the Orioles appealed from the vacatur order insofar as it declined to direct the requested remedy of rehearing in a forum that MLB does not control. R.44; R.63. The Nationals and MLB noticed cross-appeals seeking reinstatement of the vacated award. R.76; R.87.

B. MLB Tried To Reconvene The RSDC Before This Court Could Consider MASN's Challenge To Rehearing In an Arbitration under MLB's Control.

Even after vacatur, MLB continued to align itself with the Nationals. Despite the pending cross-appeals, the Nationals moved the trial court for an order compelling MASN and the Orioles to appear before the RSDC for a rehearing of the 2012-2016 fee determination. R.3480. MASN opposed the motion and filed a cross-motion to stay, arguing that it made no sense to compel a new arbitration while MASN's challenge to a rehearing before the MLB-controlled RSDC was pending before this Court—particularly where MLB and the Nationals had noticed their own appeals seeking reversal of the vacatur decision and the award's reinstatement. R.3527. After initially professing to be neutral, R.3584, MLB reversed course and (on the same day the Nationals' reply papers were due) noticed a new RSDC hearing for the first week of August 2016, R.3683, contending that this notice provided new grounds on which to deny MASN's cross-motion to stay.

On July 11, 2016, the trial court turned aside this effort, once again enjoining MLB from disrupting the litigation process and disturbing the status quo. The trial court explained that its injunction would permit this Court to decide the proper remedy for MLB's partiality in an orderly fashion, and "*that the parties should not be arbitrating, again, without a final determination on the arbitral*

process or forum." R.121.19 (emphasis added). The trial court also explained that its vacatur decision did not "*require the parties to return to arbitration under the RSDC*." R.121.15 (emphasis added).

On July 21, 2016, the Nationals appealed the order denying its motion to compel and granting MASN's cross-motion to stay. The parties have jointly stipulated to consolidate the Nationals' appeal from this July 2016 order with the parties' cross-appeals from the vacatur order.

STANDARD OF REVIEW

In a summary proceeding, a trial court must "make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised." CPLR 409(b). The scope of the trial court's remedial authority under the FAA is a question of law subject to plenary review. The exercise of that authority is a matter of discretion, *see infra* pp. 34-42, as to which this Court can substitute its own discretion for the trial court's even in the absence of abuse, *see Brady v. Ottaway Newspapers, Inc.*, 63 N.Y.2d 1031, 1032 (1984); *Ackerson v. Stragmaglia*, 176 A.D.2d 602, 605 (1st Dep't 1991).

ARGUMENT

After correctly vacating the award because of MLB's evident partiality, the trial court should have ordered rehearing in an independent and neutral forum that

is unaffected by MLB's systemic bias and control, the Commissioner's predetermined views on the merits, and MLB's financial interest in the outcome.

The trial court had established authority to do so. Under Section 10(b) of the FAA, where an arbitral award is vacated for partiality, bias, or misconduct, the vacating court has the power to replace the prior arbitrators, and indeed must do so. That safeguard is necessary to ensure that rehearing occurs before fair and impartial arbitrators, consistent with bedrock principles of due process.

Section 10(b) equally authorizes a trial court to replace a biased arbitral *institution* where, as here, the *institution's* conduct led to vacatur. The underlying principle is the same: the FAA enshrines the right to rehearing before neutral and impartial arbitrators. And, because of MLB's pervasive bias, control over the RSDC process, expressed predetermination of the ultimate issue in dispute, and financial interest in the outcome, MASN and the Orioles cannot receive a fair and impartial rehearing before any panel under MLB's control or influence. Principles of fairness and due process therefore compel rehearing in an independent and neutral forum outside MLB.

I. The Trial Court Failed To Recognize And Exercise Its Broad Remedial Authority To Ensure A Fair And Impartial Rehearing, Especially In Light Of Facts Confirming That MLB Is Not Neutral And Controls The RSDC Proceedings.

A. After Vacating An Arbitral Award for Evident Partiality, A Court Has Broad Authority To Order A Remedy That Will Ensure A Fair And Neutral Rehearing.

Under FAA Section 10(b), "[i]f an [arbitral] award is vacated … the court may, in its discretion, direct a rehearing by the arbitrators." 9 U.S.C. § 10(b). "[C]ourts have discretion" under this provision "to remand a matter to the same arbitration panel or a new one." *Sawtelle v. Waddell & Reed, Inc.*, 304 A.D.2d 103, 117 (1st Dep't 2003); *see also Aircraft Braking Sys. Corp. v. Local 856*, 97 F.3d 155, 162 (6th Cir. 1996) (replacing the arbitrator lies within the vacating court's "broad discretion in fashioning appropriate relief"); *accord Kashner Davidson Sec. Corp. v. Mscisz*, 601 F.3d 19, 25 (1st Cir. 2010). Consequently, after vacating an award, a court "should formulate an appropriate remedy to provide for the resolution of the parties' differences by arbitration, including, if necessary, a procedure whereby a new arbitrator is selected." *Hart v. Overseas Nat'l Airways Inc.*, 541 F.2d 386, 394 (3d Cir. 1976).

It is also established that "[a] new or different arbitrator *should be appointed on remand* if an award is vacated due to [the] arbiter's partiality, corruption, fraud or misconduct." 4 THOMAS H. OEHMKE, COMMERCIAL ARBITRATION § 131:17 (2016 update) (emphasis added); *see In re Lipschutz (Gutwirth)*, 304 N.Y. 58, 63-

65 (1952) (court may remove an arbitrator who is "incapable of discharging his duties in an impartial manner"); *Sawtelle*, 304 A.D.2d at 117 (arbitrators "incapable of carrying out [their] duties impartially" should be replaced); *In re First Nat'l Oil Corp. (Arrieta)*, 2 A.D.2d 590, 592-93 (2d Dep't 1956) (where an award is vacated for evident partiality, "it would of course be anomalous not to direct in the exercise of discretion, that the rehearing be had before new arbitrators"); *cf. Fernandez v. N.Y.C. Transit Auth.*, 29 N.Y.S.3d 175 (1st Dep't 2016) (Mem.) ("The matter should be remitted to the original Arbitrator, because there has been no showing that the original Arbitrator is biased ….").

Courts applying the FAA therefore routinely replace arbitrators where, as here, the grounds for vacatur or the facts of the case call into question their ability to ensure a fair rehearing. *See, e.g.*, *Pitta v. Hotel Ass'n of N.Y.C., Inc.*, 806 F.2d 419, 423-24 (2d Cir. 1986) (financial stake rendered arbitrator evidently partial); *Stroehmann Bakeries, Inc. v. Local 776*, 969 F.2d 1436, 1446 (3d Cir. 1992) (arbitrator's reasoning and conduct showed he "was biased or partial towards" one of the parties); *Grand Rapids Die Casting Corp. v. Local Union No. 159*, 684 F.2d 413, 416-17 (6th Cir. 1982) (similar).[18]

[18] These federal decisions interpreting the FAA are "entitled to great weight." *N.Y. Rapid Transit Corp. v. City of N.Y.*, 275 N.Y. 258, 265 (1937), *aff'd*, 303 U.S. 573 (1938); *Myer v. Shields & Co.*, 25 A.D.2d 126, 128 (1st Dep't 1966) (this Court "give[s] due and great respect" to "the construction of a Federal statute … by Federal courts"). Similarly, cases applying the CPLR offer guidance because "the FAA was modeled after New York's arbitration law," and "no significant distinction can be drawn between the policies supporting the FAA and the

The rationale of these decisions embodies a basic precept of fundamental fairness: if the initial proceeding was tainted by evident partiality, "the arbitrators would then have shown themselves to be unfit to be judges, and *it would be a clear abuse of discretion to trust them further*." *Hyman*, 101 F.2d at 266 (emphasis added). Further, the arbitrators have already heard the evidence and reached a decision colored by the bias of the earlier proceeding. They thus would come to the new arbitration not with an open mind, as basic principles of fairness require, but instead with predetermined views on the merits. *See In re Excelsior 57th Corp. (Kern)*, 218 A.D.2d 528, 531 (1st Dep't 1995).

