To be Argued by:
JONATHAN D. SCHILLER
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

TCR SPORTS BROADCASTING HOLDING, LLP,

Petitioner-Appellant,

– against –

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

Respondents-Respondents,

– and –

THE COMMISSIONER OF MAJOR LEAGUE BASEBALL,

Respondent,

– 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.

Appellate Case Nos.: 2019-05390 2019-05458 2019-05459

BRIEF FOR PETITIONER-APPELLANT AND NOMINAL RESPONDENTS-APPELLANTS

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PRELIMINARY STATEMENT

This appeal arises from a judgment of the New York County Supreme Court (Cohen, J.) that (i) confirmed an April 15, 2019 arbitration award issued by Major League Baseball's ("MLB") Revenue Sharing Definitions Committee ("RSDC") and (ii) entered judgment against TCR Sports Broadcasting Holding, LLP ("MASN") for a sum total of $105,025,080.30. A.90. The RSDC is an MLB arbitration panel of three team representatives who are appointed by the Commissioner of Baseball (the "Commissioner"). MASN is a regional sports network majority-owned by the Orioles. MASN was formed pursuant to a 2005 Settlement Agreement among MLB, the Commissioner, the Orioles, MASN and the Nationals (then-owned by MLB). A.790-97. In the Settlement Agreement, the parties agreed to compensate the Orioles, in perpetuity, for the damages to the Orioles caused by MLB's relocation of the Montreal Expos into Washington, D.C., by granting the Orioles a supermajority share of MASN's profits. A.807-10.

The first arbitration award in this dispute was vacated because of MLB's and its RSDC's evident partiality. *See TCR Sports Broadcasting Holding, LLP v. WN Partner, LLC*, 2015 WL 6746689 (Sup. Ct. N.Y. Cty. Nov. 4, 2015) ("*TCR I*"), *aff'd* 153 A.D.3d 140 (1st Dep't 2017) ("*TCR II*"), *appeal dismissed* 30 N.Y. 3d 1005 (2017). In its July 13, 2017 order, this Court unanimously affirmed vacatur of the first award but divided 2-1-2 on the proper forum for rehearing.

None of the three opinions received a quorum because there was no ground upon which three Justices agreed. N.Y. Const. Art. VI § 4.b. The plurality (Andrias and Richter, JJ.) and concurrence (Kahn, J.) ordered rehearing before the RSDC but on different grounds. *TCR II*, 153 A.D.3d at 143, 161. By contrast, the dissent (Acosta and Gesmer, JJ.) concluded that "MLB's pervasive bias and unfair conduct has infected the RSDC so as to frustrate the parties' intent to submit their dispute to a fundamentally fair arbitration." *Id.* at 181. Forcing MASN and the Orioles to arbitrate again before the same committee (the RSDC) appointed and controlled by the same governing body (MLB), the dissent wrote, would "be all but guaranteed to yield the same result" as the vacated first award. *Id.* at 155, 163. The dissent concluded that the Court should have ordered the arbitration to be reheard before a different and neutral panel outside of MLB's ambit and control. *Id.* at 180-81.

The re-arbitration before MLB's RSDC commenced in January 2018. Unfortunately, the dissent's warning of continued partiality by MLB was prescient. MLB continued its unfair treatment of MASN and the Orioles and, as the dissent predicted, its RSDC *reached the same result* as the vacated first award. Once again, the Federal Arbitration Act ("FAA") requires vacatur of the award. The Supreme Court's confirmation of the award and entry of a money judgment are legal errors and must be reversed on at least one of the following grounds, and the case remanded for decision by a neutral arbitral forum unaffiliated with MLB.

First, MLB permitted the Nationals to buy their preferred partial forum, the RSDC. At oral argument before this Court on March 31, 2017, the Nationals promised to post a bond to "guarantee repayment of" $25 million previously advanced by MLB to the Nationals. *TCR II*, 153 A.D.3d at 158. The plurality relied on the Nationals' promise to *guarantee* repayment of the $25 million when it concluded that MLB would not have a financial interest in the new arbitration and that remand to the RSDC was appropriate. *Id.* (The dissent concluded that a bond would not cure MLB's prejudice and the concurrence did not address it.)

