To be Argued by:
STEPHEN R. NEUWIRTH

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 and WASHINGTON NATIONALS BASEBALL CLUB, LLC,
Respondents-Respondents-Cross-Appellants-Appellants,
– and –
THE OFFICE OF COMMISSIONER OF BASEBALL and THE COMMISSIONER OF MAJOR LEAGUE BASEBALL,
Respondents-Respondents-Cross-Appellants,
– 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-Cross-Respondents-Respondents.

BRIEF FOR RESPONDENT-RESPONDENT-CROSS-APPELLANT-APPELLANT WASHINGTON NATIONALS BASEBALL CLUB, LLC

STEPHEN R. NEUWIRTH
SANFORD I. WEISBURST
JULIA J. PECK
CLELAND B. WELTON II
QUINN EMANUEL URQUHART & SULLIVAN, LLP
Attorneys for Respondent-Respondent-Cross-Appellant-Appellant Washington Nationals Baseball Club, LLC
51 Madison Avenue, 22nd Floor
New York, New York 10010
(212) 849-7000
stephenneuwirth@quinnemanuel.com
sandyweisburst@quinnemanuel.com
juliapeck@quinnemanuel.com
clelandwelton@quinnemanuel.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Respondent Washington Nationals Baseball Club, LLC ("the Nationals")[1] respectfully submits this brief in opposition to the appeal of Appellants TCR Sports Broadcasting Holding, LLP d/b/a Mid-Atlantic Sports Network ("MASN"), the Baltimore Orioles Baseball Club (the "Orioles") and Baltimore Orioles Limited Partnership ("BOLP"), from an Order entered on November 4, 2015 by the Supreme Court of the State of New York, New York County, Part 41 (Hon. Lawrence K. Marks, J.S.C.).[2] MASN's appeal concerns whether a new arbitration hearing should take place before the Revenue Sharing Definitions Committee ("RSDC") of Major League Baseball ("MLB"), as agreed in the parties' contract and as Supreme Court held. The main portion of this brief defends Supreme Court's holding that the new arbitration hearing should take place before the RSDC. The final portion of this brief presents a cross-appeal arguing that Supreme Court erred in vacating the original RSDC award.

PRELIMINARY STATEMENT

The core question implicated by MASN's appeal is whether parties are bound by their arbitration agreements. The parties here indisputably agreed in

---

[1] Respondents WN Partner LLC and Nine Sports Holding, LLC are not proper parties, because they were not parties to the underlying arbitration. To the extent they are deemed proper parties, these Respondents join this brief.

[2] Unless indicated otherwise, "MASN" refers collectively to MASN, BOLP, and the Orioles. BOLP has supermajority ownership and complete management control of MASN.

2005 that any disputes concerning television rights fees to be paid by MASN to the Nationals would be resolved by the RSDC, a body comprising three individuals affiliated with MLB teams. The RSDC is a specialized "inside-baseball" committee that regularly assesses, among other things, the revenues of regional sports networks, such as MASN, to determine which portions can properly be characterized as profits and which instead should be characterized as telecast rights fees subject to revenue sharing among MLB Clubs.

After an arbitration hearing and award by a RSDC panel then comprised of Jeffrey Wilpon, Chief Operating Officer of the New York Mets, Francis Coonelly, President of the Pittsburgh Pirates, and Stuart Sternberg, principal owner of the Tampa Bay Rays, Supreme Court vacated the RSDC's award solely on the ground that the Nationals' counsel during the arbitration (Proskauer Rose LLP) was "concurrently representing" MLB and interests associated with the three arbitrators. R.35. According to the court, none of MLB, the arbitrators, the Nationals, or Proskauer took any steps to address MASN's "concerns" about the Nationals' choice of counsel. R.41. The court recognized, however, that this situation could be cured: the court "emphasize[d] that because it is ultimately the Nationals' choice of counsel that created the conflict [forming the basis for vacatur]," if "the Nationals are willing and able to retain counsel who do not concurrently represent MLB or the individual arbitrators and their clubs," they can

"thereby return to arbitration by the RSDC, however currently constituted, *pursuant to the parties' agreement*." R.42-43 n.21 (emphasis added). Following the court's order, the Nationals have retained new arbitration counsel (Quinn Emanuel Urquhart & Sullivan, LLP), which does not have such concurrent representations. Quinn Emanuel does not represent MLB, any RSDC member, or any MLB team other than the Washington Nationals. And the RSDC's membership is now entirely different, consisting of individuals affiliated with the Milwaukee Brewers, Seattle Mariners, and Toronto Blue Jays.

MASN's attempt to use the obsolete Proskauer conflict to prevent the RSDC from even attempting to conduct a new arbitration hearing would violate the parties' agreement and contractual expectations here. As Supreme Court found, MASN "clearly agreed to an 'inside baseball' arbitration, where the parties and arbitrators would all be industry insiders who knew each other and inevitably had many connections." R.36. But MASN's argument threatens more than just the contractual expectations of MLB's 30 Clubs. It would invite an onslaught of litigation by parties that seek to exploit minor and curable conflicts to escape the arbitration forum to which they had agreed in writing.

Importantly, Supreme Court did not find that Proskauer's involvement actually altered the result of the RSDC arbitration in any way, and the court indeed *rejected* all of MASN's other challenges aside from the one based on Proskauer's

involvement. Specifically, the court (1) *rejected* MASN's contention that MLB had fraudulently contrived "to ensure the Arbitration favored the Nationals," and had used its purported "power over the arbitral process to set the telecast rights fees to [the Nationals'] advantage," R.26; (2) *rejected* MASN's contention that the RSDC had exceeded the scope of its authority or manifestly disregarded the law in applying its "established methodology" for determining the rights fees, R.26-29, noting that the RSDC's award "set forth an extensive explanation of their determination of the appropriate methodology to apply," R.28 (citing R.219-23); (3) *rejected* MASN's argument that MLB had "engaged in persistent procedural misconduct," R.29-31, observing that MLB had "provided the sort of support that the parties *must necessarily have expected when they entered into the Agreement*," which was "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 (emphasis added); and (4) *rejected* MASN's contention that a $25 million advance that MLB had extended to the Nationals in 2013 to facilitate settlement negotiations reflected "evident partiality," R.32-34.

Critical here, MASN has not appealed any of Supreme Court's determinations to reject MASN's and the Orioles' asserted grounds for vacatur. Rather, the sole question that MASN presents on appeal is whether, following vacatur of the RSDC's decision, the new arbitration should be before the RSDC, as

the parties agreed, or before some other arbitral body such as the AAA. In declining that request, Supreme Court found MASN's request for such relief "unavailing," R.42 & n.21, explaining that "re-writing the parties' Agreement is outside of [the court's] authority," R.42 n.21. Indeed, the Agreement identifies the AAA as a forum for resolving *other* disputes, R.209 (§ 8.C), but unambiguously states that the RSDC is the forum for rights fee disputes, R.203 (§ 2.J.3).

Supreme Court correctly rejected MASN's effort to move arbitration away from the RSDC. Granting such relief would run counter to the most foundational principles of governing federal arbitration law: arbitration is a matter of contract, and an agreement to arbitrate a dispute accordingly *must be enforced* unless the contract itself is invalid under the common law. The Agreement here is indisputably valid, and MASN identifies no basis to revoke or to reform it. Nor does any statute or common-law doctrine support MASN's contention that a different rule applies after an initial arbitral award has been vacated, as happened here. The eventual award may be challenged as the Federal Arbitration Act ("FAA") provides, but the contractually designated arbitrators may not be *preemptively* replaced.

A contrary result would impair parties' ability to set the parameters of their dispute-resolution mechanisms. Such a ruling would become a precedent for undermining agreements to arbitrate before expert inside-industry panels whose

specialized knowledge of particular topics necessarily brings with it close interconnections with others in the industry. These results would be anathema to the freedom of contract that is enshrined in the FAA. Supreme Court was correct to avoid them here by declining to order the parties to an arbitration forum different from the one agreed in their contract.

In a more recent (July 11, 2016) order than the one at issue on MASN's appeal, Supreme Court denied the Nationals' motion to compel the parties to return to the RSDC for a new arbitration *while MASN's appeal of the November 4, 2015 order to this Court was pending*. But this Court, if it affirms Supreme Court's November 4, 2015 order on the issue of the proper forum for any new arbitration (as we respectfully submit this Court should), should apply the FAA's and CPLR's compulsory-arbitration provisions to order the parties to return to the RSDC for prompt resolution of their dispute over the rights fees for the 2012-16 period.

COUNTERSTATEMENT OF QUESTION PRESENTED ON MASN'S APPEAL

1. Where parties have agreed to a particular arbitration forum for resolution of a dispute, and where an original award by that arbitration forum is vacated based upon a curable defect that does not undermine the arbitration forum's fairness, should the parties be held to their agreement and ordered to return to that arbitration forum for the new hearing?

Answer of Supreme Court: Supreme Court correctly answered "yes."

STATEMENT OF QUESTIONS PRESENTED ON THE NATIONALS' APPEAL AND CROSS-APPEAL

1. Where parties have agreed to a particular arbitration forum for resolution of a dispute, and one party has failed to submit to arbitration in that forum, should that party be compelled by court order to arbitrate in the contractually elected forum?

Answer of Supreme Court: Supreme Court incorrectly answered "no."

2. Where parties have agreed to a particular arbitration forum for resolution of a dispute, should the award resulting from that arbitration be confirmed over an "evident partiality" objection based on a party's arbitration counsel's representations of arbitrators' affiliates in unrelated matters, even where the objecting party failed to seek disqualification of the arbitrators prior to the award's issuance?

Answer of Supreme Court: Supreme Court incorrectly answered "no."

STATEMENT OF THE CASE

A. The Agreement To Arbitrate Rights-Fees Disputes Before The Revenue Sharing Definitions Committee

Following a determination by the MLB Clubs to relocate the then-Montreal Expos (now the Nationals) to Washington, D.C., the Agreement was negotiated and agreed to in March 2005 among MLB (which at the time owned the Nationals), BOLP, and MASN (a regional sports network that until then had been broadcasting only Orioles' games and was wholly owned by the Orioles). R.196-

215. Notwithstanding MASN's assertions (*e.g.*, Br. 13-14), the Agreement is not titled "Settlement Agreement" and does not reference any "settlement" of disputes. The Agreement contains an integration clause providing that the Agreement's contents constitute the parties' entire agreement on the subject matter therein. R.210.

The Agreement provided the Orioles with highly valuable benefits. The Orioles were given supermajority ownership and complete management control of MASN, which now would have the exclusive right to televise regionally games of not only the Orioles, but also the Nationals. R.204-05; R.200; R.196; R.215. The Orioles started with a 90% ownership stake, which beginning in 2010 would decrease by 1% a year until 2032, when the Orioles would have a final stake of 67%. R.204. (As of 2016, the Orioles have an 83% stake, which today is likely worth more than $1 billion. R.2048-49.) The Orioles' supermajority interest entitles them to a proportionate supermajority of MASN's profit distributions (*i.e.*, for each dollar of profit, the Orioles receive a percentage equal to their then-current ownership stake). R.204.

The Orioles also received a $150 million capital account credit (while, by contrast, the Nationals paid $75 million cash for their minority ownership stake). R.205. And the Agreement guaranteed the Orioles a minimum price of $365

million in the event the franchise is sold, more than double the $173 million that the Orioles' current owners paid to purchase the team in 1993. R.205.

The Agreement addresses the fees MASN are to pay to both the Orioles and the Nationals for the right to broadcast the teams' games. The Orioles are guaranteed, beginning in 2007, to receive the same rights fees as the Nationals. R.203; R.2049. The Agreement provides a fixed schedule of rights fees to be paid from 2005 through 2011, set at a level substantially below what the Nationals' telecast rights would have been worth on the open market. *See* R.202; R.2052-55; R.3019-21. This again was a benefit to the Orioles, because the lower the rights fees (for which the Orioles would earn 50 cents on every dollar, given that that the Orioles and the Nationals would be paid the same rights fees), the higher MASN's profits (of which the Orioles, as supermajority owners, would receive a supermajority).

But the Agreement expressly provides that, "[a]fter 2011," the rights fees to be paid to the Nationals shall be determined for "successive five-year period[s]" based on "the fair market value of the telecast rights." R.202-03.[3]

---

[3] Notwithstanding MASN's arguments about the Agreement's purported "compensatory" purpose (*e.g.*, Br. 11, 27 n.17), it in fact neither provides for "annual reparative compensation" nor guarantees the Orioles any profit distributions *at all*. *See* R.204 ("[D]istributions, *if any*, to be made from [MASN] shall be made consistent with the parties' relative and then-applicable partnership profits interests….") (emphasis added). The provision guaranteeing the Nationals

The Agreement also provides a mechanism (in Section 2.J) for resolving disputes over the amount of rights fees to be paid the Nationals:

> 2.J.1 Mandatory Negotiation Period: In the event that the Nationals and [MASN], or the Orioles and the RSN, are unable to agree on the *fair market value of their respective rights*…, the relevant parties shall follow the procedures set forth in this Subsection *to establish the fair market value of the rights*….
>
> 2.J.2 Mediation: In the event that the Nationals and [MASN] are unable to timely *establish the fair market value of the Rights* by negotiation …, then the parties agree to enter into non-binding mediation.…
>
> 2.J.3. Appeal: In the event that the Nationals and/or the Orioles and [MASN] are unable to timely *establish the fair market value of the Rights* by negotiation and/or mediation …, then *the fair market value of the Rights shall be determined by the Revenue Sharing Definitions Committee ("RSDC")* using the RSDC's established methodology for evaluating all other related party telecast agreements in the industry.
>
> The *fair market value* of the rights established pursuant to this Subsection … *shall be final and binding* on the Nationals and [MASN], and the Nationals and [MASN] may seek to vacate or modify such *fair market valuation* as established by the RSDC only on the grounds of corruption, fraud or miscalculation of figures….