Courts have not retreated from this established rule where its application has required replacing arbitrators who were specifically chosen in the parties' contract. To the contrary, the courts have prioritized the need to ensure that the rehearing will be impartial. In *Pitta*, for example, the Second Circuit disqualified the arbitrator named in the parties' contract and ordered the appointment of a different arbitrator because the contractually designated arbitrator had "a personal stake" in the dispute. 806 F.2d at 423-24. Similarly, in *Kern*, this Court disqualified a party-designated arbitrator prior to rehearing because his conduct in the prior arbitration

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arbitration provisions of the CPLR." *Smith Barney, Harris Upham & Co. v. Luckie*, 85 N.Y.2d 193, 205-06 (1995). Federal courts applying the FAA thus look to "[c]ases applying New York arbitration law analogous to the FAA" on this very issue. *Tempo Shain Corp. v. Bertek, Inc.*, No. 96-3354, 1997 WL 580775, at *2 & n.3 (S.D.N.Y. Sept. 17, 1997).

and the intervening vacatur action "demonstrate[d] 'evident partiality.'" 218 A.D.2d at 530-32. Again, the logic is simple: just like any other arbitrator, a contractually designated or party-selected arbitrator who has displayed evident partiality cannot be trusted to fairly hear the dispute. *See id.*; *cf. Hyman*, 101 F.2d at 266.

Here, the trial court vacated the award because *MLB* was evidently partial. R.41. And record evidence demonstrates MLB's deep bias, control over the arbitral process, prejudgment of the issues in dispute, and financial interest in the outcome. *See infra* pp. 43-52. Under these circumstances, MLB—and the panel that it appoints and controls—must be replaced to ensure a fair and impartial rehearing. That practical relief is supported by the text of the FAA, the holdings and reasoning of the decisions described above, and basic principles of due process.

MLB and the Nationals nevertheless argued below that courts must turn a blind eye to evident partiality on remand because, in their view, replacing the arbitral institution selected in the parties' agreement would impermissibly "rewrite" the parties' contract. But they never cited a single case in which a court declined to replace an arbitrator or arbitral institution that had been found partial or ruled that its authority to do so was constrained by the parties' agreement. Nor are MASN and the Orioles aware of such authority.

The notion that the parties' contract limits the courts' post-vacatur remedial power is contradicted by the fact that this power is not derived from any contract, but is instead established by statute—namely, by the FAA. As the Second Circuit has explained in rejecting the parallel argument that parties can contract out of the standards of review set forth in FAA Section 10(a), "judicial review is not a creature of contract, and the authority of a federal court to review an arbitration award … does not derive from a private agreement." *Hoeft v. MVL Grp., Inc.*, 343 F.3d 57, 66 (2d Cir. 2003), *overruled on other grounds by Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576 (2008). That is true *notwithstanding* the usual "deference to private agreements to arbitrate." *Id.* at 63.

The same reasoning applies to the courts' remedial authority under Section 10(b). Although the courts typically defer to parties' arbitral agreements, the general rule of deference is limited by the courts' express statutory power to vacate for evident partiality under FAA Section 10(a), and to order rehearing on terms that will ensure a fair process under FAA Section 10(b). *See Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 147 (1968) (Congress intended the FAA "to provide not merely for any arbitration but for an impartial one"); *In re Wal-Mart Wage & Hour Employment Practices Litig.*, 737 F.3d 1262, 1268 (9th Cir. 2013) (the FAA "forecloses a contractual arrangement" to restrict the courts' Section 10 powers because such an arrangement "would not only run counter to the

text of the FAA, but would also frustrate Congress's attempt to ensure a minimum level of due process for parties to an arbitration"). These critical statutory safeguards cannot be annulled or limited by a private contract, because "[j]udicial standards of review … are not the property of private litigants." *See Hoeft*, 343 F.3d at 65. And indeed, the courts have never treated the Section 10(b) remedial power as if it were controlled by the parties' contract. *See supra* pp. 36-37. The same power authorizes courts to replace a partial institution.

The contrary position is also inconsistent with foundational principles of arbitration. Arbitration is inherently "a system whereby disputes are fairly resolved by an *impartial* third party." *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999) (emphasis added). To hold that parties have no choice but to return to a demonstrably partial institution cannot be squared with that fundamental premise, and would establish precisely the sort of "technical and unsubstantial barrier[]" to fair and efficient arbitration that the courts have repeatedly rejected. *See Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1067-68 & n.2 (2d Cir. 1972) (affirming replacement of contractually designated arbitrator on partiality grounds).

Indeed, if the FAA did not grant courts the power to disqualify and replace biased arbitral institutions, serious constitutional concerns would arise. "[D]ue process requires a neutral and detached judge in the first instance, *and the*

command is no different when a legislature delegates adjudicative functions to a private party." *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 617, 630 (1993) (emphasis added). Neutrality is so central to due process that "[e]ven appeal and a trial *de novo* will not cure a failure to provide a neutral and detached adjudicator." *Id.* at 618. Constitutional avoidance thus provides yet another reason to reaffirm the trial court's power to craft an appropriate post-vacatur remedy that ensures impartiality. *See In re Jacob*, 86 N.Y.2d 651, 667 (1995).

To be sure, not many cases address bias on the part of the arbitral *institution*. That is because most arbitral institutions are scrupulously neutral and maintain clear lines of separation between the arbitrators and arbitral institution. They also play no substantive role in the arbitration. Thus, when *panel or arbitrator* bias occurs, there is usually "no suggestion that [the institution] itself is biased or incapable of providing a fair arbitration proceeding." *Kashner Davidson*, 601 F.3d at 24-25 (discussing replacement of individual FINRA arbitrators). In such cases, merely replacing the arbitrators suffices to ensure a neutral process.

None of that is true of MLB. Here, as the court found, it was *MLB* that "objectively demonstrate[d] an utter lack of concern for fairness of the proceeding." R.41. Further, MLB maintained none of the usual lines of separation between panel and arbitral institution. Unlike MLB, the staff of arbitral institutions

do not join the arbitrators in questioning counsel at a hearing, R.2945 ¶ 4; R.2953-54 ¶ 12, do not offer their own substantive analyses of the dispute and the evidence, R.2922 ¶ 5; R.3151-52 ¶ 6; R.2898-2901, and certainly do not grab the pen and write the award, R.2934 ¶ 26; R.2956 ¶ 19; *see* R.3090, 3092.[19]

Nor would AAA or any other arbitral institution ever pay tens of millions of dollars to a party, link repayment of that money to the outcome of the dispute, defend the resulting award against vacatur, take public positions on the validity of the award, or issue press statements evidencing that a rehearing would be *a fait accompli* and attacking a party's positions on the ultimate issues. *See supra* pp. 23-29. And if AAA or any other arbitral instruction were to engage in such conduct, no court would insist that the matter be remanded to it for rehearing—even if the parties' contract so provided. *Cf. Rabinowitz v. Olewski*, 100 A.D.2d 539, 540 (2d Dep't 1984) (in a pre-award case, affirming the trial court's order removing dispute from the industry group designated by the parties, because the prospect of bias "permeate[d] the entire" group). An institution that has acted as a partisan with respect to an arbitration, both in public and behind closed doors, and that has a vested financial stake in the outcome, simply cannot be trusted to act on rehearing with the impartiality required by the FAA.

[19] For example, in an AAA arbitration, a case manager is assigned to handle the "administrative aspects of the case." Significantly, "[h]e or she does not decide the case. He or she only manages the case's administrative steps, such as exchanging documents, matching schedules, and setting up hearings." R.3711.

For all of these reasons, simply naming new RSDC members, as MLB has done, R.3670, is not remotely sufficient to ensure a fair and impartial rehearing. That is particularly so where the arbitrators are appointed by the Commissioner and can be removed by the Commissioner at any time. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 493 (2010) ("[O]ne who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will."). MLB's and the Commissioner's pervasive influence over the MLB Club Owners appointed to the RSDC will remain.