But the Nationals reneged on their promise to the Court. Instead, during the second arbitration, MLB and the Nationals negotiated an agreement to *condition* the Nationals' repayment of the $25 million and signed it on February 9, 2018 without MASN's or the Orioles' knowledge. A.941. Under the February 9, 2018 agreement, the Nationals were *only* required to repay the $25 million to MLB *if the RSDC held the hearing*, which could occur *only* if MLB denied MASN's recusal request and ensured the Nationals received the biased MLB forum. In other words, to ensure that the arbitration occurred before the Nationals' preferred partial MLB forum, and not before an independent arbitrator, the Nationals *conditioned* their repayment of the $25 million on the RSDC holding the hearing.

MASN and the Orioles demanded that MLB and its RSDC recuse themselves on March 6, 2018 on the basis that, due to MLB's public prejudgment

of the dispute in favor of the Nationals, MLB's RSDC could not act as impartial arbitrators. A.1138-42. But unbeknownst to MASN and the Orioles, MLB had a $25 million financial stake in denying that request. A.941. MLB and the Nationals revealed their February 9, 2018 agreement on March 12, 2018, *after* MASN and the Orioles had made their recusal demand on March 6, 2018. A.941. The RSDC denied MASN's and the Orioles' recusal demand. A.953.

An arbitral body's taking a $25 million stake in the arbitrators' recusal decision is abhorrent. Impartial arbitral bodies do not secretly devise agreements with one party to an arbitration giving the arbitral body a financial stake in the arbitrators' decision of whether to recuse themselves. The February 9, 2018 agreement is an "objective fact[] inconsistent with impartiality" which violates section 10(a)(2) of the FAA and requires the Court to vacate the award. *See Pitta v. Hotel Ass'n of N.Y.C., Inc.*, 806 F.2d 419, 423-24 n.2 (2d Cir. 1986). The Supreme Court's confirmation of the award despite the partiality evident from the February 9, 2018 agreement is contrary to governing FAA precedent.

Second, the RSDC refused to disclose *anything* that the Commissioner or his staff told the RSDC about this dispute. The Commissioner appoints the RSDC and exercises plenary power over MLB teams. A.194-95, 245. The record shows that the Commissioner (erroneously) believes that MASN and the Orioles are wrong, and the Nationals are right, and that he has *publicly stated* that he thinks the

Nationals should prevail. A. 1003, 1205. The Commissioner has also declared that MASN "will be required to pay" the rights fees in the vacated first award "sooner or later." A.1009-11. The Commissioner and his staff continued to speak privately to the RSDC about this dispute. MLB's lawyer Joseph Shenker *stated* in a March 22, 2018 letter that MLB staff *were speaking with the RSDC*, and told the parties that "the RSDC is not a separate entity from MLB." A.1051.

In light of the Commissioner's bias, the RSDC's refusal to disclose their communications with the Commissioner or his staff about this dispute violates their obligation under section 10(a)(2) of the FAA to disclose *everything* that "might create an impression of possible bias." *Sanko S.S. Co. v. Cook Indus, Inc.*, 495 F.2d 1260, 1263-64 (2d Cir. 1973). MASN and the Orioles have the right to know what the Commissioner and his agents told the RSDC. The RSDC's failure to disclose these communications violates the FAA and requires vacatur of the award. The Supreme Court's ruling that the RSDC had no obligation to disclose what the Commissioner told them is directly contrary to governing precedent.

Third, the RSDC denied MASN and the Orioles their fundamental right to present their case. The central issue in the arbitration was the valuation methodology required by the 2005 Settlement Agreement, which instructs the RSDC to determine the fair market value of the rights fees "using the RSDC's established methodology for evaluating all other related party telecast agreements

in the industry." A.793. The Nationals relied on a November 2011 letter written by the Commissioner (then deputy Commissioner), A.1153, which MASN contends is wrong and inconsistent with MLB's prior statements, A.1173-75. Thus, MASN requested that MLB disclose all of its statements about "the RSDC's established methodology." A.1012-21. MLB refused to disclose this information, and the RSDC refused to require MLB to disclose it, on the basis that documents after the 2005 Settlement Agreement were *not relevant* and *not probative* to the dispute over the methodology required by the Settlement Agreement. A.1057.