R.203 (emphases and final paragraph break added).

Thus, Section 2.J makes clear that if the parties dispute the "fair market value" of the Nationals' rights, the issue "*shall be determined*" exclusively in an arbitration before the RSDC. *Id.* (emphasis added). The RSDC's members rotate periodically (not in connection with this or any particular matter), and are typically

---

"fair market value" for telecast rights certainly evinces no purpose to "compensate" MASN.

drawn from Clubs hailing from media markets of varying size. R.19; R.1762. From its establishment through today, the RSDC has always been an MLB body, and therefore MLB serves an administrative role in any matter before the RSDC. R.1762. MLB does not have arbitral rules, and has never followed a formalized model like that used by bodies such as the AAA. *See* R.1924.

The parties thus agreed to resolve rights-fees disputes in a specialized baseball-industry arbitration forum conducted under MLB's organizational auspices, and composed of Club-affiliated arbitrators familiar with baseball-industry revenue issues. The Orioles' owner Peter Angelos himself explained in Congressional testimony in 2006, less than a year after the Agreement had been entered, that in the event of a dispute over rights fees, the Nationals would have "a right to complain *to Major League Baseball*" to obtain resolution. R.1977 (emphasis added). MASN's attorneys also have acknowledged that MASN "agreed to" and "had to live with" "whatever the structure was, whatever Major League Baseball's role was." R.3286.

Contrary to MASN's repeated assertion that the Agreement requires application of a so-called "Bortz method" calculation of rights fees that assures MASN a profit margin of no less than 20 percent (*e.g.*, MASN Br. 15-16, 26), the Agreement provides that the RSDC is to determine the rights fees using "the RSDC's established methodology for evaluating all other related party telecast

agreements in the industry." R.203. The Agreement makes no mention of the "Bortz" approach that MASN now advocates (Br. 12), nor does it guarantee MASN any fixed profit margin. Again, Orioles owner Mr. Angelos' testimony to Congress is telling: he stated under oath that the Nationals have a right under the Agreement to "fair market value payments … for the rights fees for the rights to their games," to be determined following a "survey" of comparable telecast-rights transactions (the type of survey used by the RSDC in the now-vacated award). R.1977.

In 2006, after the Agreement had been fully negotiated and executed, the Nationals' current owners acquired the Club from MLB. R.1917. In acquiring the Club, the Nationals' current owners knew that they would be "unconditionally bound" to the Agreement, R.210, and accordingly relied "on the understanding that the 2005 Agreement was … the 'entire agreement' between the parties," R.2270 (quoting R.210).

B. The Revenue Sharing Definitions Committee Arbitration

In the fall of 2011, the Nationals and MASN attempted to negotiate the Nationals' rights fees for 2012-2016. R.2191-92; R.1923. Unable to reach agreement, the parties waived mediation and submitted the dispute directly to the RSDC for arbitration under the Agreement. R.1924; R.2193. The parties held an organizational meeting with MLB in February 2012, submitted pre-hearing

statements to the RSDC in March 2012, and made oral presentations at an April 3, 2012 hearing before the RSDC. R.2200-02. The three RSDC-member arbitrators at the time, who had been appointed in 2008 and 2010, were Jeffrey Wilpon, Chief Operating Officer of the New York Mets; Francis Coonelly, President of the Pittsburgh Pirates; and Stuart Sternberg, the principal owner of the Tampa Bay Rays. R.1844-45; R.1854-55; R.1863-64.

1. MLB's Role In The Arbitration

While MLB administered the proceedings in accordance with the Agreement and the parties' expectations, it neither controlled the outcome of the RSDC arbitration nor acted as a "de facto fourth arbitrator" (*contra* MASN Br. 18-23). To the contrary, the record shows that the arbitration proceeded in accordance with the ordinary RSDC procedures to which the parties assented in the Agreement, and that the three RSDC arbitrators reached their decision independently, without influence or interference from MLB.

For instance, notwithstanding MASN's complaints (Br. 19-21), it was common RSDC practice for the Commissioner to (among other things) sit with the RSDC members and ask questions during the proceedings. R.2922-24; *see also* R.3124; R.3129; R.3134; R.3170. Indeed, the nature and extent of MLB's role in connection with RSDC proceedings were "well known to MLB Clubs, including the [Orioles]," R.2924-25, and were in fact so clearly "standard practice," R.2922,

that MASN *did not object* to the Commissioner's or MLB staff's "participation or conduct in any respect, including with regard to where [he] was seated in the room or any questions [he] asked or comments [he] may have made," R.2926.

It was also fully consistent "with the other RSDC proceedings" for MLB staff to draft the RSDC's written award. R.3170. As the RSDC members and the Commissioner attested, MLB prepared the draft at the arbitrators' direction *to memorialize a decision the arbitrators had already made*. R.3124; R.3129; R.3134; R.3170. As the three arbitrators consistently attested in sworn submissions to the trial court:

> [The RSDC members] reviewed all of the evidence and arguments submitted by the parties, seriously deliberated on the matters before it and advised the MLB support staff of the specific decision it was rendering. At this point, the RSDC directed the MLB support staff to prepare a draft decision reflecting its ruling. The RSDC members then reviewed, commented upon, and edited the draft prepared by staff (at meetings, on phone calls, and occasionally in writing) to ensure that it conformed with our direction and reasoning. Our input into the draft was substantive, and was not limited to the correction of typographical errors.

R.3124; *see* R.3129; R.3134.

MLB Commissioner Robert Manfred, who was Deputy Commissioner at the time, similarly explained:

> [T]he members of the RSDC considered the arguments, deliberated, reached their decision as to the fair market value of the Nationals' telecast rights for 2012 through 2016, and advised MLB staff of that decision. MLB staff then assisted in preparing a draft of that decision that complied with the substantive instructions of the RSDC and

> provided the draft to the RSDC members for their review and comment. The RSDC members reviewed the draft and provided substantive comments at meetings, on phone calls, and occasionally in writing. MLB staff incorporated those comments into the draft, and the RSDC members eventually approved the draft as accurately embodying their decision and authorized it to be issued.

R.3170. Thus, as the arbitrators explained, the RSDC's "decisions … were made independently and on the merits," and were neither "pre-judge[d]" nor "predetermined" either by the arbitrators or by MLB. R.1846; *see also* R.1856; R.1865. And the arbitrators specifically attested that "neither the Commissioner, nor Mr. Manfred, nor anyone else in the Commissioner's Office attempted to or did dictate the result of the RSDC Proceeding to [the arbitrators]." R.1846; *see also* R.1856; R.1865; R.3123-24; R.3128-29; R.3133-34. Mr. Manfred likewise denied that MLB "attempted to or did dictate the result of the RSDC Proceeding." R.1763; *see also* R.1767 (RSDC's decision "reflected the independent judgment of the RSDC members, based on the merits"); R.3184 (MLB did not act as a "super-arbitrator").

2. MASN's Objection To Proskauer's Service As The Nationals' Counsel

The Nationals were represented at the arbitration by their longtime attorneys at Proskauer. R.1923; R.2190-91. During the pendency of the RSDC proceeding, none of the three RSDC members was personally represented by Proskauer, nor did any of them have any personal financial, confidential, or fiduciary relationship

with Proskauer. R.1848; R.1858; R.1867. Proskauer also did not represent the RSDC itself. *Id.* Proskauer did represent MLB and interests affiliated with the individual RSDC-member arbitrators in other matters unrelated to this dispute, *see* R.35, but MASN knew or could have learned about many of those representations during the pendency of the arbitration.[4] And for two of the four instances of which Proskauer represented interests affiliated with RSDC members, the relevant arbitrators were not even aware of Proskauer's involvement until MASN raised the issue in this litigation, R.1869 (Wilpon); R.1860 (Sternberg).

Despite MASN's assertions (*e.g.*, Br. 17) regarding purportedly inadequate disclosures, MASN was aware that Proskauer had relationships with MLB and other Clubs—but MASN neither inquired with the arbitrators nor conducted public-records searches to ascertain Proskauer's particular representations, even *after* MLB had advised MASN that it should inquire with the Clubs to determine

[4] During the pendency of the arbitration, MASN was aware of many of the representations, including that Proskauer represented MLB, R.850; R.1785-87; R.852-53 & n.1, that Proskauer did salary arbitration work for the Rays, R.420; R.803; R.858; R.1771, and that Proskauer represented MLB and individual Clubs in the *Garber* and *Senne* litigations, R.1788-90; R.1874-75. Simple public information searches (such as those MASN purported to have performed once it petitioned to vacate the RSDC award) would have uncovered others. *See, e.g.*, R.190 ("Google search" uncovered Wilpon-Sterling representation); R.165-66 (information about MLB representations available through "public records"). MASN never sought such information from the individual arbitrators. *See* R.1851; R.1861; R.1869.

the extent of Proskauer's representations. *See* R.1786; R.850.[5]

In any event, MASN was sufficiently aware of the issue to raise an objection to Proskauer's involvement in the arbitration at the February 2012 organizational meeting. R.1772. But Mr. Manfred explained that the RSDC had *no authority* to disqualify Proskauer—meaning that MASN's objection was "beside the point" because it was "made in a forum that lacked authority to act." R.2928; R.1772; *see Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Benjamin*, 1 A.D.3d 39, 44 (1st Dep't 2003). MASN never sought disqualification of MLB or any of the RSDC arbitrators, nor did it pursue relief in a court or other forum with authority to address any purported conflict. R.1772.

3. The Revenue Sharing Definitions Committee's Award

At the arbitration, the Nationals submitted that their rights had a "fair market value" averaging $118 million per year for 2012-16, based on an analysis of factors including the size and attractiveness of the Nationals' television market, a survey of the economic value of recent deals entered into by teams in other comparable markets, and the escalating value of live sports programming. R.2055-56. MASN, in contrast, proposed to apply a purported "Bortz" analysis based on an assumption that MASN should be guaranteed a 20% profit margin on baseball

[5] MASN complains (Br. 17) that MLB denied a request for leave to contact the individual arbitrators, but Mr. Manfred attested that he had "no recollection of such a request ever being made," and that MASN was in any event free to pursue such inquiries without authorization. R.1773.

programming, submitting on that basis that the Nationals should be paid an average of just $39.5 million per year. R.2056; R.1185, R.1193.

The RSDC reached its decision by the summer of 2012, valuing the Nationals' rights at an average of $59.6 million per year—far closer to the amount the Orioles had proposed than to the Nationals' proposal. R.1931; R.1768; R.234; R.2062. In its decision, the RSDC set forth its reasons for rejecting both MASN's proffered methodology and the Nationals' analysis, explaining in detail how the panel had instead applied the *RSDC's* established methodology. R.219-23; R.227. The award noted that MASN and the Nationals had both been provided with summaries of the RSDC's established methodology prior to the arbitration, that "[t]hose summaries accurately describe the methodology [applied in the RSDC's award]," and that "*[n]o party took issue with [the] description [of the methodology] at the time*." R.220 n.5 (emphasis added).[6] Applying its established methodology, the RSDC found that the "fair market value" of the Nationals' rights

[6] In asserting (Br. 25) that the RSDC's award "failed to treat MASN like 'all other' related-party [regional sports networks] in the industry" (emphasis omitted), MASN misstates the significance of the award's footnote stating that the award "shall not constitute precedent of the RSDC." R.217 n.2. As the footnote explains, the RSDC made its statement in recognition that the *forward*-looking valuation it undertook in this case differed from the RSDC's usual *retrospective* work relating to revenue sharing: it was "issued by the RSDC as the arbiter of a contractual dispute between these parties, and not in its capacity as the evaluator of transactions under [MLB's Revenue Sharing] Plan." *See id.* The award is not precedent vis-à-vis other disputes under that Plan, but it does not disavow the RSDC's "established methodology" for determining fair market value. *See id*.

for the relevant period was about $60 million annually. R.223-34.

MLB informed the Nationals and MASN of the approximate amount of the RSDC's award in mid-2012. R.1931-32. But the RSDC's final award was not released until June 30, 2014, as MLB in the interim encouraged the parties to reach a broader settlement of the long-term dispute over the Nationals' rights. R.1929. During this two-year period, MASN paid the Nationals rights fees only in the amounts that MASN had proposed to the RSDC, despite MLB having made it known that the RSDC had found the fair market value of the Nationals' rights to be higher. *See* R.1933-35.

As MLB continued to encourage settlement negotiations, the Nationals made clear that they viewed resolution of their 2012-2013 compensation as a "condition precedent" to any broader settlement. R.2917. To facilitate negotiations, R.2917; R.1933; R.1770, MLB on August 26, 2013—more than a year after the RSDC had made its decision, and well into the second baseball season covered by the arbitration—offered approximately $25 million to the Nationals, a net amount that would reduce the shortfall between the RSDC's unreleased award and the amounts that MASN was paying for 2012 and 2013. R.2917-20; R.1933.