Because the RSDC and MLB (which already heard the evidence and formed opinions on the ultimate issue to be decided on rehearing) cannot be trusted to provide the fair and neutral process that the FAA and basic arbitral principles require, there is simply no alternative but to look outside MLB for a neutral decision-maker. That remedy is fully consistent with the Court's "broad discretion in fashioning appropriate relief" under FAA Section 10(b), *Aircraft Braking Sys.*, 97 F.3d at 162, "including, if necessary, a procedure whereby a new arbitrator is selected," *Hart*, 541 F.2d at 394.[20]

[20] Moreover, replacing the biased and financially interested institution, MLB, is less drastic than the alternative of holding that the arbitration clause simply fails, releasing the parties to litigate in court, which the FAA requires where the parties' intent to arbitrate cannot be effectuated. *See In re Salomon Inc. S'holders' Derivative Litig.*, 68 F.3d 554, 561 (2d Cir. 1995).

B. MLB's Pervasive Bias, Utter Lack Of Concern For Fairness, Stated Predetermination Of And Continued Financial Interest In The Outcome Confirm That This Dispute Must Be Removed From MLB's Purview And Referred To A Neutral Arbitral Institution.

Further, the circumstances of this case demand that the authority granted by Section 10(b) be exercised to order rehearing outside of MLB's ambit. As the trial court correctly found, MLB displayed an "utter lack of concern for fairness of the proceeding" that was "inconsistent with basic principles of justice." R.39-41. On that basis alone "it would … be anomalous not to direct … that the rehearing be had" before a neutral and independent panel. *See Arrieta*, 2 A.D.2d at 593.

But there is more. MLB has engaged in a broad range of overtly partial conduct, including by taking a *direct monetary stake* in the outcome of this dispute. MLB's $25 million payment to the Nationals in anticipation of an award in that Club's favor remains outstanding. And the prejudicial weight of that payment and its repayment terms cannot be ignored—or minimized. Under repayment terms agreed to solely between MLB and the Nationals (without MASN's or the Orioles' knowledge), MLB can now recover its $25 million payment to the Nationals only through an award rendered *by the RSDC* that *favors the Nationals*.

MLB's letter agreement with the Nationals states that MLB will recoup its $25 million advance via any "payments from MASN otherwise due to the Nationals" under an "RSDC … decision that covers 2012 and/or 2013." R.2918.

Because MASN has already paid the Nationals the Bortz-calculated telecast rights fees for that period, there will be additional "payments from MASN" *only if* the RSDC rules in favor of the Nationals in a new arbitration. If, on the other hand, no additional funds are awarded to the Nationals by the RSDC, there will be no such payments and MLB would be (in its own counsel's words) "out the money." R.2845.

Accordingly, allowing the MLB-controlled RSDC to adjudicate this dispute would, to quote the Commissioner, place MLB back in a position to "recover[] our [$]25 million … out of additional MASN payments due to the issuance of an RSDC opinion." R.2498. This would violate the fundamental constitutional principle that "no man is permitted to try cases where he has an interest in the outcome." *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016); *see also Pitta*, 806 F.2d at 423 (replacing arbitrator for this reason).

Below, the trial court concluded (erroneously) that MLB's $25 million payment to the Nationals, which the court referred to as an "advance," did not provide an independent ground for vacatur.[21] The trial court's reasoning, however—that "MLB set the amount of the advance with full knowledge of the

[21] This was error because arbitrators may *never* adopt a "direct financial interest" in any matter before them. *See Coty Inc. v. Anchor Const., Inc.*, 7 A.D.3d 438, 439 (1st Dep't 2004) (affirming vacatur where arbitrators involved themselves "in the parties' dispute over prepayment of arbitration fees, a matter in which the arbitrators had a direct financial interest"). The same is surely true for an arbitral institution, particularly one that controls all aspects of the arbitration, is directly and substantially involved in the panel's deliberations, provides confidential legal advice to the panel, and writes the panel's award.

amount of the planned RSDC Award," R.33—actually underscores why the existence of this debt disqualifies MLB from having any involvement in the rehearing. As the court said, MASN's and the Orioles' argument that MLB should be disqualified because of this debt and its repayment terms "would be stronger if the advance had been made *before* the parties were informed of the RSDC's internal decision." *Id.* (emphasis added).

That, of course, is precisely the situation that would exist if this dispute were returned to the RSDC. MLB's payment to the Nationals now precedes the rehearing, and, obviously, precedes any decision on the merits. Thus, MLB has a present and direct financial stake in the outcome of the dispute—which would be decided by a panel it appoints, advises, and controls. The existence of a *current* $25 million financial stake in the outcome disqualifies MLB from conducting the rehearing.

What is more, MLB is adverse to MASN and the Orioles in these and other related proceedings, and has actively supported the Nationals' attempts to confirm the award. This conduct is further evidence of MLB's bias and another reason that the rehearing cannot occur under MLB's influence or control. MLB first tried to bar MASN from seeking judicial review by threatening "the strongest sanctions available." *Supra* p. 27. MLB, through its Commissioner, made these threats even though the applicable law creates an absolute and unwaivable right to seek judicial

review of an arbitral award. *See Wal-Mart*, 737 F.3d at 1268; *Hoeft*, 343 F.3d at 64-65. The trial court halted that brazen effort to interfere with its jurisdiction and MASN's rights by issuing a preliminary injunction. MLB also tried, again on pain of sanctions, to force MASN to pay the Nationals the amounts that were purportedly due under the now-vacated award before MASN could litigate its challenge to the award. *Supra* pp. 27-28. This too was halted by the trial court's injunction.

MLB then litigated in tandem with the Nationals, urging confirmation and opposing remand to a neutral arbitral institution. In the vacatur proceeding, MLB also argued (frivolously) that MASN and the Orioles had waived their objections to Proskauer's participation, breaking the current Commissioner's express promise "*never* [to] assert that [they] waived [their] objection to [P]roskauer's involvement." R.2493 (emphasis added); *see* R.36. And when the Court vacated the award, MLB appealed (again, alongside the Nationals).

This joint litigation effort featured affidavits from the Commissioner and senior MLB staffers disputing MASN's factual account of the underlying events and expressing the Commissioner's views on the proper construction of the Settlement Agreement. In particular, the Commissioner said in a sworn affidavit that MASN's and the Orioles' interpretation of the Settlement Agreement "did not conform to the text," R.3181 ¶ 40—thus telegraphing MLB's view on the ultimate

issue in any rehearing. The Commissioner and MLB even went so far as to disparage MASN's and the Orioles' claims and factual assertions (which are grounded in documentary evidence) as "false," "groundless," "baseless," "inaccurate," and "misleading." R.3170-84 ¶¶ 11, 20, 38, 41.

MLB's recent litigation conduct reinforces why it must be disqualified. When the Nationals prematurely moved to compel a rehearing before the RSDC (even as MASN and the Orioles were appealing to this Court to disqualify that very body), MLB initially expressed that it would not take sides in that motion sequence. Yet, just hours before the Nationals' reply papers were due, MLB reversed course and announced that it would promptly convene a rehearing before the "reconstituted" RSDC. MLB then opposed MASN's cross-motion to stay, arguing that it would convene the RSDC *regardless* of the trial court's ruling. Once again, it took a court order to preclude MLB from its attempts to circumvent MASN's and the Orioles' rights to judicial review. R.121.19. No disinterested institution under whose auspices an arbitration is conducted would try even once to interfere with the oversight or appellate functions of the courts. MLB is a repeat offender.

That MLB cannot fairly preside over this dispute is further shown by the extent of the Commissioner's *personal* involvement in every aspect of the prior arbitration, including the drafting of the now-vacated award. The Commissioner

sat with the RSDC during the hearing, questioned counsel, R.2945 ¶ 4; R.2953-54 ¶ 12, and participated in the panel's deliberations, *see* R.3081-86 (notes and emails regarding RSDC calls and meetings). He was the one who refused to disqualify Proskauer, R.2937-38 ¶ 5; R.807 ¶ 44, and who (with his staff) instructed the RSDC as to the meaning of the Settlement Agreement, *see* R.2955-56 ¶¶ 15, 17; R.2987 ¶ 23; *cf.* R.2934 ¶ 27.