In the award, however, the RSDC *relied on* the Commissioner's November 2011 letter as *dispositive*, and drew an "adverse inference" against MASN based on the lack of evidence about the November 2011 letter, A.762-65, the very type of evidence that MASN requested but which MLB refused to disclose and which the RSDC refused to require MLB to disclose. The RSDC's use of the incomplete evidentiary record that MLB and the RSDC created to rule against MASN was a denial of a fundamentally fair hearing under the FAA and requires vacatur of the award. *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1997).

Fourth, the RSDC "exceeded [its] powers." 9 U.S.C. § 10(a)(4). As stated above, a central issue in the arbitration was the meaning of the RSDC's mandate. In knowing violation of controlling Maryland law that MASN and the Orioles cited, the RSDC refused to determine the parties' intent "*at the time the agreement*

was effectuated." *Schneider Elec. Bldgs. v. Western Surety Co.*, 149 A.3d 778, 787 (Md. App. 2016) (emphasis added). Instead, the RSDC based its interpretation of its mandate—a contractual provision contained in the March 2005 Settlement Agreement—on the RSDC's *opinion* that, in its view, the Orioles had received enough money as of April 2019. A.759-60, 784. The RSDC thus did what Maryland law (and the law of most states) prohibits: it interpreted a contract based on its opinion of the contract's outcome over a decade after it was signed.

The Court should vacate the award on at least one of the above grounds, and should order rehearing of the arbitration before an arbitral forum unaffiliated with MLB. The Court has the power to order rehearing of the arbitration in a new forum to ensure fundamental fairness, and should do so here to finally afford MASN and the Orioles their statutory right to an impartial arbitration.

* * *

Finally, even if the Court affirms the Supreme Court's confirmation of the award, the Court must still reverse the money judgment entered by the Supreme Court. The Settlement Agreement does not give the RSDC any authority to award monetary damages and the RSDC did not. The RSDC stated that "its authority runs no further than determining the fair market value of the rights at issue," and *did not perform a calculation* of any damages. A.754. The only award the RSDC made was a declaration of "the fair market value of MASN's rights to the telecast

of each of the Orioles and Nationals." A.785. The RSDC found that the money due the Nationals would be *less than the fair market valuation the RSDC reached* in its award, because calculating damages would require subtracting the rights fees and profit distributions that MASN had *already paid* to the Nationals during 2012-2016. A.783-84. The Supreme Court's unlawfully modified the RSDC's declaratory award by taking the additional step of calculating damages (and doing so inaccurately). *Zeiler v. Deitsch*, 500 F.3d 157, 170 (2d Cir. 2007).

QUESTIONS PRESENTED

1. Whether the February 9, 2018 agreement, which MLB and the Nationals secretly negotiated during the second arbitration, and which required the Nationals to repay the $25 million to MLB *only if* MLB's RSDC conducted the arbitration, is an objective fact inconsistent with impartiality.

The Supreme Court erroneously answered "no."

2. Whether the RSDC violated the FAA by refusing to disclose all communications with MLB about the dispute, when the MLB Commissioner had publicly argued against MASN's and the Orioles' position and in favor of the Nationals' position, and had publicly stated that "sooner or later" MASN "will be required to pay" the Nationals the telecast rights fees set in the previous arbitration award issued by the RSDC that the court vacated for evident partiality

The Supreme Court erroneously answered "no."

3. Whether the RSDC denied MASN's right to a fundamentally fair arbitration when it refused to require MLB to disclose its communications about "the RSDC's established methodology for evaluating all other related party telecast agreements in the industry" made after the 2005 Settlement Agreement on the ground that these communications were not relevant, but then relied on a November 2011 letter from the Commissioner to rule against MASN.

The Supreme Court erroneously answered "no."