Although MASN asserts (Br. 24) that it was "kept in the dark" about this advance, the record shows that MASN was contemporaneously "advised of the advances," and was in fact "enthusiastic and supportive of the Commissioner's

actions, because they avoided possible litigation over the delayed RSDC Decision and allowed settlement discussions to continue." R.1770; *see also* R.3173-74; R.3178-80. MASN claims (Br. 25) that it was unaware that the advance came with repayment terms, but that suggestion cannot be squared with common sense (MLB "was not in a position simply to give the money to the Nationals," R.3180) or the fact that the terms of the advances were discussed with MLB's Executive Council, R.3178; R.3180, on which the Orioles' Mr. Angelos sat at all relevant times, R.3143. And contrary to MASN's suggestion (Br. 23-35) that MLB's advance affected the RSDC's award, in fact the advance was made more than a year *after* the RSDC had reached its conclusion. R.1768.

C. Proceedings Below

1. MLB's Effort To Prevent Either Party From Seeking Judicial Review Of The RSDC Award

When the RSDC's award finally issued, the Nationals wanted to collect the fees awarded by the RSDC (though they were almost $60 million per year below what the Nationals had requested), while MASN asserted the RSDC should have awarded $20 million less per year.

MLB wrote *to both parties* (*contra* MASN Br. 27-28), aiming to keep *both sides* from taking the dispute to court. R.569. MLB advised *both parties* that "nothing in the Agreement authorizes the parties to file any lawsuit," that "[l]itigation in the courts is expressly prohibited by Article VI of the Major League

Constitution," and that in MLB's view "any attempt to pursue litigation in the courts would not be in the best interests of [Baseball]." *Id.* MLB stated that "if *any party* initiates *any* lawsuit, or fails to act in strict compliance with the procedures set forth in the Agreement concerning the RSDC's decision, [the Commissioner would] not hesitate to impose the strongest sanctions available … under the Major League Constitution." *Id.* (emphasis added).

MASN nonetheless filed a court petition to vacate the award, naming both MLB and the Nationals as respondents. R.135-36. The Nationals petitioned to confirm the award. R.1910-11.

MLB responded with further correspondence indicating that it would pursue sanctions against *both parties* for instituting litigation. R.572-77.

MASN sought an injunction barring the Nationals from terminating the Agreement for nonpayment of rights fees. Supreme Court granted the injunction in August 2014. R.511.[7] Since that time, MASN has paid the Nationals only the limited rights fees that MASN proposed to the RSDC. R.3513.

2. The Order Vacating The Award And Specifying Conditions For A New RSDC Arbitration

The case proceeded to the merits of the cross-petitions to vacate and to confirm the RSDC's award. MLB, which MASN had named as a respondent in its

[7] MASN inaccurately asserts (Br. 28) that the injunction was also *against MLB*. *See* R.411; Dkt. 47, at 1; R.511.

confirmation petition, defended the integrity of the proceeding—denying MASN's charges that the RSDC was corrupt, fraudulent, or incapable of arbitrating the parties' dispute.

While the cross-petitions were pending, the Commissioner was asked by the press for comment on the ongoing dispute. At a May 22, 2015 press conference, the Commissioner expressed confidence the RSDC proceeding was compliant with applicable law and would ultimately be confirmed and enforced:

> Question: Are you anticipating a decision at any point on MASN? How do you see that playing out both short-term and long-term?
>
> Commissioner Manfred: Hard to say until you know what the decision [on the cross-petitions to confirm and to vacate the award] is. I think the agreement is clear, in MASN [*sic*]. 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.

R.3433. The substance of this comment, which MASN repeatedly misrepresents (Br. 2, 29, 49 & n.22, 51), is that the RSDC properly exercised its authority under the Agreement to set the Nationals' rights fees for 2012-2016. The Commissioner did *not* "declare[] that any rehearing before MLB's RSDC would be a *fait accompli*" (*id.* at 2), nor did he "sa[y] that the award had been correctly decided and that MASN could expect the same result in any future [RSDC] arbitration" (*id.* at 29). MASN and the Orioles brought Mr. Manfred's comments to Supreme Court's attention in May 2015. R.3423-32.

Supreme Court issued its decision on November 4, 2015 (the "Vacatur Order"). Applying the FAA, R.24, the court rejected most of MASN's challenges to the RSDC's award. *First*, the court rejected MASN's contention that MLB had fraudulently contrived "to ensure that the Arbitration favored the Nationals," and had used its purported "power over the arbitral process to set the telecast rights fees to [the Nationals'] advantage," explaining that MASN had shown no more than that it was "disappointed in the RSDC award." R.26.

Second, the court ruled that the RSDC had neither exceeded the scope of its authority nor manifestly disregarded the law by rejecting MASN's interpretation of the Agreement and the Bortz methodology. R.26-29. The court noted that whereas the Agreement neither "defines the RSDC's established methodology" nor "offer[s] the slightest hint that a specific operating margin might be required" (let alone the 20% margin that MASN insisted was required), the RSDC's award "set forth an extensive explanation of their determination of the appropriate methodology to apply." R.28 (citing R.219-23). The court found that explanation "reasonable on its face," and thus "more than sufficient" to satisfy the FAA—which requires confirmation so long as there is a "barely colorable justification" for the arbitrators' decision. R.28-29 (citation omitted).

Third, the court rejected MASN's argument that the award had to be vacated because MLB "engaged in persistent procedural misconduct"—which included

complaints that MLB had "improperly drafted the award and decided the arbitration in the RSDC's stead, denied requests for the production of other Clubs' telecast rights fees agreements, … and otherwise … improperly controlled or influenced the arbitration process or usurped the arbitrators' decision-making function." R.29-30. The court found that "very little was establish[ed]" to support MASN's position. R.30. MLB, the court found, "provided the sort of support that the parties must necessarily have expected when they entered into the Agreement," which was "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." *Id.* There was no "denial of fundamental fairness," and the award could not be overturned. R.31.

Fourth, the court found that the $25 million advance that MLB had extended to the Nationals in 2013 did not establish "evident partiality." R.32-34. The court noted that MASN knew of the advance when it occurred, and that the advance had been made only *after* the RSDC reached its decision—such that the advance could not have affected the result. R.33. Thus, the court said, "MASN and the Orioles have not demonstrated that the circumstances of the advance raise any serious questions about the fairness of the arbitration process." R.34.

But despite finding the RSDC had reasonably applied the Agreement, and had neither been corrupted nor engaged in misconduct, the court nevertheless

vacated the award because of Proskauer's representation of the Nationals in the arbitration. The court recognized that MASN "clearly agreed to an 'inside baseball' arbitration, where the parties and arbitrators would all be industry insiders who knew each other and inevitably had many connections," R.36, and that a mere "appearance of bias" is "unquestionably" insufficient to support vacating an arbitration award under the FAA's "evident partiality" standard, R.38; R.31. Under that standard, the court acknowledged, R.31-32, an award cannot be vacated unless "a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." *U.S. Elecs., Inc. v. Sirius Satellite Radio, Inc.*, 17 N.Y.3d 912, 914 (2011) (quoting *Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984)).

While acknowledging that no prior case had found evident partiality in similar factual circumstances, Supreme Court found this standard met here because MASN's "concerns" about Proskauer's involvement "fell on entirely deaf ears." R.41. The court did not find that Proskauer's involvement had actually altered the result of the RSDC arbitration, nor did it rule that MLB or the RSDC were automatically disqualified because of Proskauer's representations. In fact, the court expressed its view that lesser remedial action would have "dictated a simple decision from this Court to confirm the award" under the FAA. R.38-39. But the court found the FAA's vacatur standard met because "MLB, the arbitrators, the

Nationals and/or Proskauer" did not take any "step[s] to address [MASN's] concerns about the Nationals' choice of counsel in the arbitration." R.41.

The court refused, however, to order the parties to conduct a new rights-fees arbitration outside the RSDC, finding MASN's request for such relief "unavailing." R.42 & n.21. The court explained that "re-writing the parties' Agreement is outside [the court's] authority" under the FAA. R.42 n.21. And the court "emphasize[d] that because it is ultimately the Nationals' choice of counsel that created the conflict [forming the basis for vacatur], the parties may wish to meet and confer as to whether the Nationals are willing and able to retain counsel who do not concurrently represent MLB or the individual arbitrators and their clubs, and thereby return to arbitration by the RSDC, however currently constituted, pursuant to the parties' Agreement." R.42-43 n.21 (citing R.203).

Following the Vacatur Order, the Nationals pursued a prompt return to the RSDC in accordance with the Agreement and the trial court's decision, as discussed below. MASN, however, maintained its position that any new arbitration should be in a venue other than the RSDC, and appealed Supreme Court's decision not to order the parties to a different forum. R.44-46; R.63-65. As a defensive measure in response to MASN's appeal, the Nationals noticed a

cross-appeal of Supreme Court's "evident partiality" determination. R.76-77; R.3486-87.[8] MLB also cross-appealed the Vacatur Order. R.87-89.

3. The Order Staying The New RSDC Arbitration

Following the Vacatur Order, the Nationals notified MASN and MLB that the Nationals had retained new arbitration counsel that would not concurrently represent MLB, the RSDC members, or their Clubs; the Nationals accordingly requested that MLB convene a new RSDC arbitration to determine the rights fees for 2012-2016. R.3489; *see also* R.3493. In ensuing correspondence and oral discussions, MASN "dispute[d]" that "the RSDC is the proper forum for new proceedings," R.3491, asserted that "MLB and the RSDC are incurably compromised," R.3496, and declared that because they "will not accept that the RSDC can fairly arbitrate this dispute now or at any time in the foreseeable future," R.3490, a new arbitration should occur in a different forum, R.3498.

The Nationals thus filed a motion to compel a new arbitration before the RSDC. At the court's urging, the parties participated in a two-day mediation, *see* R.3525, which was unsuccessful. MASN then filed its opposition to the Nationals' motion to compel, as well as a cross-motion seeking a stay of proceedings pending the cross-appeals of the Vacatur Order. R.3527-28. During the course of briefing the cross-motions, MLB announced that individuals affiliated with the Milwaukee

[8] The Nationals' position on the merits of the evident partiality determination is set forth at Point III, *infra*.

Brewers, Seattle Mariners, and Toronto Blue Jays had been appointed to the RSDC, R.3666; R.3670, and that MLB intended to convene a new RSDC arbitration "during the first week of August 2016," R.3683.

While the cross-motions were pending, the press again asked the Commissioner for comment. He stated: "It is important to bear in mind the fundamentals. The fundamentals are that the Orioles agreed the RSDC would set the rights fees for MASN and the Orioles every five years. The Orioles have engaged in a pattern of conduct designed to avoid that agreement being effectuated." R.3702.[9] While MASN suggests (Br. 29, 49) that this demonstrates bias in the Nationals' favor, MASN again misstates the substance of the comments. In context, the Commissioner's comments clearly refer to MASN's refusal to accept the RSDC's initial decision and subsequent refusal to participate in a new RSDC arbitration notwithstanding its express agreement to arbitrate in that forum. The Commissioner did not state that he believes an RSDC arbitration ought to reach any particular result, but rather that the Agreement's provision for arbitration of rights-fees disputes before the RSDC ought to be enforced and respected.

---

[9] *See also* Barry Svrluga, *Manfred: Orioles, MASN ignoring fundamentals of revenue share agreement with Nationals*, WASHINGTON POST (May 19, 2016), https://www.washingtonpost.com/news/sports/wp/2016/05/19/manfred-orioles-masn-ignoring-fundamentals-of-revenue-share-agreement-with-nationals/.

On July 11, 2016, Supreme Court entered an order (the "Stay Order," R.121.9-.20) denying the Nationals' motion to compel a new RSDC arbitration and enjoining the parties from conducting a new arbitration, without consent of all parties, "until the final determination of the appeals." R.121.20. The court did not retreat from its earlier ruling that a new RSDC arbitration would be appropriate upon the Nationals' retention of new counsel, but reasoned that it would be "inefficient" to commence a new arbitration, without all parties' consent, while the appeals are pending R.121.19-.20.

The Nationals noticed an appeal of the Stay Order, which the parties agreed to consolidate with the cross-appeals of the Vacatur Order.

STANDARD OF REVIEW

Supreme Court's interpretation of the FAA is reviewed *de novo*. *See Jones v. Bill*, 10 N.Y.3d 550, 553 (2008). The FAA provides that an arbitration provision "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, and that when a party has failed to comply with such a provision, a court "shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement," *id.* § 4; *see also* CPLR § 7503(a) (same under New York law). An arbitral award may be vacated for "evident partiality" only if "a reasonable person

would have to conclude that an arbitrator was partial to one party to the arbitration." *U.S. Elecs.*, 17 N.Y.3d at 914.

ARGUMENT

I. SUPREME COURT CORRECTLY RULED ARBITRATION SHOULD BE BEFORE THE RSDC

A. Supreme Court Had No Authority To Modify The Agreement And Compel The Nationals To Arbitrate Outside The RSDC

1. The FAA Requires Rigorous Enforcement Of Arbitration Agreements

The Agreement provides that disputes over telecast-rights fees "shall be determined by the Revenue Sharing Definitions Committee," and that the RSDC's determination "shall be final and binding on the Nationals and [MASN]." R.203. Yet the premise of MASN's appeal is that the Nationals should be compelled to arbitrate this dispute over telecast rights fees for 2012-2016 in a *different* forum.