He attested that he *personally* gave legal advice to the panel, on subjects that remain undisclosed because of MLB's privilege assertions. R.2922 ¶ 5; *see* R.2898-2901 (privilege log); *e.g.*, R.3087 (redacted emails among arbitrators, Commissioner, and MLB staff). His staff decided what party information would (and would not) reach the RSDC, *see* R.2402 ¶ 27; R.2949-50 ¶ 11(a); R.2927 ¶ 20(a); "analyzed … detailed financial information" and provided "legal analysis" regarding the dispute, *see* R.3151-52 ¶ 6; R.2898-2901; and then drafted the award, R.2934 ¶ 26. And the Commissioner *personally* negotiated and signed the letter-agreement with the Nationals concerning MLB's $25 million payment. *Supra* pp. 23-25.

No wonder, then, that the Commissioner has personally expressed strong views about how the dispute should be resolved and the correctness of the award. At a May 2015 press conference held in connection with a MLB Club Owners' meeting, he said: "I think the agreement's clear [as to] MASN … I think the

RSDC was empowered to set rights fees. That's what they did, and I think sooner or later MASN is going to be required to pay those rights fees."[22] R.3426; *accord* R.3427. And at a June 2016 press conference (also held in connection with a MLB Club Owners' meeting), the Commissioner voiced his view that "[*t*]*he Orioles have engaged in a pattern of conduct designed to avoid that agreement being effectuated*." R.3702 (emphasis added).

In fact, the Commissioner's conduct resembles the actions that prompted this Court to disqualify an arbitrator in *Kern*. There, the parties agreed to arbitrate before a three-member panel, in which each side appointed an arbitrator, who jointly appointed the third. The initial award was vacated because (like here) one of the arbitrators failed to disclose a material relationship. 218 A.D.2d at 529. During the trial court's review of the award, a different arbitrator "displayed extreme partisanship with respect to the issues still to be determined in this very arbitration." *Id.* at 530. In particular, his affidavits "unequivocally [stated] that he d[id] not agree with the petitioner's … method" for valuing the property at issue and urged the court not to vacate the award. *Id.* at 530-31. The Court held that the

[22] As noted above, MASN has been paying the Nationals the amount of telecast rights fees calculated using the Bortz methodology throughout this dispute. What MASN disputes and is not paying, is the approximately $20 million per year in *additional* fees that the award improperly ordered. Thus, when the Commissioner said, "sooner or later MASN is going to be required to pay *those rights fees*," he was necessarily referring to the very amounts that are the subject of this litigation.

second arbitrator could not serve on rehearing, given his "comments concerning the prior arbitration including, but not limited to, his statements about the petitioner's conduct, and his precarious position of having already heard the evidence." *Id.* at 531.

The same is true here. Through its Commissioner and numerous high-ranking MLB staff, MLB has "heard the evidence." *Id.* MLB's Commissioner has made "comments concerning the prior arbitration" and "statements about [MASN's] conduct," and has "unequivocally [stated] that [it] d[id] not agree with [MASN's] … method" of construing the Settlement Agreement. *Id.* at 530-31; *see supra* p. 28. And the Commissioner's plenary power over the Clubs, *e.g.*, R.568-77, will allow him to extend his partisanship to any rehearing in this dispute.

Unquestionably, the interpretation of the Settlement Agreement will be *the* central issue in a new arbitration and the amount of telecast rights fees will be the ultimate issue to be decided. *See supra* pp. 11-14, 25-27. Those are precisely the issues that MLB and the Commissioner have already decided, and as to which they have publicly expressed their views. No one could reasonably expect the Commissioner, MLB, or any arbitrator operating under their auspices to be impartial. *See Morris v. New York Football Giants, Inc.*, 150 Misc. 2d 271, 277 (Sup. Ct. N.Y. Cnty. 1991) (NFL Commissioner's "past advocacy of a position in opposition to plaintiffs' position … deprive[d] him of the necessary neutrality" to

serve as arbitrator); *cf. Williams*, 136 S. Ct. at 1906 (a previously adversarial decision-maker may "consciously or unconsciously avoid the appearance of having erred or changed position").

This conduct supplies still further reason to send the dispute to an institution other than MLB, and to a panel of arbitrators that MLB did not choose and cannot influence or control. That the Commissioner has appointed three new MLB Club owners to the RSDC, R.3670, changes nothing. MLB remains under the control of the very same officials, including the Commissioner, who insinuated themselves so deeply into every aspect of the prior arbitration. MLB can thus guide the new arbitrators to its preferred result just as a easily as it could the prior arbitrators. *See Hooters of Am.*, 173 F.3d at 939 ("Given the unrestricted control that one party … has over the panel, the selection of an impartial decision maker would be a surprising result.").

MLB has also already signaled to the new arbitrators, through its vigorous advocacy below and the Commissioner's public pronouncements, what it expects the outcome to be—"sooner or later" MASN will have to pay. Thus, the very same person who appoints the RSDC members has publicly expressed definitive views as to the Orioles' and MASN's positions and—most disturbingly—as to the ultimate issue in the dispute, the amount of telecast rights fees MASN will be obligated to pay. In light of the Commissioner's plenary powers, his public

pronouncements carry enormous weight with MLB Clubs and will certainly be known to the MLB Clubs since they were made in connection with MLB Club Owners' meetings. It is clear that the well of potential MLB Club arbitrators has been poisoned.

II. Alternatively, MLB And The RSDC Must Be Disqualified Because MLB's Bias Has Frustrated The Parties' Intent To Conduct A Fair And Impartial Arbitration Of The Telecast Rights Fee Dispute.

Alternatively, the Court should hold that the Settlement Agreement must be reformed to remove the dispute from MLB's control and influence because the parties' intent for a neutral arbitration has been frustrated.[23]

In agreeing to the RSDC as the arbitral panel for the telecast rights fees dispute, MASN and the Orioles reasonably expected—and had a right to expect—procedural integrity, fundamental fairness, and neutrality. They could not have expected MLB's proven partiality or that the Commissioner and MLB would exert control over every aspect of the arbitral body's deliberations and decision-making, including writing the award. Nor could they expect that the Commissioner and MLB would threaten sanctions against them; litigate alongside the Nationals;

[23] One option for reformation is laid out in the Settlement Agreement itself. Alongside the § 2.J.3 process that MLB so completely corrupted in this case, the parties agreed to arbitrate a wide range of disputes arising under the Settlement Agreement before a three-person panel, under the Commercial Rules of the American Arbitration Association (AAA). R.209 § 8.C. They specified that the "panel shall be constituted of persons with specialized knowledge, experience or expertise in broadcasting, media rights, or professional sports." *Id.* And notably, they specifically contemplated that AAA arbitration would be used in cases where the MLB has a "financial interest in the Nationals or [MASN]." *Id.* § 8.B.

publicly assert the validity of the award and make public pronouncements on issues central to the ultimate issue on rehearing; and publicly chastise them for asserting their rights in court. And the Orioles and MASN never could have expected that MLB would take a financial interest in the outcome of any such arbitration. In all of these ways, MLB has frustrated the parties' intent to submit their dispute to a neutral decision-maker.

MLB and the Nationals argued below that the trial court had no power to replace the institution designated in the parties' contract. As explained above, pp. 34-43, that claim cannot be squared with the courts' broad post-vacatur remedial authority, which must be exercised to replace evidently partial actors before rehearing—even if those actors are named in the parties' agreement. Likely for that reason, MLB and the Nationals primarily relied below on cases addressing the removal of arbitrators *before* arbitration has occurred, where FAA Section 10(b) is not yet implicated. Those cases are inapposite where, as here, an award has already been rendered—and vacated. But even if they applied, they would equally require replacing MLB and the RSDC.