4. Whether the RSDC exceeded its powers under the March 2005 Settlement Agreement by relying on the RSDC's subjective opinion about how much money the Orioles have received under the Settlement Agreement when interpreting the RSDC's mandate to "us[e] the RSDC's established methodology for evaluating all other related party telecast agreements in the industry."

The Supreme Court erroneously answered "no.'

5. Whether, because of the Commissioner's public prejudgment of the dispute, and MLB's refusal to conduct an arbitration free from evident partiality in two successive arbitrations, the Court should order rehearing of the arbitration before a different and neutral panel outside of MLB's ambit and control.

The Supreme Court did not answer this question.

6. Whether the Supreme Court unlawfully modified the arbitration award by performing a calculation of monetary damages due to the Nationals, and

entering a money judgment against MASN for that amount, where the Settlement Agreement did not give the arbitrators authority to award monetary damages and the arbitration award did not include a calculation of monetary damages.

The Supreme Court erroneously held that the arbitration award was an award of monetary damages and that it was exercising a "ministerial" function by calculating what the Supreme Court asserted were the Nationals' damages.

STATEMENT OF THE CASE

The background to this dispute prior to the second arbitration is contained in this Court's July 13, 2017 decision and order. *TCR II*, 135 A.D.2d 140. Since several events that occurred during the first arbitration, including MLB's prejudice and entry into the August 26, 2013 agreement with the Nationals, are relevant to this appeal, MASN and the Orioles will highlight those events where appropriate.

A. The Settlement Agreement

On March 28, 2005, MLB, the Commissioner, the Orioles, MASN and the Nationals (then-owned by MLB) entered into the Settlement Agreement. A.786. The purpose of the Settlement Agreement was to provide the Orioles with monetary compensation in perpetuity for the perpetual damages to the Orioles caused by MLB's relocation of the Montreal Expos to Washington, D.C. A.806-13. From 1973 to 2005, the Orioles were the only MLB team in their exclusive home television territory. MLB's relocation of the Expos into Washington, D.C.,

the most populous part of that television territory, cut the Orioles off from two-thirds of the Orioles' historic fan base and transferred that fan base to the relocated Expos (which MLB subsequently renamed the Nationals). MLB acknowledged that its relocation of the Expos to Washington D.C., just 38 miles from the Orioles' home at Camden Yards in Baltimore, would inflict perpetual financial injury on the Orioles and on the Baltimore and Maryland communities. A.806-13.

The Settlement Agreement provides that the Orioles and Nationals must license the rights to telecast all of their baseball games to MASN (formerly the Orioles' own sports network, TCR, rebranded as MASN) in perpetuity. A.790-91. The Settlement Agreement requires MASN to make equal annual payments to the Orioles and Nationals (rights fees) for the rights to telecast their games. A.793 The Settlement Agreement then grants the Orioles the right to a supermajority share of MASN's residual profits (its revenues remaining after payment of all expenses including rights fees) as compensation. A.794, 808. Since the Nationals receive 50% of all rights fees but only a minority share of MASN's profits, the Settlement Agreement gives the Nationals a strong incentive to seek the highest rights fees possible and to try to ultimately eliminate MASN's profits.

B. The Parties' Agreement to Arbitrate Before the RSDC

The Settlement Agreement set the amount of telecast rights fees to be paid to the teams for the first seven years from 2005-2012. A.792. Starting in

2012, the Settlement Agreement requires MASN, the Orioles, and the Nationals to "negotiate in good faith using the most recent information available which is capable of verification to establish the fair market value of the telecast rights" for each subsequent five-year period (i.e., 2012-2016). A. 793. If the parties cannot agree, they must mediate. *Id.* If mediation fails, MLB's RSDC must determine the fair market value of the rights fees "using the RSDC's established methodology for evaluating all other related party telecast agreements in the industry." *Id.*

MLB's RSDC is a standing committee within MLB that consists of three representatives from MLB teams who are each appointed personally by the Commissioner. A.978, 1051. The RSDC was created as part of MLB's Revenue Sharing Plan to ensure that the teams share all appropriate revenue. As part of this function, "[t]he RSDC typically reviews related-party transactions to see if the revenues that teams declare in the form of license fees are at market value or too low." A.740. Once the RSDC determines the amount of rights fees owed from telecast rights, those rights fees, in turn, are factored into other calculations that affect MLB teams, such as revenue sharing (or, in the case of the Orioles, their compensation for the Expos' relocation through the profits generated by MASN).