MASN's contention flies in the face of the "overarching principle" of governing federal arbitration law: "arbitration is a matter of contract." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (citations omitted); *accord Belzberg v. Verus Invs. Holdings Inc.*, 21 N.Y.3d 626, 630 (2013) ("Arbitration is a matter of contract, 'grounded in agreement of the parties.'") (citations omitted). FAA Section 2 provides that a "written provision in … a contract … to settle by arbitration a controversy thereafter arising out of such contract … shall be valid, irrevocable, and enforceable, save upon such grounds as

exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Under this rule, "courts must 'rigorously enforce' arbitration agreements according to their terms, including terms that 'specify with whom [the parties] choose to arbitrate their disputes,' and 'the rules under which that arbitration will be conducted,'" *Italian Colors*, 133 S. Ct. at 2309 (citations and emphasis omitted), as well as terms specifying "who will resolve specific disputes," *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010).

The FAA thus mandates that "an agreement to arbitrate before a particular arbitrator may not be disturbed, unless the agreement is subject to attack on general contract principles." *Aviall, Inc. v. Ryder Sys., Inc.*, 110 F.3d 892, 895 (2d Cir. 1997). The FAA "'does not provide for judicial scrutiny of an arbitrator's qualifications to serve, other than in a proceeding to confirm or vacate an award, which necessarily occurs after the arbitrator has rendered his service.'" *Id.* at 895 (quoting *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 174 (2d Cir. 1984)). It also does not provide for preemptive disqualification of an arbitrator. As this Court has explained, the requirement to enforce an arbitration agreement means that a court has no power to "direct that the arbitration take place in a forum other than that specified in the agreement, notwithstanding a possibly fairer or more convenient proceeding in a forum not designated in the agreement." *In re Cullman Ventures, Inc.*, 252 A.D.2d 222, 228-29 (1st Dep't 1998); *see also, e.g.*, *Gulf Underwriters*

Ins. Co. v. Verizon Commc'ns, Inc., 32 A.D.3d 709, 710 (1st Dep't 2006) ("A party cannot be forced to an arbitration to which it has not agreed, … and the IAS court was not free to rewrite the limited arbitration clause."). Thus, unless the common law would require revocation or reformation of the arbitration agreement, Section 2 requires that *all* of the contract's terms—including terms identifying an arbitral forum—must be honored. As Supreme Court observed (R.42 n.21), "re-writing the parties' Agreement is outside of its authority."

2. The FAA Permits Remand Only To "The Arbitrator" Specified In The Agreement

Disregarding Section 2, MASN asserts that a *different* standard purportedly permits arbitrator replacement after an initial arbitration award has been vacated under Section 10(b). *See* MASN Br. 33-34, 38-39, 42-43. But Section 10(b) does not alter Section 2's requirement that arbitration agreements be "'rigorously enforce[d]' … according to their terms," *Italian Colors*, 133 S. Ct. at 2309 (citations omitted). Rather, it provides only that upon vacatur, "the court may, in its discretion, direct a rehearing *by the arbitrators*." 9 U.S.C. § 10(b) (emphasis added). This is *not* a grant of power to "direct a rehearing" in a forum to which the parties did not assent: "the arbitrators" referenced in Section 10(b) are plainly *arbitrators chosen pursuant to the governing arbitration agreement*, the terms of which remain "valid, irrevocable, and enforceable" under Section 2.

MASN identifies *no* case in which a court invoked Section 10(b) to direct a rehearing in an arbitral forum not agreed by the parties. MASN asserts (Br. 36) that courts have "replac[ed] arbitrators who were specifically chosen in the parties' contract," but the cited decisions did no such thing. In *Pitta v. Hotel Association of N.Y.C.*, 806 F.2d 419 (2d Cir. 1986), the contract "specifie[d] procedures for designating a replacement '[s]hould the [chosen arbitrator] resign, refuse to act, or be incapable of acting, or should the office become vacant for any reason.'" *Id.* at 420. There, the issue to be arbitrated was whether the appointed arbitrator (Cass) had been permissibly discharged *from his position as arbitrator*. *Id.* at 421. The Second Circuit rightly found that Cass had a "clear personal interest in the outcome" going beyond mere "evident partiality," *id.* at 423-24, and concluded in the circumstances that Cass was "'incapable of acting' *within the meaning of … the Agreement*, [such that] the provision for appointing another person to act as Impartial Chairman takes effect." *Id.* at 424 (emphasis added). Thus the court "direct[ed] the parties to appoint another arbitrator *in accordance with … the Agreement* for purposes of hearing and deciding this issue." *Id.* at 424-25 (emphasis added). The court did not remand to a new forum under Section 10(b), but instead *applied* the agreement's arbitrator-selection provisions to replace a *contractually-ineligible* arbitrator with one who could serve.

MASN also invokes *In re Excelsior 57th Corp. (Kern)*, 218 A.D.2d 528 (1st Dep't 1995). But that case arose under *state* law, not the FAA. Moreover, the arbitrators there were not designated by contract, but were individually chosen by the parties as part of a tripartite selection scheme. *See id.* at 528-29, 531. This Court did *not* depart from that scheme, but ordered the parties to adhere to it on remand, with the caveat that they could not reappoint disqualified arbitrators. *See id.* at 532.

MASN's other cases (Br. 34-36) come no closer to the mark. In *Sawtelle v. Waddell & Reed, Inc.*, 304 A.D.2d 103 (1st Dep't 2003), this Court suggested in *dicta* that Section 10(b) allows for "discretion to remand a matter to the same arbitration panel or a new one"—but it did not state that a court may require parties to arbitrate outside the *forum* to which they agreed, and it remanded the matter "*to the original panel* of arbitrators." *Id.* at 117 (emphasis added); *see also Fernandez v. N.Y.C. Transit Auth.*, 139 A.D.3d 417, 418 (1st Dep't 2016) (same under New York law).[10] None of these decisions suggests courts may invoke Section 10(b) to override the parties' contractual election of a particular arbitration forum.[11]

---

[10] *Accord Kashner Davidson Sec. Corp. v. Mscisz*, 601 F.3d 19, 20-21, 25 (1st Cir. 2010) (affirming remand to FINRA with possibility district court could appoint new arbitrators *within that forum*); *Aircraft Braking Sys. Corp. v. Local 856*, 97 F.3d 155, 157, 162 (6th Cir. 1996) (remand to a new arbitrator within contractual AAA forum, because arbitrator had already indicated his probable decision); *Hart v. Overseas Nat'l Airways Inc.*, 541 F.2d 386, 394 (3d Cir. 1976) (suggesting that district court could direct appointment of new arbitrator without

Finally, *Lipschutz v. Gutwirth*, 304 N.Y. 58 (1952), was decided under state law rather than the FAA, and in any event stands for virtually the *opposite* of MASN's position. The Court of Appeals there reversed the Appellate Division's decision replacing the contract's prescribed three-arbitrator panel with a single court-appointed arbitrator, explaining that the purpose of New York arbitration law is "to strengthen—not change—the rights and obligations of parties to arbitration agreements." *Id.* at 61, 63 (contractual "right to have disputes adjusted by several rather than one arbitrator is not to be lightly regarded"); *id.* at 65 (court would not "alter[] the framework within which the parties have agreed that their disputes be settled").[12]

---

indicating that rearbitration could be compelled in a forum not agreed by the parties); *Stroehmann Bakeries, Inc. v. Local 776*, 969 F.2d 1436, 1439-40, 1446 (3d Cir. 1992) (similar); *Grand Rapids Die Casting Corp. v. Local Union No. 159*, 684 F.2d 413, 414, 416-17 (6th Cir. 1982) (similar); *First Nat'l Oil Corp. v. Arrieta*, 2 A.D.2d 590, 591, 593 (2d Dep't 1956) (similar in *dicta* under New York law; court declined to remand to new panel); *Hyman v. Pottberg's Ex'rs*, 101 F.2d 262, 266 (2d Cir. 1939) (declining to consider "[w]hether new arbitrators must be selected by consent, or whether the court has power to appoint them").

[11] MASN cites *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1067-68 & n.2 (2d Cir. 1972), in passing (Br. 39), but that case also did not involve Section 10(b). Rather, the arbitration agreement there was not enforced because it was "invalid under general contract principles," *Aviall*, 110 F.3d at 896. MASN's fallback argument that reformation applies here is addressed in Point I.B, *infra*.

[12] The court stated that *under New York law* an arbitrator "may be removed" if he is shown to be "incapable" of abiding his oath "'faithfully and fairly to hear and examine the matters in controversy and to make a just award,'" 304 N.Y. at 64-65 (quoting former Civil Practice Act § 1455), but that *dicta* has no application in an FAA case like this one, or under the facts here. As discussed *infra* at 36-38, parties

MASN thus fails to identify even a *single* Section 10(b) decision compelling arbitration in a forum other than one chosen in the parties' agreement; its suggestion (Br. 40) that there are merely "not many" such cases is a gross understatement. Conversely, MASN's assertion (Br. 37) that there is no authority for the proposition that the courts are "constrained by the parties' agreement" is belied by the FAA's fundamental and unambiguous provision that courts must enforce *any* valid arbitration agreement. 9 U.S.C. § 2; *see Italian Colors*, 133 S. Ct. at 2309; *Aviall*, 110 F.3d at 895.

MASN's reference to FAA Section 10(a) (MASN Br. 38-39) similarly falls flat. While parties cannot contract *around* the courts' Section 10 authority, the question here is the *scope* of that authority. As shown, the courts' Section 10(b) authority is limited, permitting remand to "the arbitrators" chosen in accordance with the arbitration agreement. Congress provided no free-floating Section 10 power "to order rehearing on terms that will ensure a fair process" (*contra* MASN Br. 38).

Remand to a body other than the RSDC also cannot be justified by some "inherent[]" or "foundational principle[] of arbitration" requiring neutral arbitrators (*contra* MASN Br. 39). "Fundamental fairness" is *not* a necessity in arbitration,

---

under the FAA also are free to contract for arbitrators who are less than fully disinterested.

N.F.L. Players Ass'n ex rel. Peterson v. N.F.L., 2016 WL 4136958, *10 (8th Cir. Aug. 4, 2016); the touchstone is rigorous enforcement of contract rights. *Italian Colors*, 133 S. Ct. at 2309. The FAA is clear that parties to an arbitration agreement "can ask for no more impartiality than inheres in the method they have chosen," *N.F.L. Mgmt. Council v. N.F.L. Players Ass'n*, 820 F.3d 527, 548 (2d Cir. 2016), and may indeed elect by contract an arbitrator that is "precommitted to a particular substantive position," *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 679 (7th Cir. 1983) (Posner, J.); *see also, e.g.*, *Williams v. N.F.L.*, 582 F.3d 863, 885 (8th Cir. 2009) (similar); *Winfrey v. Simmons Foods, Inc.*, 495 F.3d 549, 551 (8th Cir. 2007) (similar).

For instance, in *N.F.L. Management Council*, the NFL Commissioner had taken disciplinary action against player Tom Brady, who appealed the decision via an arbitral proceeding in which the Commissioner exercised his contractual authority to appoint *himself* as arbitrator. 820 F.3d at 534. The Second Circuit upheld the Commissioner's decision as arbitrator to uphold his own disciplinary finding, explaining that he was not "evidently partial" because "the parties contracted … to specifically allow the Commissioner to sit as the arbitrator[,] … knowing full well … that the Commissioner would have a stake both in the underlying discipline and in every arbitration [arising therefrom]." *Id.* at 548. The FAA did not require a neutral arbitral forum, but that the contract be enforced:

"Had the parties wished to restrict the Commissioner's authority, they could have fashioned a different agreement." *Id.*; *see also Peterson*, 2016 WL 4136958, at *9-10 (upholding arbitration despite arbitrator's "actual or apparent conflict of interest" because "the parties bargained for this procedure").

MASN cites (Br. 39) *Hooters of America, Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999), but that case is inapposite. The plaintiff restaurant corporation had agreed in the arbitration contract to promulgate arbitral rules, but did not provide them to the defendant (a bartender) until after she threatened to sue for sexual harassment. *See id.* at 935-36. The Court found the post-contract promulgated rules were "so egregiously unfair as to constitute a complete default of [Hooters'] contractual obligation to draft arbitration rules and to do so in good faith." *Id.* at 938. The court thus held only that Hooters had breached its unilateral duty to set up a reasonable arbitral forum, *id.* at 940—not that sophisticated parties to a heavily negotiated contract are restricted in choosing the forum before which they will arbitrate. The plurality opinion in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), also does not establish that perfect impartiality is required. *See Morelite*, 748 F.2d at 82-83 & n.3 (adopted in *U.S. Elecs.*, 17 N.Y.3d at 914). Rather, parties are permitted to make a "trade-off between expertise and impartiality." *Id.* at 83. Such a voluntary trade-off must be enforced. 9 U.S.C. § 2.

Finally, no basis exists for MASN's suggestion (Br. 39-40) that the Constitution requires interpreting Section 10(b) to allow a court to replace a contractually elected arbitral forum. *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993), is plainly distinguishable: the due process concerns there arose because *Congress* had statutorily *required* arbitration of certain ERISA pension disputes. *See id.* at 611, 617-18. The same concerns do not arise under purely private arbitration agreements governed by the FAA. *Cf. N.F.L. Mgmt. Council*, 820 F.3d at 548 (upholding award issued by arbitrator despite conflict of interest because contract permitted his appointment).