The Nationals principally relied on *Aviall, Inc. v. Ryder System, Inc.*, 110 F.3d 892 (2d Cir. 1997). *Aviall*, however, addressed an attempt to remove the parties' designated arbitrator "*before* an award ha[d] been rendered." *Id.* at 895. The court stressed that often—but not always—a challenge to "the qualifications or

partiality of arbitrators" is properly brought "in a proceeding to confirm or vacate an award, which necessarily occurs after the arbitrator has rendered his service." *Id*. *Aviall* thus does not address the court's authority to replace arbitrators—and institutions—when it has *already* vacated an award for evident partiality.

Regardless, applying *Aviall* here would lead to the same result. *Aviall* holds that where unforeseen events have "frustrate[d] … the parties' contractual intent to submit their dispute to a neutral expert," a court may reform the contract by "substituting a neutral arbitrator." *Id.* at 896; *see also Fleming Cos., Inc. v. FS Kids, L.L.C.*, No. 02-0059, 2003 WL 21382895, at *4 (W.D.N.Y. May 14, 2003) ("a court has the power to remove an arbitrator" where "unforeseen intervening events have frustrated the intent of the parties" or "the unmistakable partiality of the arbitrator will render the arbitration a mere prelude to subsequent litigation"); *Masthead MAC Drilling Corp. v. Fleck*, 549 F. Supp. 854, 856 (S.D.N.Y. 1982) (same). Indeed, the Second Department has squarely held that this power includes authority to remove a dispute from the auspices of an industry arbitral institution, due to evidence of bias among the members. *See Rabinowitz*, 100 A.D.2d at 540. That is precisely the remedy that MASN and the Orioles seek here.

For all the reasons explained above—MLB's "utter lack of concern for fairness," the outstanding $25 million payment, MLB's adversarial and partial role in post-award litigation, the Commissioner's prejudicial conduct, and MLB's

domination of the RSDC, *see supra* pp. 15-32—unforeseen events have frustrated the parties' intent for a neutral arbitration. MASN knew that RSDC members would be drawn from the baseball community, but when MASN agreed to *arbitrate* in front of the RSDC, it expected a fair and neutral proceeding. *See Hooters of Am.*, 173 F.3d at 939 (collecting authorities discussing "the most fundamental aspect of justice [in arbitration], namely an impartial decision maker").

Accordingly, even if the Court concludes that a contract-reformation analysis is appropriate, the right result would remain that the Settlement Agreement should be reformed by barring MLB and the RSDC from any arbitral role. *See Aviall*, 110 F.3d at 896; *Rabinowitz*, 100 A.D.2d at 540; *cf. Hooters of Am.*, 173 F.3d at 939-40 (where one party was obligated to establish a neutral arbitration, but created a biased process instead, the other party could not be compelled to arbitrate).

Two other cases from the professional sports context are illustrative. In *Erving v. Virginia Squires Basketball Club*, the parties' contract provided that any dispute would be arbitrated by the Commissioner of the American Basketball Association. 349 F. Supp. 716, 718 (E.D.N.Y.), *aff'd*, 468 F.2d 1064 (2d Cir. 1972). When a dispute arose, however, the recently appointed Commissioner was a partner in the law firm representing the defendant. *Id.* at 719. The district court

therefore held that the "arbitration should proceed before a neutral arbitrator." *Id*. The Second Circuit agreed that a substitution "to insure a fair and impartial hearing" was required "in spite of the contract clause naming the Commissioner as arbitrator." 468 F.2d at 1067 & n.2; *see also Aviall*, 110 F.3d at 896 (*Erving* "reformed the contract by substituting a neutral arbitrator").

Morris v. New York Football Giants, Inc. is similar. That case concerned a dispute between two football players and their former teams. The parties' agreement "expressly provide[d] that the disputes be submitted to the Commissioner of the NFL" for arbitration. 150 Misc. 2d at 276. But the NFL Commissioner had previously advocated strongly against the players' positions. *Id.* at 277. He was also named as a defendant in the underlying action. *Id.* The trial court held that the Commissioner's "past advocacy of a position in opposition to plaintiffs' position herein, deprive[d] him of the necessary neutrality to arbitrate these claims." *Id.* To rule for the plaintiffs, he "would have to reverse certain positions he previously strongly advocated, and declare non-binding or void a certain directive he, through his office, issued." *Id.*

This reasoning applies equally here. The Commissioner "heard the evidence," *Kern*, 218 A.D.2d at 529, and provided legal advice to the panel regarding the dispute, *see* R.2922 ¶ 5. He also defended the now-vacated award in court filings and in the press. *Supra* pp. 28-29; *see Porter v. City of Flint*, 736 F.

Supp. 2d 1095, 1098 (E.D. Mich. 2010) (relying on *Aviall* to remove an arbitrator who commented about one of the parties to the press). For the RSDC to rule for MASN now, the Commissioner would have to "reverse [the] positions he previously strongly advocated," *Morris*, 150 Misc. 2d at 277, and perhaps retract legal advice he previously provided. And ruling for MASN would have a "major financial impact" on MLB, *id.*, because it would mean forsaking $25 million.

The record demonstrates that MLB has frustrated the parties' contractual intent to conduct a fundamentally fair and neutral arbitration. Reformation is thus fully warranted and would be a suitable remedy in light of the combined efforts of MLB and the Nationals to jettison the negotiated constraints of the Settlement Agreement, and with it, basic principles of procedural regularity and due process.

CONCLUSION

MLB's systemic bias, publicly declared prejudgments, and financial interest in the outcome disqualify it—and any arbitrators it influences—from conducting a rehearing of this dispute. Basic principles of fundamental fairness and due process compel rehearing in an independent and neutral forum beyond the reach of MLB and any arbitrators under its influence. This Court should direct that relief, or, alternatively, make clear that the trial court has such authority and remand for further proceedings.

August 22, 2016

Respectfully submitted,

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PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 NYCRR § 600.10 that the foregoing brief was prepared on a computer using Microsoft Word 2007.

Type. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman
Point size: 14
Line spacing: Double

Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, and this Statement, is 13,987.

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

TCR SPORTS BROADCASTING HOLDING, LLP,

Petitioner-Appellant,

-against-

WN PARTNER, LLC; NINE SPORTS HOLDING, LLC; WASHINGTON NATIONALS BASEBALL CLUB, LLC; THE OFFICE OF COMMISSIONER OF BASEBALL; and THE COMMISSIONER OF MAJOR LEAGUE BASEBALL,

Respondents-Appellees,

-and-

THE BALTIMORE ORIOLES BASEBALL CLUB and BALTIMORE ORIOLES LIMITED PARTNERSHIP, in its capacity as managing partner of TCR SPORTS BROADCASTING HOLDING, LLP,

Nominal Respondents-Appellants.

Index No. 652044/2014
(IAS Part 41)

PRE-ARGUMENT STATEMENT

Petitioner-Appellant TCR Sports Broadcasting Holding, LLP (d/b/a the Mid-Atlantic Sports Network or "MASN") ("Petitioner-Appellant" or "MASN"), hereby submits this Pre-Argument Statement pursuant to Section 600.17(a) and (b) of the Rules of the Appellate Division, First Department.

1. TITLE OF ACTION

The title of the action is as set forth in the caption above.

2. FULL NAMES OF THE PARTIES

The full names of the parties are as follows: (i) Petitioner-Appellant is TCR Sports Broadcasting Holding, LLP (d/b/a the Mid-Atlantic Sports Network or "MASN"); (ii) Nominal Respondents-Appellants are The Baltimore Orioles Baseball Club (the "Orioles") and Baltimore Orioles Limited Partnership ("BOLP"), in its capacity as managing partner of TCR Sports Broadcasting Holding, LLP; and (iii) Respondents-Appellees are WN Partner, LLC, Nine Sports Holding, LLC, Washington Nationals Baseball Club, LLC (the "Nationals"), The Office of Commissioner of Baseball and The Commissioner of Major League Baseball ("MLB").