The members of the RSDC serve at the pleasure of the Commissioner and the Commissioner can remove them at any time for any reason. Staffed and advised by MLB personnel, MLB lawyers, and MLB consultants, the RSDC has no

separate legal or practical existence; it is part and parcel of MLB. Indeed, in a March 22, 2018 letter, MLB's lawyer Joseph Shenker of Sullivan & Cromwell stated that "the RSDC is not a separate entity from MLB." A.1051.

C. "The RSDC's Established Methodology for Evaluating All Other Related Party Telecast Agreements in the Industry"

Because, in the event of a dispute, the RSDC is required to determine the fair market value of the rights fees using "the RSDC's established methodology for evaluating all other related party telecast agreements in the industry," A.793, in March 2012 MASN used that methodology to determine the fair market value of the rights fees before the negotiation with the Nationals. A.1739. To determine the fair market value of the rights fees, MASN applied the same methodology the RSDC had applied without deviation in every related party telecast agreement evaluation the RSDC had disclosed. The RSDC referred to this methodology as the "Bortz methodology," A.1710-11, a reference to Bortz Media and Sports Group, the firm that MLB hired shortly after MLB created the RSDC to use its methodology in RSDC proceedings. Commissioner Bud Selig directed the RSDC to apply the Bortz methodology without "any material variation." A.1711.

Thus, in January 2012, with MLB's permission, MASN engaged Bortz Media and Sports Group to apply the Bortz methodology to determine the fair market value of the rights fees for the 2012-2016 period. Bortz's calculation yielded a fair market value for 2012-2016 that was, on average, approximately $40

million per team per year (approximately $200 million per team for 2012-2016). A.1739. This was an increase of approximately $65 million over the $135 million in rights fees MASN paid the teams during 2007-2011. A.792. The Nationals rejected MASN's determination at a meeting where Edward Cohen, a Nationals' executive, literally ripped it to pieces, and sought an RSDC arbitration.

During 2012-2016, MASN *paid* the Nationals and the Orioles the rights fees (approximately $200 million) determined using the Bortz methodology. A.1739, 1446. In addition, during 2012-2016, MASN distributed approximately $276 million in profits to the teams in proportion to the teams' ownership interests. A.1446. MASN's profit margin during 2012-2016, about 33%, approximated the industry median and average profit margin during that period. This dispute is an attempt by the Nationals to use an "evidently partial" MLB forum to try to get more money than the Settlement Agreement's methodology provides.

D. MLB Conducts an Evidently Partial Arbitration

The first RSDC arbitration was held on April 4, 2012. During the first arbitration, MLB and its RSDC subjected MASN and the Orioles to a fundamentally unfair and biased proceeding. MLB's partial conduct included permitting MLB's own long-time counsel, Proskauer Rose, to concurrently represent the RSDC arbitrators or their business interests, MLB, and MLB's Commissioner individually at the same time they were representing the Nationals

in the arbitration. Despite MASN's and the Orioles' objections, MLB refused to disclose the nature of these overlapping and conflicting relationships, or take any steps to correct this obvious unfairness. *TCR II*, 153 A.D.3d at 143.

After the hearing and the disclosure of a tentative award, but before the award was actually issued, MLB took a $25 million financial stake in the dispute. On August 26, 2013, MLB entered into an agreement with the Nationals whereby MLB advanced the Nationals $25 million. A.1134-35. Pursuant to the August 26, 2013 agreement, "if the RSDC issues a decision that covers 2012 and/or 2013, any payments from MASN otherwise due to the Nationals will be made first to the Commissioner's Office to cover" the $25 million advance. A.1135. For MLB to recover the $25 million from MASN under the August 26, 2013 agreement, (i) the RSDC would have to "issue[] a decision," and (ii) the RSDC decision would need to award the Nationals at least $25 million more than they received from MASN for telecast rights fees in 2012-2013. *Id*. The Commissioner confirmed this in contemporaneous emails. A.464.28.[1]