B. MASN Does Not Make The Extraordinary Showing Necessary To Reform The Agreement

MASN argues in the alternative (Br. 52-57) that the Agreement should be "reformed to remove the dispute from MLB's control and influence because the parties' intent for a neutral arbitration has been frustrated." But MASN fails even to identify the requirements for judicial reformation of a contract—requirements that MASN could never satisfy here.

Reformation may be appropriate in a case of "mutual mistake or fraud," because in those situations the parties' writing may be found not to properly express their agreement. *Chimart Assocs. v. Paul*, 66 N.Y.2d 570, 573 (1986). Reformation is not permitted, however, "'for the purpose of alleviating a hard or

oppressive bargain, but rather to restate the intended terms of an agreement when the writing that memorializes that agreement is at variance with the intent of both parties.'" *US Bank N.A. v. Lieberman*, 98 A.D.3d 422, 424 (1st Dep't 2012) (quoting *George Backer Mgmt. Corp. v Acme Quilting Co.*, 46 N.Y.2d 211, 219 (1978)). Thus, "unilateral mistake" alone is "an insufficient basis for reformation," *Rotter v. Ripka*, 110 A.D.3d 603, 604 (1st Dep't 2013), and such relief also is not available "where the parties purposely contract[ed] based upon uncertain or contingent events." *Chimart*, 66 N.Y.2d at 574. Even where a party "may not have expected [a particular] result," that fact "is not enough to rewrite an agreement that is complete on its face, unambiguous and contains a merger clause that claims to supercede [*sic*] all prior agreements, particularly where, as here, the parties were sophisticated business entities represented by counsel." *Resort Sports Network Inc. v. PH Ventures III, LLC*, 67 A.D.3d 132, 136 (1st Dep't 2009).

The "proponent of reformation must show in no uncertain terms, not only that mistake or fraud exists, but exactly what was really agreed upon between the parties." *Chimart*, 66 N.Y.2d at 574 (quoting *Backer*, 46 N.Y.2d at 219); *see also, e.g.*, *Warberg Opportunistic Trading Fund, L.P. v. GeoResources, Inc.*, 112 A.D.3d 78, 85-86 (1st Dep't 2013) (reformation requires "clear, positive and

convincing evidence" that writing does not reflect parties' agreement) (emphasis omitted).[13]

MASN makes no attempt to show that there was any mutual mistake or fraud in the making of the Agreement. MASN instead asserts (Br. 52-53) it did not "expect" MLB's role in the arbitration to be as MASN alleges it was, and that conducting a new RSDC arbitration would "frustrate" the parties' agreement. But failure of a party's unilateral expectations is not enough to justify reformation, *see Resort Sports*, 67 A.D.3d at 136, and neither is mere "frustrat[ion]" of the parties' purpose, *see Simkin v. Blank*, 19 N.Y.3d 46, 51, 54 (2012). Any demand for reformation thus fails as a matter of law.

The facts here, in any event, do not support MASN's reformation argument. MASN posits (Br. 53; *see also* Br. 55, 57) that the parties contracted with an "intent to submit their dispute to a neutral decision-maker," but MASN cites no evidence of such intent—let alone the *unequivocal* evidence necessary for reformation. *See Chimart*, 66 N.Y.2d at 574. MASN claims (Br. 5 (citing R.113,

---

[13] If Maryland law governs this issue (*see* R.210), identical standards apply. *See, e.g.*, *Md. Port Admin. v. John W. Brawner Contracting Co.*, 492 A.2d 281, 288 (Md. 1985) ("[O]ne of two circumstances must exist before a court of equity will reform a written contract: either there must be mutual mistake, or there must be fraud, duress, or inequitable conduct."); *Hearn v. Hearn*, 936 A.2d 400, 410 (Md. Ct. Spec. App. 2007) (reformation requires "clear, strong and convincing" evidence that "leave[s] no reasonable doubt" about contracting parties' true intent) (citation omitted).

118-19)) that Supreme Court found MASN "expected" a proceeding more "impartial" than the one the RSDC provided, but that finding concerned only Proskauer's involvement in the first arbitration. The court did not find that arbitration before the RSDC itself was in any way, shape or form inconsistent with the obvious expectations inherent in the contractual designation of the RSDC as arbitration forum. Instead, Supreme Court found: "MASN, and the Orioles as its majority owner, clearly agreed to an 'inside baseball' arbitration, where the parties and arbitrators would all be industry insiders who knew each other and inevitably had many connections." R.36.

The record confirms that the first RSDC arbitration conformed to the parties' expectations. The parties knew that the RSDC is an MLB committee composed of individuals affiliated with MLB Clubs, who would receive administrative support from MLB in conducting any arbitration. R.2924-25; R.1920; R.3307-08 *see also* R.36. The RSDC proceeding was consistent in every material respect with past RSDC practice. It was normal for the Commissioner to sit alongside the RSDC members and take an active role in questioning witnesses, R.2922-24, as well as for MLB staff to play the role of law clerk by assisting with data analysis, *id.*; R.3151-52, and preparing a draft of the award at the panel's direction, R.2923; R.3170; *see also* R.30. Indeed, MLB's role in RSDC proceedings was "standard practice," *see* R.2922, and "well known to MLB Clubs, including the [Orioles],"

R.2924-25. MASN's counsel *admitted* below that it had "agreed to" and "had to live with" "whatever the structure was, whatever Major League Baseball's role was." R.3286.

Tellingly, MASN *did not object* during the arbitration to the Commissioner's or MLB staff's "participation or conduct in any respect, including with regard to where [he] was seated in the room or any questions [he] asked or comments [he] may have made." R.2926. As Supreme Court found, MLB provided only "the sort of support that the parties must necessarily have expected when they entered into the Agreement." R.30.

MASN's citations (Br. 54-57) also do not support reformation. In *Aviall*, the Second Circuit *rejected* an attempt to disqualify a contractually designated arbitrator (KPMG) that both served as one party's regular auditor and assisted that party in preparing for the arbitration. 110 F.3d at 895. In *Erving v. Virginia Squires Basketball Club*, 349 F. Supp. 716 (E.D.N.Y. 1972), the parties (a basketball player and his club) had a "contractual intent to submit their dispute to a neutral expert," *Aviall*, 110 F.3d at 896, namely the league commissioner. But *after* the contract was entered, a partner in the defendant's law firm was appointed as commissioner. *Erving*, 349 F. Supp. at 719. The basis for claiming bias thus was not in the parties' contemplation when the contract was executed—whereas here, the material facts were known and accepted by all parties to the Agreement.

Moreover, the plaintiff in *Erving* alleged an element of fraud in the *making* of the arbitration contract, *id.* at 718—another basis for contract reformation that is not present here.

Morris v. N.Y. Football Giants, Inc., 150 Misc. 2d 271 (N.Y. Cnty. 1991), is likewise inapposite. The commissioner there could not arbitrate the dispute in part because he was a named defendant in the suit, on a substantive claim for tortious interference of contract. *Id.* at 277; *see Aviall, Inc. v. Ryder Sys., Inc.*, 913 F. Supp. 826, 834 (S.D.N.Y. 1996) (distinguishing *Morris* on this ground). Moreover, the commissioner in *Morris* had expressly and repeatedly pre-judged "the very issue he would have to decide" in the arbitration. *See Morris*, 150 Misc. 2d at 277. The same is not true here; neither MLB nor any of the RSDC members who will decide the dispute has expressed a view on its substantive merits. *See infra*, at 47-48[14]

[14] In *Fleming Companies, Inc. v. FS Kids, L.L.C.*, 2003 WL 21382895 (W.D.N.Y. May 14, 2003), the court did not reform the arbitration agreement and instead ruled that attacks on the arbitration would "have to wait until after an arbitration award has been rendered at which time [defendants] may proceed to seek vacatur." *Id.* at *6. With respect to the *Aviall* case, the language MASN quotes (Br. 54) regarding "unforeseen intervening events" and "unmistakable partiality" is drawn from the district court's decision, and was *not* adopted in the Second Circuit's holding that an arbitration agreement can be altered only "under general contract principles." *Aviall*, 110 F.3d at 895. The court in *Masthead MAC Drilling Corp. v. Fleck*, 549 F. Supp. 854, 856 (S.D.N.Y. 1982), did *not* reform the contract, but indicated only that such reformation could be available if the contract had been fraudulently procured—a circumstance not established either there or here. *See Aviall*, 110 F.3d at 896. And the disqualification in *Porter v. City of Flint*, 736 F. Supp. 2d 1095 (E.D. Mich. 2010), was based on a contractual *agreement* (again not present here)

C. MASN Identifies No Basis To Preemptively Disqualify The Reconstituted RSDC

MASN's objections to a new RSDC arbitration (Br. 43-52) are aimed at the wrong target. MASN's claim is that *MLB* is biased for various reasons, but neither MLB nor any of its personnel (including the Commissioner) will act as arbitrator in the new proceeding. The three RSDC members will fill that role, and MASN does not suggest that any of those individuals (or their clubs) has any disqualifying interest in the dispute. MASN's argument (Br. 40-41, 51) that MLB would control the result of a new arbitration is refuted by the record of the first arbitration. The evidence established that the RSDC members decide disputes independently, and that MLB staff (who are required to remain neutral, R.3142) merely provide administrative, legal, and organizational support. *E.g.*, R.3170; R.3124; R.3129; R.3134; R.1846; R.1855-56; R.1864; R.1763; R.1767; R2922. Supreme Court *rejected* MASN's arguments that "MLB improperly controlled or influenced the arbitration process, or usurped the arbitrators' decision-making function," explaining that "very little was establish[ed] by" MASN. R.30.

MASN's objections to the RSDC are thus misplaced, because they cannot show that *the arbitrators* in a new RSDC arbitration will be partial to either side. In any event, the objections also fail on the merits:

---

that an arbitrator with an "appearance of partiality" was "not eligible to continue." *Id.* at 1099.

1. MASN's lead argument (Br. 37, 40, 43) omits that the *only* aspect of the first RSDC arbitration that the trial court found improper was the Nationals' representation by Proskauer. R.36; R.42-43 n.21 ("emphasiz[ing] that … it [was] ultimately the Nationals' choice of counsel" alone that supported vacatur). And that purported conflict has been removed by the Nationals' retention of new counsel. R.3489; R.3493; *see* R.42-43 n.21.

2. MASN cites (Br. 41, 43-45) the $25 million advance MLB made to the Nationals in 2013, but the record shows that MASN was aware that MLB expected to be repaid, *see* R.3173-74; R.3178; R.3180; R.3143, and was "enthusiastic and supportive of the Commissioner's actions" undertaken in furtherance of settlement discussions, R.1770; R.3178-80; R.2917; *see supra*, at 19-20. MASN cannot base a claim for extraordinary equitable relief on conduct that MASN itself supported at the time: "Equity will not aid one who consciously invites the wrong of which he complains; so where the result complained of is induced by plaintiff's own conduct, equity will refuse relief." *Meisner v. Meisner*, 29 N.Y.S.2d 342, 345 (N.Y. Cnty. 1941) (collecting authorities), *aff'd*, 264 A.D. 758 (1st Dep't 1942); *see also* 55 N.Y. JURISPRUDENCE 2d *Equity* § 89 (same).

3. MASN next argues (Br. 45-47) that MLB must be biased because it "is adverse to MASN and the Orioles in these and other related proceedings, and has actively supported the Nationals' attempts to confirm the award." But it was

MASN that sued MLB here, not the other way around. R.135-36. MASN cannot prevent the Nationals from asserting their rights under the Agreement by the expedient of suing MLB. And having been named as a respondent by MASN, MLB surely was entitled to defend against MASN's allegations (all rejected by Supreme Court) that MLB had run a corrupt and fraudulent arbitration.

Nor has MLB prejudged the outcome of the parties' underlying dispute. While the Commissioner recounted that he had previously advised MASN that its proffered construction of the Agreement "did not conform to the text," R.3181, that observation was simply accurate as a matter of fact: the Agreement's language "makes no reference to any 'Bortz Methodology,'" nor does it make "reference to MASN maintaining a 20 percent operating margin." *Id.* In any event, the RSDC's award discussed at length why MASN's proposed "Bortz" methodology was not consistent with the RSDC's "established methodology" (the contractually agreed standard to be applied). *See* R.219-23; R.227.

The Commissioner's comments to the press also do not establish any bias regarding the outcome of a new RSDC arbitration. Neither expressed any judgment as to how the ultimate "dispute should be resolved," nor did they advocate "the correctness of the award." *Contra* MASN Br. 48-49. In his May 2015 remarks (of which Supreme Court was aware in rejecting MASN's argument), the Commissioner only explained that "the RSDC was empowered to

set rights fees," and expressed confidence that MASN would eventually "pay th[e] rights fees" that the RSDC had set, because the tribunal had issued a *confirmable* award—*i.e.*, one that drew its essence from the Agreement and which had not been procured by fraud. R.3433. And in his May 2016 remarks, the Commissioner again expressed no view of the merits, but merely stated the obvious: MASN "agreed the RSDC would set the rights fees for MASN and the Orioles every five years," yet made repeated efforts "to avoid that agreement [to decide such disputes in the RSDC] being effectuated." R.3702; *see supra*, at 22, 28.