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5. COURT AND ORDER FROM WHICH APPEAL IS TAKEN

This limited appeal is taken from certain parts of a November 4, 2015 Decision and Order of the Supreme Court of the State of New York, County of New York, Commercial Division I.A.S. Part 41 (Justice Lawrence K. Marks). The Decision and Order granted Petitioner-Appellant MASN's petition to vacate an arbitral award, denied that petition to the extent that it sought the further relief of ordering rehearing before a new, neutral and independent forum, and denied Respondent-Appellee the Nationals' cross-motion to confirm the award. Notice of entry of the order on appeal was served on November 13, 2015 and is attached hereto as Exhibit 1.

6. NATURE AND OBJECT OF THE CASE

On or about July 2, 2014, Petitioner-Appellant MASN commenced a special proceeding to vacate an arbitration award under 9 U.S.C. § 10(a) and CPLR § 7511(b)(1). The award was rendered on June 30, 2014 (the "Award") by MLB's Revenue Sharing Definitions Committee (the "RSDC") in a dispute between MASN and BOLP, on the one hand, and the Nationals, on the other. The dispute concerns the amount of telecast rights fees to be paid by MASN to the Nationals for the years 2012 to 2016, under the terms and conditions of a 2005 Settlement Agreement entered into among the parties to compensate the Orioles for the economic harms caused by the introduction of the Nationals into the Orioles' previously-exclusive markets.

MASN sought vacatur on several grounds. Chief among them were that the Award was procured through evident partiality, and that the arbitrators exceeded the scope of their authority and manifestly disregarded the law by facially differentiating the methodology used to determine the telecast rights fees in the Award from their "*established methodology* for evaluating *all other* related party telecast agreements in the industry," in direct contradiction to the mandate set forth

in the contract. (Emphasis added). MASN also asked the Court to order rehearing in an impartial forum, outside of MLB and the RSDC.

With respect to vacatur on the grounds of evident partiality, MASN asserted, among other things, that MLB and the RSDC, sitting as the arbitral panel, lacked any semblance of impartiality or neutrality for a number of reasons, including because the Nationals' counsel in the arbitration, Proskauer Rose LLP ("Proskauer") (i) concurrently represented MLB executives and closely-related entities in approximately 50 engagements, including league-wide, "bet the company" litigation; (ii) had previously represented MLB numerous times in matters of similar importance; and (iii) had represented (or was concurrently representing) one arbitrator individually, one arbitrator's family-held corporation, as well as his father personally, and all three arbitrators' Baseball Clubs (all arbitrators were Club owners or executives). Further, MASN asserted that MLB and the RSDC were conflicted by, among other things, MLB's financial interest in the outcome of the arbitration by virtue of a $25 million advance made to the Nationals, which MLB could only recoup if MASN were sold (which never transpired) or the RSDC issued an award against MASN in excess of the amounts properly determined using the contractually-mandated methodology.

On September 23, 2014, MASN filed an Amended Verified Petition to Vacate the Award and supporting papers. Nominal Respondents-Appellants Orioles and BOLP, in its capacity as managing partner of TCR Sports Broadcasting Holding, LLP, filed papers in support of that Petition on the same date.

On October 20, 2014, Respondent-Appellee the Nationals filed a Notice of Cross-Motion to Confirm the Award and papers in opposition to MASN's Amended Petition to

Vacate. Respondent-Appellee MLB also filed papers in opposition to MASN's Amended Petition to Vacate and in support of the Nationals' Cross-Motion to Confirm.

After limited discovery and briefing, the hearing on MASN's Amended Petition to Vacate and the Nationals' Cross-Motion to Confirm the Award was held on May 18, 2015.

7. RESULT REACHED BELOW

In a Decision and Order of the Supreme Court of the State of New York, County of New York, by the Honorable Lawrence K. Marks, I.A.S. Part 41, dated November 4, 2015, and entered at the Office of the Clerk of the County of New York on November 4, 2015 (the "Decision and Order"), the Court properly vacated the Award for evident partiality and denied the Nationals' Cross-Motion to Confirm.

In so doing, the Court found "there are objective facts that are unquestionably inconsistent with impartiality." Decision and Order at 27. The Court was particularly critical of MLB's and the RSDC's "*complete inaction*" in the face of MASN's and the Orioles' "well-documented concerns" regarding Proskauer's representation of the Nationals. *Id.* (emphasis added). In the Court's words, their failure to act "*objectively demonstrates an utter lack of concern for fairness of the proceeding that is 'so inconsistent with basic principles of justice' that the award must be vacated*." *Id.* (citation omitted) (emphasis added). Neutrality, the Court stressed,

> *is so fundamental to any adjudicative process that trust in the neutrality of the adjudicative process is the very bedrock of the [Federal Arbitration Act]. It is upon that foundation, and in great reliance upon it, that courts can defer to processes decided upon and designed by private contract.* But without neutrality, where partiality runs without even the semblance of a check, the alternative process created does not warrant — and cannot be given — the great deference that arbitrators, and their awards, are bestowed by courts under the Federal Arbitration Act.

Id. at 28 (emphasis added).

Despite vacating the Award for evident partiality, however, the Court concluded that it did not have the legal authority to hear the dispute itself or direct that rehearing be held before a neutral arbitration panel outside of MLB's control. Accordingly, the Court denied MASN's and the Orioles' request that the Court do so. The Court's reasoning is provided in footnote 21:

> For example, the Orioles argue that remand to the RSDC process would be futile, and therefore the matter should be referred to "a panel of arbitrators that is not subject Baseball's corrupting influence, such as a panel convened under the auspices of the American Arbitration Association." Orioles Mot. Br. at 16. *The Court, however, notes that rewriting the parties' Agreement is outside of its authority*. (Emphasis added).

MASN now appeals this erroneous legal determination.

8. GROUNDS FOR APPEAL

While the Court properly vacated the Award on evident partiality grounds, it erroneously held as a matter of law that it did not have the authority to order that the determination of the telecast rights fees payable to the Nationals take place before a new, neutral and independent forum, be it before new arbitrators outside of MLB's ambit or in court.

By way of summary, and without limitation, both the Federal Arbitration Act (9 U.S.C. § 10(b)) and the Civil Practice Law and Rules (§ 7511(d)) grant courts the power to order rehearing before different arbitrators after vacating an arbitral award. Both New York and federal case law confirms that power. Alternatively, other precedent supports the court's authority to adjudicate the dispute itself. The Supreme Court's ruling that it lacked this authority as a matter of law was simply erroneous.

Further, rehearing in a new and neutral forum, independent from MLB, is plainly warranted in this case. As the prior proceedings demonstrate, MLB and the RSDC would be hopelessly and irreparably conflicted in any new RSDC arbitration. Uncontroverted evidence

below shows that MLB, which controls the RSDC, and the Commissioner, who appoints the RSDC members in his sole discretion:

- Wrote the now-vacated Award;
- Endorsed the now-vacated Award in filings, pleadings and affidavits in the case below;
- Participated in the merits hearing, asked questions and made rulings;
- Participated directly in the arbitrators' deliberations;
- Made critical and dispositive procedural and substantive decisions impacting the outcome of the arbitration; and
- Made subsequent public comments that prejudge and predetermine the outcome of a future arbitration, which were included in the record.

So pervasive was MLB's involvement that it objected to the discovery of any documents in the case below relating to MLB's control over the RSDC or the arbitral process, the full nature of its participation in the arbitration and its influence on the Award. MLB argued that its actions were shielded because it served as the arbitrators' legal advisors, functioned as the arbitrators' law clerks and participated in the arbitrators' decisional process.

Overseeing it all was the then-MLB Executive VP of Economics and League Affairs, today the Commissioner of Baseball. The Commissioner appoints the RSDC members in his sole discretion from a pool generally comprised of MLB Club owners or principals, and the RSDC members report directly to him. All of them are aware of this litigation, the Commissioner's endorsement of the RSDC's now-vacated Award and the Commissioner's determination that MASN will eventually pay the amounts previously awarded by the RSDC to the Nationals.