MLB delivered the first RSDC award to the parties on June 30, 2014. *See* A.815. The RSDC award was replete with legal and factual errors indicating a predetermined result. It set the teams' telecast rights fees for 2012-2016 at

[1] The August 26, 2013 agreement also provided for MLB's recovery of the $25 million out of the proceeds of any settlement (a "Comcast transaction"). A.1135. However, once the RSDC issued its award on June 30, 2014, a Comcast transaction was no longer an option.

approximately $59,600,000 per team per year (about $300 million per team for 2012-2016), and approximately $200,000,000 more than the total rights fees determined by (and paid by) MASN pursuant to the established methodology required by the Settlement Agreement. A.833. The rights fees imposed by the RSDC eliminated almost all of MASN's profits, almost entirely eliminating the compensation MLB promised the Orioles when the parties signed the Settlement Agreement, and threatening MASN's economic viability. It was revealed during the vacatur proceedings in the Supreme Court that MLB staff, not the RSDC, drafted the award. *TCR II*, 153 A.D.3d at 174 (Acosta, P.J., dissenting).

E. The Supreme Court Vacates the First Award

On August 28, 2014, the Supreme Court (Marks, J.) granted a preliminary injunction, finding that MASN was likely to succeed on the merits. *TCR I*, 2015 WL 6746689 at *4. After the Supreme Court's ruling, the Commissioner made public statements against MASN and the Orioles, and in favor of the Nationals. A.1205. He also declared that: "I think the agreement's clear . . . . 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 fees." A.1008-11.

The Commissioner *then submitted three affidavits* to the Supreme Court arguing against MASN and the Orioles, and in favor of the Nationals. A.959-1007. In particular, the Commissioner took a position on a central issue in dispute: the

methodology that the Settlement Agreement requires the RSDC to use to determine the fair market value of the clubs' telecast rights fees. On that issue, the Commissioner argued (wrongly) that MASN's position "does not conform to the text" of the Settlement Agreement. A.1003. The Commissioner has never retracted that statement nor any other he has made about this dispute.

In a November 4, 2015 order, the Supreme Court vacated the award, holding that MLB's conduct "objectively demonstrate[d] an utter lack of concern for fairness of the proceeding," such that it was "inconsistent with basic principles of justice." *TCR I*, 2015 WL 6746689 at *12. However, in a footnote and without citation to authority, the Supreme Court stated that it lacked authority to disqualify the RSDC from presiding over any rehearing of the dispute. *Id.* at *13 n.21.

F. This Court Unanimously Affirms the Supreme Court's Vacatur of the First Award, but Divides 2-1-2 on the Question of Whether MLB's RSDC May Rehear the Dispute

On July 13, 2017, this Court unanimously affirmed the vacatur ruling in a *per curiam* opinion joined by all five Justices. *TCR II*, 153 A.D.3d at 142. However, the panel sharply divided 2-1-2 on the question of the required forum for rehearing the arbitration. The question of the proper forum for rehearing produced three separate opinions, each advocating a different legal standard: a two-Justice plurality, a one-Justice concurrence, and a two-Justice dissent. No opinion received a quorum of three Justices. *See* N.Y. Const. Art. VI § 4.b.

The plurality (Andrias and Richter, JJ.) assumed that courts have the power to disqualify the contractually-designated arbitral forum on the ground that a rehearing before that forum would be fundamentally unfair, but disagreed with the dissent over the standards governing the exercise of the Court's power to reform the agreement. Specifically, the plurality believed that a showing that the *new* RSDC arbitrators were biased would be required in order to reform the arbitration agreement or disqualify the RSDC, and that MASN and the Orioles had not shown that the new arbitrators were biased. *TCR II*, 153 A.D.3d at 143-44, 160. No case cited by the plurality, however, holds that such a standard applies.