Nor do MASN's other specific complaints about MLB's conduct hold water. For one thing, as noted (*supra*, at 20-21), MLB's warnings against bringing a court litigation cannot establish bias (*contra* MASN Br. 27), for they were issued against *both* the Nationals *and* MASN. R.568-69. MLB's announcement that it intended to reconvene the RSDC this past August also shows no bias as to the outcome of that arbitration, nor is it reflective of an effort to "circumvent … judicial review" (MASN Br. 47): Supreme Court had indicated in its Vacatur Decision that the Nationals' choice of new counsel would permit the parties to return to the RSDC, R.42-43 n.21, and any award from the planned arbitration would have been subject to confirmation and vacatur proceedings.

4. MASN's position is not supported by its complaints (Br. 47-48) about MLB's role in the prior arbitration. As discussed (*supra*, at 10-14, 42-43), that role

was wholly consistent with the ordinary RSDC practice to which MASN consented by entering the Agreement. MLB did not dictate the result of the first RSDC arbitration, and would not do so in a subsequent proceeding. *See* R.1845-46; R.1855-56; R.1864-65; R.1763.

At bottom, this case is thus again distinguishable from *Kern*, 218 A.D.2d 528 (cited in MASN Br. 49-50). The current RSDC (none of whose members served in the initial arbitration) has not "heard the evidence" to be presented in a new arbitration, nor have its members expressed any view as to the outcome.

II. MASN SHOULD BE COMPELLED TO ARBITRATE BEFORE THE RSDC

Because MASN is obligated under the Agreement and the FAA to submit to a new RSDC arbitration, the Stay Order should be reversed to the extent of granting the Nationals' motion for an order compelling MASN to arbitrate the 2012-2016 rights fee dispute before the RSDC.

Under the FAA, when a court is "satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue," it "*shall* make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C. § 4 (emphasis added); *see also* CPLR § 7503(a) (similar). Thus, where (1) there is an agreement to arbitrate, and (2) one party has failed to honor that agreement, a court is *required* to issue an order compelling arbitration. There is "no place for the exercise of discretion," and a court *must*

"direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 844 (2d Cir. 1987) (citation omitted); *see also LAIF X SPRL v. Axtel, S.A. de C.V.*, 390 F.3d 194, 198 (2d Cir. 2004) (similar); *Kensington Ins. Co. v. James River Specialty Ins. Co.*, 997 N.Y.S.2d 407, 408-09 (1st Dep't 2014) (similar).

Supreme Court here ignored the mandatory statutory language in denying the Nationals' application for an order compelling arbitration. The court instead noted (R.121.15-16) that the Vacatur Order did not *itself* compel MASN and the Orioles to participate in a new RSDC arbitration, and asserted (R.121.15) that it would not "require that [the arbitration] process move faster than the plain language of [the Agreement] requires." But nothing in either contract or statute permits a court to delay compelling arbitration once a properly supported application is filed. And here, the Nationals' motion should have been granted because each of the two prerequisites to such an order is plainly met.

First, as discussed above, there can be no legitimate dispute that the Agreement's terms require MASN to arbitrate the instant dispute before the RSDC.

Second, a refusal to arbitrate requires only that the party has "fail[ed] to comply with an arbitration demand or ... otherwise unambiguously manifest[ed] an intention not to arbitrate the subject matter of the dispute" in accordance with the agreement. *PaineWebber Inc. v. Faragalli*, 61 F.3d 1063, 1066 (3d Cir. 1995)

(quoted in *LAIF*, 390 F.3d at 198). MASN's conduct, insisting ever since the Vacatur Order issued that it is "entitled" to a tribunal other than the RSDC and that they "will not accept" their contractual obligation to arbitrate in that forum, clearly meets this standard. R.3485-86; R.3498; R.3490; R.3496; R.3488; *see, e.g.*, *Telesat Canada v. Planetsky, Ltd.*, 2013 WL 592668, *3 (S.D.N.Y. Feb. 15, 2013) (refusal to arbitrate established where party failed to respond to arbitration demand); *accord Emilio v. Sprint Spectrum, L.P.*, 315 F. App'x 322, 325 (2d Cir. 2009) (party had "refus[ed] to arbitrate" where it ceased to participate in arbitration and sought injunction dismissing arbitration claims).

MASN's failure to arbitrate before the RSDC is clear. It should be ordered to comply with its obligations. The Stay Order should be reversed in this respect.

III. SUPREME COURT IMPROPERLY FOUND "EVIDENT PARTIALITY"

Supreme Court's vacatur of the RSDC's initial award was based entirely on Proskauer's representation of the Nationals and Supreme Court's view that neither MLB, the RSDC nor the Nationals had responded to MASN's concerns about that representation. That was error; the circumstances did not support a finding of "evident partiality" justifying vacatur under the FAA.

A. MASN Waived Any Challenge To Alleged Arbitral Partiality

Supreme Court erred by even considering MASN's argument, which MASN waived by failing to seek the arbitrators' disqualification. The FAA "precludes

attacks on the qualifications of arbitrators on grounds previously known but not raised until after an award has been rendered." *AAOT Foreign Econ. Ass'n (VO) Technostroyexport v. Int'l Dev. & Trade Servs., Inc.*, 139 F.3d 980, 982 (2d Cir. 1998). Thus, a party wishing to vacate an award based on an arbitrator's alleged bias must challenge "the composition of the arbitration panel at the time of the hearing." *Bernstein Seawell & Kove v. Bosarge*, 813 F.2d 726, 732 (5th Cir. 1987) (citing *Sheet Metal Workers Int'l Ass'n v. Kinney Air Conditioning Co.,* 756 F.2d 742, 746 (9th Cir. 1986)); *see also Kiernan v. Piper Jaffray Cos.*, 137 F.3d 588, 593 (8th Cir. 1998) (petitioner waived objection by failing to seek allegedly biased arbitrator's removal until after issuance of award). But here, MASN never objected to "the composition of the [RSDC] panel"—it only sought disqualification of *Proskauer* as the Nationals' counsel. R.1772; R.1774; R.1852; R.1862; R.1870. That is insufficient to preserve MASN's argument that *the panel* was biased. *See, e.g.*, *Delta Mine Holding Co. v. AFC Coal Props., Inc.*, 280 F.3d 815, 821 (8th Cir. 2001) ("express[ing] concern to the arbitrators" regarding partiality insufficient to preserve objection where party "did not request [challenged arbitrator's removal"); *Douglas Elliman, LLC v. Parker Madison Partners*, 2007 WL 2175574 (N.Y. Cnty. June 12, 2007) (similar), *aff'd*, 45 A.D.3d 252 (1st Dep't 2007).

MASN also waived any challenge resting on a purported failure to *disclose* the extent of Proskauer's engagements. Although "[a]rbitrators have an obligation to 'disclose dealings of which the parties cannot reasonably be expected to be aware,' … a party cannot avoid [confirmation] of an award based on its discovery of a non-disclosed relationship where the party 'could have made such a review just as easily before or during the arbitration rather than after it lost its case.'" *Schwartzman v. Harlap*, 377 F. App'x 108, 110 (2d Cir. 2010) (quoting *In re Andros Compania Maritima, S.A.*, 579 F.2d 691, 700 (2d Cir. 1978)); *see also Lucent Techs. Inc. v. Tatung Co.*, 379 F.3d 24, 28 (2d Cir. 2004) (similar). Here, MASN knew that Proskauer represented MLB, *see* R.850, and interests associated with the RSDC members, *see* R.420; R.858; R.1788-90; R.1874-75. And MASN could have discovered more about the relationships of which it now complains either by inquiring with the arbitrators (as MLB recommended, R.1786; R.850) or by conducting public-records searches. *See* R.165-66, R.190 (detailing information obtained through "public records" and "Google" searches during the present litigation); *supra*, at 16 & n.4. But MASN did neither, and cannot now establish evident partiality on this basis.

The only thing MASN *actually* sought was disqualification by MLB of Proskauer as the Nationals' counsel—relief that, as MLB advised MASN, R.1772, MLB had no authority to grant. *See, e.g.*, *Merrill Lynch*, 1 A.D.3d at 44

(disqualification of counsel is "beyond the jurisdiction of arbitrators"). MLB thus did not simply ignore MASN's entreaties; it advised MASN that it could not act. The relief MASN sought could only have been granted by a court or an ethics body, but MASN did not take action in any such forum—MASN instead waited until *after* the arbitration was complete to ask Supreme Court for relief that neither MLB nor the RSDC could grant. That was too late, and Supreme Court erred in not finding the objection waived.

B. The Record Does Not Support The "Evident Partiality" Finding

Wholly apart from any waiver, Supreme Court also erred in finding "evident partiality" on the facts here. As Supreme Court recognized, R.38, the FAA requires more than a mere "appearance of bias" on the part of the arbitrators. Instead, the FAA standard applied by both the Court of Appeals and the Second Circuit permits vacatur *only* if "a reasonable person would *have* to conclude that an arbitrator was partial to one party to the arbitration," *U.S. Elecs.*, 17 N.Y.3d at 914 (quoting *Morelite*, 748 F.2d at 84) (emphasis added), meaning that *any* reasonable person would conclude that the arbitrator was "predisposed to favor one party over another," *Scandinavian Reins. Co. v. St. Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 74 (2d Cir. 2012). The party seeking vacatur bears the "burden of proving evident partiality," *id.* at 72, and must do so by "demonstrating objective facts" that are "direct and not speculative" and which are clearly and convincingly "inconsistent

with impartiality," *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust*, 729 F.3d 99, 104-06 (2d Cir. 2013) (citation omitted). Such facts would include an arbitrator's "financial interest" in the case, and whether there is a "direct[] … relationship between the arbitrator and a party." *Id.* at 106 (quoting *Sanford Home for Adults v. Local 6, IFHP*, 665 F. Supp. 312, 320 (S.D.N.Y. 1987)). Supreme Court erred in finding this rigorous standard met, for there are no "objective facts" from which a reasonable person would have to conclude that the RSDC was predisposed to rule in the Nationals' favor.

First, there is no evidence that Proskauer's involvement gave the RSDC or any of its members any financial interest in the outcome of the rights-fees dispute.

Second, any posited relationship between the Nationals and the RSDC is the *opposite* of a "direct" one that would require a reasonable person to infer bias: the Nationals and the RSDC members at most had *indirect* relationships by way of Proskauer's representations not of the members themselves, but of the members' Clubs and associated entities. MASN cannot legitimately complain about such relationships, which were an inherent part of the close-knit industry arbitration to which MASN agreed. *See* R.36; R.1921-23; *Ecoline, Inc. v. Local Union No. 12*, 271 F. App'x 70, 72 (2d Cir. 2008) ("courts must remain cognizant of peculiar commercial practices," such that "the small size and population of an industry might require a relaxation of judicial scrutiny"); *Andros*, 579 F.2d at 701

("Expertise in an industry is accompanied by exposure, in ways large and small, to those engaged in it…."). And where, as here, arbitrators "are chosen precisely because of their involvement in [a particular industry] community, some degree of overlapping representation and interest inevitably results"; vacating arbitration awards based on nothing more than such routine overlaps "would seriously disrupt the salutary process of settling … disputes through arbitration." *Int'l Produce, Inc. v. A/S Rosshavet*, 638 F.2d 548, 552 (2d Cir. 1981).

In any event, neither Supreme Court nor MASN ever substantiated the speculative supposition that such an indirect relationship predisposed the RSDC to rule in the Nationals' favor. Indeed, the record shows that the relevant RSDC members were not even aware of two of the cited representations at the time of the arbitration, R.1869; R.1860, so they cannot justify vacatur as a matter of law. *See, e.g.*, *Univ. Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331, 1341 (11th Cir. 2002) ("the arbitrator must be aware of the facts comprising a potential conflict" for nondisclosure to justify vacatur).

In any event, every member of the RSDC panel that participated in the original arbitration attested that they exercised their independent judgment, R.1865; R.1846; R.1856, and that Proskauer's involvement in the arbitration had no bearing on the result, R.1849; R.1859; R.1867; *see also* R.30 (finding that MLB did not wield undue influence over arbitration). And the RSDC here returned an

award *far* closer to MASN's proposal than to the Nationals'. R.234; R.1934; R.2062.

The supposed "objective facts" on which Supreme Court relied in finding evident partiality, R.41, were limited to supposed "inaction" in response to MASN's complaints. The court proffered a list of alternative steps that *MLB* might have taken, R.38-39, but it offered no reason to think that *MLB's* failure to take such steps would necessarily lead a reasonable person to conclude that *the RSDC members* were biased in the Nationals' favor. The Nationals were aware of MASN's objections and the possibility that they would be cited as a basis for vacatur, *see* R.38 & n. 15, but continued to work with their longtime attorneys at Proskauer because they saw no genuine risk that the representation could lead to a finding of evident partiality. MLB had no more authority to instruct Proskauer with respect to ethical screening procedures than it did to disqualify the firm, *contra* R. 38-39. And the FAA does not impose the disclosure obligation that Supreme Court posited, R.40: Vacatur is not warranted "solely because an arbitrator fails … to conform in every instance to the parties' respective expectations regarding disclosure. The nondisclosure does not by itself constitute evident partiality. The question is whether the *facts* that were not disclosed suggest a material conflict of interest." *Scandinavian Reins.*, 668 F.3d at 76-77. The

"undisclosed" facts here do not suggest any such conflict, nor any other reason to think that the RSDC members were predisposed to rule for the Nationals.