Indeed, on May 22, 2015, a mere three days after the Supreme Court hearing in this case, and included in the record in this case, the Commissioner publicly addressed the RSDC Award at a press conference he convened at the end of a MLB Club owners' meeting. He said that the

Award was correctly decided and that MASN could expect the same result in any future arbitration under MLB's control, stating: "I think the agreement's clear in MASN"; "The RSDC was empowered to set the rights fees, and that's what they did"; and "*Sooner or later MASN is going to be required to pay those rights fees*" set out in the now-vacated RSDC Award. (Emphasis added). Because of this, no potential RSDC member can be neutral and impartial: the RSDC as a forum is conflicted and thoroughly compromised.

MLB also strenuously objected to MASN's Petition to Vacate, even going as far as to threaten MASN with sanctions for invoking its legal right to challenge the Award in court. When those threats failed, MLB actively defended the Award in written pleadings and oral submissions. The Commissioner, numerous other high-ranking MLB officials and all three arbitrators also submitted affidavits in opposition to MASN's Petition to Vacate and in support of the Nationals' Cross-Motion to Confirm. Any reasonable person would have to conclude that after 18 months of unsuccessfully attempting to defend the RSDC's biased award (which MLB wrote), and siding with the Nationals throughout the process, MLB will be biased in favor of the Nationals and against MASN and the Orioles in any renewed RSDC proceeding.

What is more, high ranking MLB officials who report directly to the Commissioner continue to serve the same (or even more vital) roles and functions with the RSDC. The Supreme Court's decision thus puts the telecast rights fee dispute back in the hands of the very same entity that the Court condemned for its "utter lack of concern for fairness of the proceeding." Decision and Order at 27. In circumstances such as these, the law is clear that the court not only has the power to order rehearing in a new and impartial forum, but should do so.

MLB and the RSDC would also be conflicted in any new RSDC arbitration because MLB and the Nationals concluded a loan agreement during the pendency of the earlier arbitration,

pursuant to which MLB advanced the Nationals $25 million on a non-recourse basis to the Nationals. Instead of looking to the Nationals for repayment, the loan agreement provides that MLB will recoup the $25 million either from the sale of MASN (which never happened) or an RSDC award determining the telecast rights fees owed to the Nationals for the years 2012 and 2013.

Because MLB's $25 million advance is non-recourse to the Nationals, and because MASN has already paid the Nationals the telecast rights fees MASN considers due for these years using the contractually-mandated methodology, the only way MLB can now recover its $25 million advance is if the RSDC rejects the lower amount of telecast rights fees put forth by MASN, and awards the Nationals significantly higher amounts. MLB thus has a substantial financial interest in the outcome of any new arbitration covering this time period, which, as discussed above, MLB and the Commissioner will effectively control if it is before the RSDC. This, the law does not allow.

Finally, insofar as they are relevant to the determination of where the dispute should be reheard, MASN also appeals the Court's erroneous factual findings, including but not limited to: (i) that MLB would recoup the $25 million advance it paid to the Nationals regardless of the RSDC's determination of the telecast rights fees; and (ii) that MLB's role in the RSDC arbitration was limited to "certain procedural support to the arbitrators that is generally akin to the support a law clerk provides to a judge, or that the staff of an established arbitration organization may provide to its arbitral panels." Decision and Order at 16.

9. RELATED ACTIONS OR PROCEEDINGS

There are no other related actions or proceedings pending before this Court.

There is an arbitration pending before the American Arbitration Association ("AAA") commenced by Petitioner-Appellant MASN and Nominal Respondents-Appellants the Orioles and BOLP, in its capacity as managing partner of TCR Sports Broadcasting Holding, LLP, against Respondents-Appellees the Nationals, WN Partner LLC, Nine Sports Holding LLC, and The Office of the Commission of Baseball in which MASN, the Orioles and BOLP assert various claims for damages, declaratory judgment and injunctive relief related to MLB's and the Nationals' obligations under the 2005 Settlement Agreement. That arbitration has been held in abeyance pending the resolution of this litigation. On November 8, 2015, the Director of ADR Services from the AAA requested an update on the matter by December 21, 2015.

Dated: New York, New York
December 11, 2015

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in its capacity as managing partner of TCR Sports
Broadcasting Holding, LLP

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

TCR SPORTS BROADCASTING HOLDING, LLP,

Petitioner-Appellant,

-against-

WN PARTNER, LLC; NINE SPORTS HOLDING, LLC; WASHINGTON NATIONALS BASEBALL CLUB, LLC; THE OFFICE OF COMMISSIONER OF BASEBALL; and THE COMMISSIONER OF MAJOR LEAGUE BASEBALL,

Respondents-Appellees,

-and-

THE BALTIMORE ORIOLES BASEBALL CLUB and BALTIMORE ORIOLES LIMITED PARTNERSHIP, in its capacity as managing partner of TCR SPORTS BROADCASTING HOLDING, LLP,

Nominal Respondents-Appellants.

Index No. 652044/2014
(IAS Part 41)

PRE-ARGUMENT STATEMENT

Nominal Respondents-Appellants The Baltimore Orioles Baseball Club (the "Orioles") and Baltimore Orioles Limited Partnership ("BOLP"), in its capacity as managing partner of Petitioner-Appellant TCR Sports Broadcasting Holding, LLP (d/b/a the Mid-Atlantic Sports Network or "MASN"), hereby submit this Pre-Argument Statement pursuant to Section 600.17(a) and (b) of the Rules of the Appellate Division, First Department.

1. TITLE OF ACTION

The title of the action is as set forth in the caption above.

2. FULL NAMES OF THE PARTIES

The full names of the parties are as follows: (i) Petitioner-Appellant is TCR Sports Broadcasting Holding, LLP (d/b/a the Mid-Atlantic Sports Network or "MASN"); (ii) Nominal Respondents-Appellants are The Baltimore Orioles Baseball Club and Baltimore Orioles Limited Partnership, in its capacity as managing partner of TCR Sports Broadcasting Holding, LLP; and (iii) Respondents-Appellees are WN Partner, LLC, Nine Sports Holding, LLC, Washington Nationals Baseball Club, LLC (the "Nationals"), The Office of Commissioner of Baseball and The Commissioner of Major League Baseball ("MLB").

3. NAME, ADDRESS AND TELEPHONE NUMBER OF COUNSEL FOR PETITIONER-APPELLANT

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4. NAME, ADDRESS AND TELEPHONE NUMBER OF COUNSEL FOR RESPONDENTS-APPELLEES

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and The Commissioner of Major League Baseball
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5. COURT AND ORDER FROM WHICH APPEAL IS TAKEN

This limited appeal is taken from certain parts of a November 4, 2015 Decision and Order of the Supreme Court of the State of New York, County of New York, Commercial Division I.A.S. Part 41 (Justice Lawrence K. Marks). The Decision and Order granted Petitioner-Appellant MASN's petition to vacate an arbitral award, denied that petition to the extent that it sought the further relief of ordering rehearing before a new, neutral and independent forum, and denied Respondent-Appellee the Nationals' cross-motion to confirm the award. Nominal Respondents-Appellants participated fully in the proceedings below, supporting MASN's positions in briefing and at argument. Notice of entry of the order on appeal was served on November 13, 2015 and is attached hereto as Exhibit 1.

6. NATURE AND OBJECT OF THE CASE

On or about July 2, 2014, Petitioner-Appellant MASN commenced a special proceeding to vacate an arbitration award under 9 U.S.C. § 10(a) and CPLR § 7511(b)(1). The award was rendered on June 30, 2014 (the "Award") by MLB's Revenue Sharing Definitions Committee (the "RSDC") in a dispute between MASN and BOLP, on the one hand, and the Nationals, on the other. The dispute concerns the amount of telecast rights fees to be paid by MASN to the Nationals for the years 2012 to 2016, under the terms and conditions of a 2005 Settlement Agreement entered into among the parties to compensate the Orioles for the economic harms caused by the introduction of the Nationals into the Orioles' previously-exclusive markets. Nominal Respondents-Appellants accordingly have a direct financial interest in the outcome of the dispute.

MASN sought vacatur on several grounds. Chief among them were that the Award was procured through evident partiality, and that the arbitrators exceeded the scope of their authority

and manifestly disregarded the law by facially differentiating the methodology used to determine the telecast rights fees in the Award from their "*established methodology* for evaluating *all other* related party telecast agreements in the industry," in direct contradiction to the mandate set forth in the contract. (Emphasis added). MASN also asked the Court to order rehearing in an impartial forum, outside of MLB and the RSDC.

With respect to vacatur on the grounds of evident partiality, MASN asserted, among other things, that MLB and the RSDC, sitting as the arbitral panel, lacked any semblance of impartiality or neutrality for a number of reasons, including because the Nationals' counsel in the arbitration, Proskauer Rose LLP ("Proskauer"), (i) concurrently represented MLB executives and closely-related entities in approximately 50 engagements, including league-wide, "bet the company" litigation; (ii) had previously represented MLB numerous times in matters of similar importance; and (iii) had represented (or was concurrently representing) one arbitrator individually, one arbitrator's family-held corporation, as well as his father personally, and all three arbitrators' Baseball Clubs (all arbitrators were Club owners or executives). Further, MASN asserted that MLB and the RSDC were conflicted by, among other things, MLB's financial interest in the outcome of the arbitration by virtue of a $25 million advance made to the Nationals, which MLB could only recoup if MASN were sold (which never transpired) or the RSDC issued an award against MASN in excess of the amounts properly determined using the contractually-mandated methodology.

On September 23, 2014, MASN filed an Amended Verified Petition to Vacate the Award and supporting papers. Nominal Respondents-Appellants Orioles and BOLP, in its capacity as managing partner of TCR Sports Broadcasting Holding, LLP, filed papers in support of that Petition on the same date.

On October 20, 2014, Respondent-Appellee the Nationals filed a Notice of Cross-Motion to Confirm the Award and papers in opposition to MASN's Amended Petition to Vacate. Respondent-Appellee MLB also filed papers in opposition to MASN's Amended Petition to Vacate and in support of the Nationals' Cross-Motion to Confirm.

After limited discovery and briefing, the hearing on MASN's Amended Petition to Vacate and the Nationals' Cross-Motion to Confirm the Award was held on May 18, 2015.

7. RESULT REACHED BELOW

In a Decision and Order of the Supreme Court of the State of New York, County of New York, by the Honorable Lawrence K. Marks, I.A.S. Part 41, dated November 4, 2015, and entered at the Office of the Clerk of the County of New York on November 4, 2015 (the "Decision and Order"), the Court properly vacated the Award for evident partiality and denied the Nationals' Cross-Motion to Confirm.

In so doing, the Court found "there are objective facts that are unquestionably inconsistent with impartiality." Decision and Order at 27. The Court was particularly critical of MLB's and the RSDC's "*complete inaction*" in the face of MASN's and the Orioles' "well-documented concerns" regarding Proskauer's representation of the Nationals. *Id.* (emphasis added). In the Court's words, their failure to act "*objectively demonstrates an utter lack of concern for fairness of the proceeding that is 'so inconsistent with basic principles of justice' that the award must be vacated*." *Id.* (citation omitted) (emphasis added). Neutrality, the Court stressed,

> *is so fundamental to any adjudicative process that trust in the neutrality of the adjudicative process is the very bedrock of the* [*Federal Arbitration Act*]. *It is upon that foundation, and in great reliance upon it, that courts can defer to processes decided upon and designed by private contract.* But without neutrality, where partiality runs without even the semblance of a check, the alternative process cre-

> ated does not warrant — and cannot be given — the great deference that arbitrators, and their awards, are bestowed by courts under the Federal Arbitration Act.

Id. at 28 (emphasis added).

Despite vacating the Award for evident partiality, however, the Court concluded that it did not have the legal authority to hear the dispute itself or direct that rehearing be held before a neutral arbitration panel outside of MLB's control. Accordingly, the Court denied MASN's and the Orioles' request that the Court do so. The Court's reasoning is provided in footnote 21:

> For example, the Orioles argue that remand to the RSDC process would be futile, and therefore the matter should be referred to "a panel of arbitrators that is not subject Baseball's corrupting influence, such as a panel convened under the auspices of the American Arbitration Association." Orioles Mot. Br. at 16. *The Court, however, notes that rewriting the parties' Agreement is outside of its authority*. (Emphasis added).

MASN now appeals this erroneous legal determination. Nominal Respondents-Appellants join in that appeal.

8. GROUNDS FOR APPEAL

While the Court properly vacated the Award on evident partiality grounds, it erroneously held as a matter of law that it did not have the authority to order that the determination of the telecast rights fees payable to the Nationals take place before a new, neutral and independent forum, be it before new arbitrators outside of MLB's ambit or in court.

By way of summary, and without limitation, both the Federal Arbitration Act (9 U.S.C. § 10(b)) and the Civil Practice Law and Rules (§ 7511(d)) grant courts the power to order rehearing before different arbitrators after vacating an arbitral award. Both New York and federal case law confirms that power. Alternatively, other precedent supports the court's authority to adjudicate the dispute itself. The Supreme Court's ruling that it lacked this authority as a matter of law was simply erroneous.

Further, rehearing in a new and neutral forum, independent from MLB, is plainly warranted in this case. As the prior proceedings demonstrate, MLB and the RSDC would be hopelessly and irreparably conflicted in any new RSDC arbitration. Uncontroverted evidence below shows that MLB, which controls the RSDC, and the Commissioner, who appoints the RSDC members in his sole discretion:

- Wrote the now-vacated Award;
- Endorsed the now-vacated Award in filings, pleadings and affidavits in the case below;
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Indeed, on May 22, 2015, a mere three days after the Supreme Court hearing in this case, and included in the record in this case, the Commissioner publicly addressed the RSDC Award at a press conference he convened at the end of a MLB Club owners' meeting. He said that the Award was correctly decided and that MASN could expect the same result in any future arbitration under MLB's control, stating: "I think the agreement's clear in MASN"; "The RSDC was empowered to set the rights fees, and that's what they did"; and "*Sooner or later MASN is going to be required to pay those rights fees*" set out in the now-vacated RSDC Award. (Emphasis added). Because of this, no potential RSDC member can be neutral and impartial: the RSDC as a forum is conflicted and thoroughly compromised.

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What is more, high ranking MLB officials who report directly to the Commissioner continue to serve the same (or even more vital) roles and functions with the RSDC. The Supreme Court's decision thus puts the telecast rights fee dispute back in the hands of the very same entity that the Court condemned for its "utter lack of concern for fairness of the proceeding." Decision

and Order at 27. In circumstances such as these, the law is clear that the court not only has the power to order rehearing in a new and impartial forum, but should do so.

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Finally, insofar as they are relevant to the determination of where the dispute should be reheard, MASN also appeals the Court's erroneous factual findings, including but not limited to: (i) that MLB would recoup the $25 million advance it paid to the Nationals regardless of the RSDC's determination of the telecast rights fees; and (ii) that MLB's role in the RSDC arbitration was limited to "certain procedural support to the arbitrators that is generally akin to the support a law clerk provides to a judge, or that the staff of an established arbitration organization

may provide to its arbitral panels." Decision and Order at 16. Nominal Respondents-Appellants join fully in that appeal.

9. RELATED ACTIONS OR PROCEEDINGS

MASN has filed its own appeal from the Decision and Order on this same date. MASN's Notice of Appeal and Pre-Argument Statement are attached hereto as Exhibit 2. There are no other related actions or proceedings pending before this Court.

There is an arbitration pending before the American Arbitration Association ("AAA") commenced by Petitioner-Appellant MASN and Nominal Respondents-Appellants the Orioles and BOLP, in its capacity as managing partner of TCR Sports Broadcasting Holding, LLP, against Respondents-Appellees the Nationals, WN Partner LLC, Nine Sports Holding LLC, and The Office of the Commission of Baseball in which MASN, the Orioles and BOLP assert various claims for damages, declaratory judgment and injunctive relief related to MLB's and the Nationals' obligations under the 2005 Settlement Agreement. That arbitration has been held in abeyance pending the resolution of this litigation. On November 8, 2015, the Director of ADR Services from the AAA requested an update on the matter by December 21, 2015.

Dated: New York, New York
December 11, 2015

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