CONCLUSION

The Nationals respectfully submit that Court should direct MASN to submit to rearbitration of the parties' 2012-2016 rights fee dispute before the RSDC. Grounds also exist for the judgment vacating the RSDC's initial award to be reversed, and for the matter to be remanded to Supreme Court with instructions to confirm the award.

Dated: September 12, 2016

Respectfully Submitted,

Stephen R. Neuwirth
Sanford I. Weisburst
Julia J. Peck
Cleland B. Welton II
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010
Telephone: (212) 849-7000
Facsimile: (212) 849-7100
stephenneuwirth@quinnemanuel.com

Attorneys for Respondent-Respondent-Cross-Appellant-Appellant Washington Nationals Baseball Club, LLC

PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 N.Y.C.R.R. § 600.10 that the foregoing brief was prepared on a computer using Microsoft Word.

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

(i) Name of Typeface: Times New Roman

(ii) Point Size: 14

(iii) 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 authorities, proof of service and this Statement, is 13,946.

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

TCR SPORTS BROADCASTING HOLDING, LLP, Petitioner-Appellant-Cross-Respondent, -against- WN PARTNER, LLC; NINE SPORTS HOLDING, LLC; WASHINGTON NATIONALS BASEBALL CLUB, LLC, Respondents-Respondents-Cross-Appellants, -and- THE OFFICE OF COMMISSIONER OF BASEBALL; and ALLAN H "BUD" SELIG, AS COMMISSIONER OF MAJOR LEAGUE BASEBALL, Respondents, -and- THE BALTIMORE ORIOLES BASEBALL CLUB and BALTIMORE ORIOLES LIMITED PARTNERSHIP, in its capacity as managing partner of TCR SPORTS HOLDING, LLP, Nominal Respondents-Appellants-Cross-Respondents.	Index No. 652044/2014 IAS Part 41 (Marks, J.) **PRE-ARGUMENT STATEMENT**

Respondents-Respondents-Cross-Appellants Washington Nationals Baseball Club, LLC, WN Partner, LLC, and Nine Sports Holding, LLC respectfully submit the following Pre-

Argument Statement regarding their cross-appeal, pursuant to Section 600.17(a) of the Rules of the Supreme Court of the State of New York, Appellate Division, First Department:

1. The complete title to this action is as set forth above.

2. The full names of the parties to this action are as captioned, except that the Commissioner of Major League Baseball is now Robert D. Manfred, Jr.

3. Counsel for Respondents-Respondents-Cross-Appellants are:

Stephen R. Neuwirth
Sanford I. Weisburst
Julia J. Peck
Cleland B. Welton II
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10166
(212) 849-7000

4. Counsel for Respondents-Appellants-Cross-Respondents and Nominal Respondents-Appellants-Cross-Respondents are:

Thomas J. Hall
Rachel W. Thorn
Caroline Pignatelli
Chadbourne & Park LLP
1301 Avenue of the Americas
New York, NY 10019
thall@chadbourne.com
Counsel for Petitioner-Appellant-Cross-Respondent TCR Sports Broadcasting Holding, LLP

Carter G. Phillips
Benjamin R. Nagin
Kwaku A. Akowuah
Sidley Austin LLP
1501 K Street NW
Washington, DC 20005
cphillips@sidley.com
Counsel for Nominal Respondents-Appellants-Cross-Respondents Baltimore Orioles Baseball Club and Baltimore Orioles Limited Partnership

Arnold Weiner
Aron U. Raskas
Rifkin, Weiner, Livingson Levitan & Silver, LLC
2002 Clipper Park Road, Suite 108
Baltimore, MD 21211
Counsel for Nominal Respondent-Appellant-Cross-Respondent Baltimore Orioles Limited Partnership, in its capacity as managing partner of TCR Sports Broadcasting Holding, LLP

Brendan V. Sullivan, Jr.
John J. Buckley, Jr.
Barry S. Simon
C. Bryan Wilson
Jay R. Schweikert
Williams & Connolly LLP
725 Twelfth Street, NW
Washington, DC 20005
jbuckley@wc.com
Counsel for Respondent The Office of Commissioner Allan H. "Bud" Selig, As Commissioner of Major League Baseball

Jonathan D. Lupkin
Rakower Lupkin PLLC
488 Madison Avenue, 18th Floor
New York, NY 10022
jlupkin@rakowerlupkin.com
Counsel for Respondent The Office of Commissioner Allan H. "Bud" Selig, As Commissioner of Major League Baseball

5. Order Below: This cross-appeal is taken from the Order of the Supreme Court, New York County, I.A.S. Part 41 (Lawrence K. Marks, J.S.C.) dated November 4, 2015, attached hereto as Exhibit 1.

6. Nature and object of the cause of action:

The action below was filed by Petitioner-Appellant TCR Sports Broadcasting Holding, LLP d/b/a Mid-Atlantic Sports Network ("MASN") to seek vacatur of an arbitration award issued by Major League Baseball's three-member Revenue Sharing Definitions Committee

("RSDC"). Respondent-Cross-Appellant Washington Nationals Baseball Club, LLC (the "Nationals")[1] cross-moved to confirm the award.[2]

The underlying arbitration award decided a dispute between the Nationals and MASN concerning the market value of broadcast rights fees to be paid by MASN to the Nationals, for the period 2012-2016, pursuant to a 2005 television-rights agreement (the "Telecast Agreement"). The Telecast Agreement provides that Nominal Respondent Baltimore Orioles Limited Partnership ("BOLP") is the super-majority owner, and has operational control, of MASN.

As provided in the Telecast Agreement, after the Nationals and MASN failed to reach agreement as to the "fair market value" of the Nationals' television broadcast rights for 2012-2016, the parties proceeded in early 2012 to arbitration before the RSDC. The RSDC was comprised of representatives of the Tampa Bay Rays, the Pittsburgh Pirates, and the New York Mets, who had been appointed previously to this standing committee.

The Nationals were represented in the arbitration by their long-time attorneys at Proskauer Rose ("Proskauer"). Although the RSDC had determined, by mid-2012, the value of the rights fees at issue, the RSDC's decision was not issued until June 30, 2014. While the Nationals had argued that the fair market value of their rights for 2012 was roughly $109 million, and MASN had argued that the same rights were worth roughly $34 million for 2012, the RSDC determined that the Nationals' rights fees for 2012 would be roughly $53 million, and that the

[1] Named Respondents below WN Partner LLC and Nine Sports Holding, LLC were not proper parties to the case below, since they were not parties to the underlying RSDC arbitration. *See* Oemke, *Appealing Adverse Arbitration Awards*, 94 Am. Jur. Trials 2011 (2004). To the extent they are considered proper parties, these named Respondents join in the Nationals' cross-appeal.

[2] The Nationals filed a separate action to confirm the RSDC's award, *see Washington Nationals Baseball Club LLC v. TCR Sports Broadcasting Holdings LLP*, No. 157301/2014 (N.Y. Sup. Ct.), but later voluntarily discontinued that action in favor of pursuing the same relief via a cross-motion to confirm in this proceeding.

fair market value of the fees would rise by approximately $3 million per year through 2016 (ultimately reaching approximately $66 million).

MASN thereafter petitioned Supreme Court to vacate the award, and the Nationals cross-moved to confirm. According to MASN, the RSDC arbitrators had exhibited "evident partiality" under the Federal Arbitration Ac, 9 U.S.C. § 10(a)(2), on the basis that the Nationals' counsel (Proskauer) had concurrently represented MLB and the RSDC members' clubs in other matters. MASN also argued that MLB and the RSDC members had improper pecuniary interests in the award, that the award was procured through fraud and corruption, that the RSDC had exceeded its authority by not adopting the royalty methodology proffered by MASN, and that the RSDC had committed misconduct during the proceeding. Finally, MASN requested that the proceeding should be remanded not to the RSDC (despite the Telecast Agreement's election of the RSDC as the exclusive forum for resolving rights-fee disputes), but to an arbitral panel outside of MLB.

7. Result Reached Below:

Supreme Court (Marks, J.) vacated the arbitration award, solely on grounds that Proskauer's representation of the Nationals caused a situation of "evident partiality" by the RSDC panel. Despite acknowledging an absence of on-point precedent, the court found that this ground for vacatur was satisfied.

The court found no fraud or prejudicial misconduct, nor did it find that the RSDC had been improperly influenced by a purported financial stake in the award. The court also found that the RSDC's award was "reasonable on its face," and neither exceeded the RSDC's powers nor constituted manifest disregard of the law. Finally, the court rejected MASN's argument that the matter should be remanded to a panel other than the RSDC.

8. Grounds for Reversal.

Supreme Court erred as a matter of law in vacating the arbitration award on the ground of "evident partiality." The court did not err with respect to any issue raised in the Pre-Argument Statements filed in connection with the appeals taken by MASN, the Orioles, and BOLP.

9. Other Related Appeals.

Petitioner MASN, and Nominal Respondents the Orioles and BOLP, have noticed two separate appeals from Supreme Court's Order. Their Notices of Appeal and Pre-Argument Statements (without exhibits) are attached hereto as Exhibits 2 through 5.

There are no other related actions pending in any court.

Dated: New York, New York
December 21, 2015

/s/ Stephen R. Neuwirth

Stephen R. Neuwirth
Sanford I. Weisburst
Julia J. Peck
Cleland B. Welton II
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10166
(212) 849-7000
Counsel for Respondents WN Partner, LLC; Nine Sports Holding, LLC; and Washington Nationals Baseball Club, LLC

To: Thomas J. Hall
Pamela J. Marple
Rachel W. Thorn
Benjamin D. Bleiberg
Caroline Pignatelli
Chadbourne & Park LLP
1301 Avenue of the Americas
New York, NY 10019
thall@chadbourne.com
Counsel for Petitioner-Appellant-Cross-Respondent TCR Sports Broadcasting Holding, LLP

Carter G. Phillips
Mark D. Hopson
Benjamin R. Nagin
Kwaku A. Akowuah
Sidley Austin LLP
1501 K Street NW
Washington, DC 20005
cphillips@sidley.com
Counsel for Nominal Respondents-Appellants-Cross-Respondents Baltimore Orioles Baseball Club and Baltimore Orioles Limited Partnership

Arnold Weiner
Aron U. Raskas
Charles S. Fax
Rifkin, Weiner, Livingson Levitan & Silver, LLC
2002 Clipper Park Road, Suite 108
Baltimore, MD 21211
Counsel for Nominal Respondent-Appellant-Cross-Respondent Baltimore Orioles Limited Partnership, in its capacity as managing partner of TCR Sports Broadcasting Holding, LLP

Brendan V. Sullivan, Jr.
John J. Buckley, Jr.
Barry S. Simon
C. Bryan Wilson
Jay R. Schweikert
Williams & Connolly LLP
725 Twelfth Street, NW
Washington, DC 20005
jbuckley@wc.com
Counsel for Respondent The Office of Commissioner Allan H. "Bud" Selig, As Commissioner of Major League Baseball

Jonathan D. Lupkin
Rakower Lupkin PLLC
488 Madison Avenue, 18th Floor
New York, NY 10022
jlupkin@rakowerlupkin.com
Counsel for Respondent The Office of Commissioner Allan H. "Bud" Selig, As Commissioner of Major League Baseball

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

TCR SPORTS BROADCASTING HOLDING, LLP, Petitioner-Respondent, -against- WN PARTNER, LLC; NINE SPORTS HOLDING, LLC; WASHINGTON NATIONALS BASEBALL CLUB, LLC, Respondents-Appellants, -and- THE OFFICE OF COMMISSIONER OF BASEBALL; THE COMMISSIONER OF MAJOR LEAGUE BASEBALL, Respondents, -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-Respondents.	Index No. 652044/2014 IAS Part 41 (Marks, J.) **PRE-ARGUMENT STATEMENT**

Respondent-Appellant Washington Nationals Baseball Club, LLC (the "Nationals")[1] respectfully submits the following Pre-Argument Statement regarding its appeal, pursuant to Section 600.17(a) of the Rules of the Supreme Court of the State of New York, Appellate Division, First Department:

1. The complete title to this action is as set forth above.

2. The full names of the parties to this action are as captioned, except that the Commissioner of Major League Baseball is Robert D. Manfred, Jr.

3. Counsel for Respondent-Appellant are:

Stephen R. Neuwirth
Sanford I. Weisburst
Julia J. Peck
Cleland B. Welton II
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10166
(212) 849-7000

4. Counsel for Petitioner-Respondent, Nominal Respondents-Respondents, and Respondents are:

Thomas J. Hall
Rachel W. Thorn
Benjamin D. Bleiberg
Caroline Pignatelli
Chadbourne & Park LLP
1301 Avenue of the Americas
New York, NY 10019
thall@chadbourne.com
Counsel for Petitioner-Respondent TCR Sports Broadcasting Holding, LLP

[1] Named Respondents below WN Partner LLC and Nine Sports Holding, LLC were not proper parties to the case below, since they were not parties to the underlying RSDC arbitration. *See* Oemke, *Appealing Adverse Arbitration Awards*, 94 Am. Jur. Trials 2011 (2004). To the extent they are considered proper parties, these named Respondents join in the Nationals' cross-appeal.

Carter G. Phillips
Benjamin R. Nagin
Kwaku A. Akowuah
Sidley Austin LLP
1501 K Street NW
Washington, DC 20005
cphillips@sidley.com
Counsel for Nominal Respondents-Respondents Baltimore Orioles Baseball Club and Baltimore Orioles Limited Partnership

Arnold Weiner
Aron U. Raskas
Rifkin Weiner Livingson, LLC
2002 Clipper Park Road, Suite 108
Baltimore, MD 21211
Counsel for Nominal Respondent-Respondent Baltimore Orioles Limited Partnership, in its capacity as managing partner of TCR Sports Broadcasting Holding, LLP

John J. Buckley, Jr.
C. Bryan Wilson
Williams & Connolly LLP
725 Twelfth Street, NW
Washington, DC 20005
jbuckley@wc.com
Counsel for Respondent The Office of Commissioner of Major League Baseball

Jonathan D. Lupkin
Lupkin & Associates PLLC
26 Broadway, 19th Floor
New York, NY 10004
jlupkin@lupkinassociates.com
Counsel for Respondent The Commissioner of Major League Baseball

5. Order Below: This appeal is taken from the Order of the Supreme Court, New York County, I.A.S. Part 41 (Lawrence K. Marks, J.S.C.) dated July 11, 2016, attached hereto as Exhibit 1.

6. Nature and object of the cause of action:

This action, and now this appeal, implicate the important question whether parties are bound by a contractual arbitration clause to which they have agreed. In a 2005 Telecast Agreement (the "Telecast Agreement") among the Nationals; Petitioner-Respondent TCR Sports Broadcasting Holding, LLP d/b/a Mid-Atlantic Sports Network ("MASN"); the Baltimore Orioles Limited Partnership ("BOLP"); MASN's controlling super-majority owner; and the Office of the Commissioner of Major League Baseball ("MLB"), the parties each agreed unambiguously that in the event of an unresolved dispute concerning the fees to be paid by MASN (a regional sports network) for the Nationals' and Orioles' telecast rights, such dispute

would be resolved through arbitration before MLB's Revenue Sharing Definitions Committee ("RSDC"), a standing committee experienced in addressing such issues.

A dispute arose concerning the rights fees to be paid by MASN to the Nationals for the five-year period from 2012-2016. The parties were unable to negotiate an agreement regarding those fees, and the matter proceeded to an RSDC arbitration under the Telecast Agreement in early 2012. The RSDC was composed at the time by owner-representatives of the Tampa Bay Rays, the Pittsburgh Pirates, and the New York Mets, who had been appointed by the Commissioner of Baseball before the rights-fee dispute had ripened and been presented to the RSDC for arbitration. The Nationals were represented at the hearing by their long-time counsel at the law firm Proskauer Rose LLP ("Proskauer").

At the RSDC arbitration, the Nationals argued that the fair market value of their rights for 2012 was roughly $109 million, whereas MASN argued that the same rights for 2012 were worth roughly $34 million. The RSDC ultimately determined that the Nationals' rights fees for 2012 would be roughly $53 million, and that the fair market value of the fees would rise by approximately $3 million per year through 2016 (ultimately reaching approximately $66 million). Although the record below confirms that the RSDC had determined the value of the rights fees at issue by mid-2012, the RSDC's decision was not issued until June 30, 2014.

MASN thereafter initiated this action by petitioning Supreme Court to vacate the award, and the Nationals cross-moved to confirm.[2] In a November 2015 decision that is not the subject of the instant appeal, Supreme Court (Marks, J.) rejected most of MASN's challenges to the RSDC's award: Supreme Court found no fraud or prejudicial misconduct, nor did it find that the

[2] The Nationals filed a separate action to confirm the RSDC's award, *see Washington Nationals Baseball Club LLC v. TCR Sports Broadcasting Holdings LLP*, No. 157301/2014 (N.Y. Sup. Ct.), but later voluntarily discontinued that action in favor of pursuing the same relief via a cross-motion to confirm in this proceeding.

RSDC had been improperly influenced by a purported financial stake in the award. The court also found that the RSDC's award was "reasonable on its face," and neither exceeded the RSDC's powers nor constituted manifest disregard of the law. Supreme Court vacated the arbitration award solely on grounds that "evident partiality" had resulted from the Nationals' representation at the arbitration by its long-time counsel at Proskauer, given among other things Proskauer's representation of MLB and the RSDC members and their teams (or other related parties). Supreme Court acknowledged the absence of on-point precedent, but found this ground for vacatur was satisfied.

Importantly with respect to the instant appeal, Supreme Court rejected MASN's argument that the matter should be remanded to a panel *other than the RSDC* for a new arbitration of the rights fees for 2012-2016. The Court found that argument "unavailing," noting that "re-writing the parties' Agreement is outside of its authority."

MASN and the Orioles noticed appeals of the Supreme Court's November 2015 decision solely on the question of whether the court properly rejected MASN's argument that the court should order that a new arbitration of the rights fees for 2012-2016 should be before an arbitration panel other than the RSDC, the body agreed by the parties in the Telecast Agreement. MASN and the Orioles have not perfected their appeals. As a purely defensive measure designed to preserve the Nationals' rights, the Nationals filed a notice of cross-appeal challenging the court's determination of "evident partiality." The Nationals have not yet perfected that cross-appeal, and have notified Supreme Court that the cross-appeal is conditional on the Appellate Division reversing Supreme Court's determination that the new arbitration may proceed before the RSDC so long as the Nationals are not represented by Proskauer in the new

arbitration. The Commissioner of Baseball also noticed a cross-appeal that has not yet been perfected.

Following Supreme Court's November 2015 decision, the Nationals asked MLB to convene a new arbitration before the RSDC on the rights fees for 2012-2016. In response to that request, MASN and the Orioles made clear that they would not agree to arbitrate before the RSDC, notwithstanding the Telecast Agreement's designation of the RSDC as the arbitration forum. The Nationals therefore moved for an order compelling MASN and the Orioles to submit to a new arbitration of the parties' dispute before the RSDC. MASN opposed the motion and cross-moved pursuant to CPLR § 2201 for a stay of proceedings pending determination of the noticed appeals on the question whether the court should have ordered the new arbitration be in a forum other than the RSDC.

7. Result Reached Below:

In a decision dated July 11, 2016, Supreme Court (Marks, J.) denied the Nationals' motion to compel a new arbitration of the rights fees for 2012-2016 before the RSDC. The court further ordered, under the purported authority of CPLR § 2201, that the parties to this case are "stay[ed] … from compelling or conducting another arbitration of this dispute, without the agreement of all the parties to this proceeding, until the final determination of the appeals," *i.e.*, the appeals of MASN and the Orioles, and the cross-appeals of the Nationals and MLB, concerning the November 2015 order.

8. Grounds for Reversal.

In large (and perhaps exclusive) part, Supreme Court's July 11, 2016 order will be rendered moot if this Court, on the appeal and cross-appeals from the November 2015 order, holds that any new arbitration must proceed before the RSDC so long as Proskauer does not

represent the Nationals in that new arbitration. Additionally, Supreme Court erred in the July 11, 2016 order in ruling that the new arbitration should not proceed while the appeal and cross-appeals from the November 2015 order are pending. Supreme Court also erred in denying the Nationals' motion to compel MASN and the Orioles to arbitrate before the RSDC pursuant to the Telecast Agreement.

9. Other Related Appeals.

The instant appeal is from the Supreme Court's July 11, 2016 decision.

As discussed above, MASN and the Orioles have noticed, but have not perfected, appeals from Supreme Court's November 2015 decision, solely on the question whether Supreme Court properly rejected MASN's argument that the Court should have ordered that a new arbitration of the rights fees for 2012-2016 proceed before a panel other than the RSDC. As also discussed above, the Nationals, as a purely defensive measure designed to preserve the Nationals' rights, filed a notice of cross-appeal challenging the court's determination of "evident partiality." The Nationals have not perfected that cross-appeal, and have notified Supreme Court that the cross-appeal is conditional on the Appellate Division reversing the Supreme Court's determination not to order the new arbitration be before a panel other than the RSDC. The Commissioner of Baseball also noticed a cross-appeal that has not yet been perfected.

There are no other related actions pending in any court.

Dated: New York, New York
July 21, 2016

/s/ Stephen R. Neuwirth

Stephen R. Neuwirth
Sanford I. Weisburst
Julia J. Peck
Cleland B. Welton II
QUINN EMANUEL URQUHART &
SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10166
(212) 849-7000
Counsel for Respondents-Appellants WN Partner, LLC; Nine Sports Holding, LLC; and Washington Nationals Baseball Club, LLC

To:

Thomas J. Hall
Rachel W. Thorn
Benjamin D. Bleiberg
Caroline Pignatelli
Chadbourne & Park LLP
1301 Avenue of the Americas
New York, NY 10019
thall@chadbourne.com
Counsel for Petitioner-Respondent TCR Sports Broadcasting Holding, LLP

Carter G. Phillips
Benjamin R. Nagin
Kwaku A. Akowuah
Sidley Austin LLP
1501 K Street NW
Washington, DC 20005
cphillips@sidley.com
Counsel for Nominal Respondents-Respondents Baltimore Orioles Baseball Club and Baltimore Orioles Limited Partnership

Arnold Weiner
Aron U. Raskas
Rifkin Weiner Livingson, LLC
2002 Clipper Park Road, Suite 108
Baltimore, MD 21211
Counsel for Nominal Respondent-Respondent Baltimore Orioles Limited Partnership, in its capacity as managing partner of TCR Sports Broadcasting Holding, LLP

John J. Buckley, Jr.
C. Bryan Wilson
Williams & Connolly LLP
725 Twelfth Street, NW
Washington, DC 20005
jbuckley@wc.com
Counsel for Respondent The Office of Commissioner of Major League Baseball

Jonathan D. Lupkin
Lupkin & Associates PLLC
26 Broadway, 19th Floor
New York, NY 10004
jlupkin@lupkinassociates.com
Counsel for Respondent The Commissioner of Major League Baseball

STATE OF NEW YORK)
) ss.: **AFFIDAVIT OF**
COUNTY OF NEW YORK) **PERSONAL SERVICE**

I, HECTOR SEVILLANO, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at 671 HALSEY ST. APT.#2A BROOKLYN, NY 11233

On SEP 12 2016

deponent served the within: **Brief for Respondent-Respondent-Cross-Appellant-Appellant Washington Nationals Baseball Club, LLC**

upon:

See Attached Service List

the attorney(s) in this action by delivering **2** true copy(ies) thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein also served electrically via email.

Sworn to before me on

SEP 12 2016

MARIANNA IANNOTTA
Notary Public State of New York
No. 01IA6285846
Qualified in Nassau County
Commission Expires July 15, 2017

Hector Sevillano

Job # 267743

SERVICE LIST:

Thomas J. Hall
CHADBOURNE & PARKE LLP
1301 Avenue of the Americas
New York, New York 10019
(212) 408-5100
thall@chadbourne.com
rthorn@chadbourne.com
cpignatelli@chadbourne.com
Attorneys for Petitioner-Appellant-Cross-Respondent-Respondent TCR Sports Broadcasting Holding, LLP

Jonathan D. Lupkin
LUPKIN & ASSOCIATES PLLC
26 Broadway, 19th Floor
New York, NY 10004
(646) 367-2771
jlupkin@lupkinassociates.com
Attorneys for Respondent- Respondent-Cross-Appellant The Office of Commissioner of Major League Baseball

Benjamin R. Nagin
SIDLEY AUSTIN LLP
787 Seventh A venue
New York, New York 10019
(212) 839-5300
bnagin@sidley.com
cphillips@sidley.com
kakowuah@sidley.com
tlosseaton@sidley.com
ejoyce@sidley.com
Attorneys for Nominal Respondent-Appellant-Cross-Respondent-Respondent The Baltimore Orioles Baseball Club

Benjamin R. Nagin
SIDLEY AUSTIN LLP
787 Seventh A venue
New York, New York 10019
(212) 839-5300
bnagin@sidley.com
cphillips@sidley.com
kakowuah@sidley.com
tlosseaton@sidley.com
ejoyce@sidley.com
Attorneys for Nominal Respondent-Appellant-Cross-Respondent-Respondent Baltimore Orioles Limited Partnership

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

AFFIDAVIT OF SERVICE BY OVERNIGHT FEDERAL EXPRESS NEXT DAY AIR

HECTOR SEVILLANO
571 HALSEY ST. APT. #2A
BROOKLYN, NY 11233

I, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On SEP 12 2016

deponent served the within: **Brief for Respondent-Respondent-Cross-Appellant-Appellant Washington Nationals Baseball Club, LLC**

upon:

See Attached Service List

the address(es) designated by said attorney(s) for that purpose by depositing **2** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York herein, also served electrically via e-mail.

Sworn to before me on

SEP 12 2016

MARIANNA IANNOTTA
Notary Public State of New York
No. 01IA6285846
Qualified in Nassau County
Commission Expires July 15, 2017

Job # 267743

SERVICE LIST:

Arnold Weiner
RIFKIN WEINER LIVINGSTON LLC
2002 Clipper Park Road, Suite 108
Baltimore, Maryland 21211
(410) 769-8080
aweiner@rwlls.com
araskas@rwlls.com
cfax@rwlls.com
Attorneys for Nominal Respondent-Appellant-Cross-Respondent-Respondent Baltimore Orioles Limited Partnership

John J. Buckley, Jr.
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, NW
Washington, DC 20005
(202) 434-5000
jbuckley@wc.com
bwilson@wc.com
Attorneys for Respondent- Respondent-Cross-Appellant The Office of Commissioner of Major League Baseball