The plurality recognized the dissent's point that "MLB has a direct financial stake in the amount of the fees that will be awarded in the second arbitration because MLB will only recoup its $25 million advance if the Nationals are awarded more than the amount MASN and the Orioles have proposed." *Id.* at 157-58. But the plurality concluded it did not disqualify the RSDC because "the Nationals have offered [at oral argument] to post a bond to guarantee repayment of the advance to MLB regardless of the outcome of the arbitration." *Id.* at 158.

The concurrence (Kahn, J.) did not express any view on the reasoning of the plurality. The concurrence voted to remand the arbitration to the RSDC on a "different ground[]" from the plurality—that absent a showing that the arbitration

clause was *procured by* "fraud, duress, coercion or unconscionability," the court had no power to order rehearing before a different arbitral forum. *Id.* at 161.

The two-Justice dissent (Acosta and Gesmer, JJ.) disagreed with the legal standards applied by both the concurrence and the plurality. Citing the decisions of several courts, including the New York Court of Appeals, the dissent concluded that courts "have the obligation, and the power, to ensure fundamental procedural fairness in an arbitration" when "the parties' chosen forum has shown itself to be unwilling to guarantee a baseline of impartiality." *Id.* at 163-64. Applying that standard to the record, the dissent concluded that "reformation of the agreement to require a rehearing not administered by MLB or the RSDC is warranted." *Id.* at 181. The dissent's conclusion that the Court must order rehearing before a neutral arbitral forum that is unaffiliated with MLB was based on several factors:

1. "MLB's apparent lack of concern for fairness at the first proceeding," *id.* at 174;

2. "MLB's refusal to address the Orioles' complaints of the unfairness created by Proskauer's multiple roles," *id.*;

3. "MLB's direct monetary stake in the outcome of the dispute as a result of its $25 million loan to the Nationals," *id.*;

4. "evidence that MLB has actively opposed MASN's claims by threatening sanctions for pursuing a judicial remedy, disparaging the claims, and making clear its view that MASN's reading of the [Settlement Agreement] is incorrect," *id.*;

5. "evidence that MLB has actively supported the Nationals' attempts to confirm the award and/or compel a rehearing before the RSDC," *id.*;

6. "MLB's continued defense of the original arbitration award which all members of this bench agree was affected by evident partiality," *id.*; and

7. "evidence of the current Commissioner's personal involvement in the prior arbitration, including the drafting of the vacated award and his publicly stated views about the dispute," *id*.

The dissent concluded, based on these factors, that a rehearing before MLB, even with new RSDC members, would be fundamentally unfair. *Id.* at 177.

In response to the plurality's central premise, that "the RSDC [conducting the second arbitration] is comprised of three new members," the dissent concluded that this fact "does not change the analysis, because MLB retains its significant influence over the panel." *Id.* at 176. As the dissent observed, although the Commissioner does not vote, "his influence on the panel, including his ability to marshal and exclude evidence and draft an award, remains substantial." *Id.* The dissent predicted that "[g]iven the Commissioner's public comments touching upon the merits of the dispute and telegraphing his support for the Nationals' position, it is highly unlikely that the RSDC would come to a different conclusion if it were to rehear the case." *Id.* The second arbitration, and the second award issued by the RSDC, demonstrate that the dissent's prediction was correct.

G. MLB Continues to Violate the FAA by Engaging in Additional Evidently Partial Conduct During the Second Arbitration

On January 19, 2018, the Nationals wrote to MLB and asked MLB to schedule a rehearing before the RSDC. Unbeknownst to MASN and the Orioles, the Nationals had reneged on their promise to this Court at oral argument on March 31, 2017 to guarantee repayment of the $25 million in a bond. Instead, in January and early February of 2018, MLB and the Nationals privately negotiated a different agreement that did not guarantee repayment, but instead gave MLB a $25 million incentive to hold the hearing. On February 9, 2018, MLB and the Nationals signed that agreement in secret. A.941-42. The February 9, 2018 agreement *conditioned* the Nationals' repayment of the $25 million on the RSDC's hearing the arbitration, which could only occur if MLB and the RSDC *refused* MASN's request for MLB and the RSDC to recuse themselves. *If a hearing was held before any arbitrator other than the RSDC, the Nationals could keep the $25 million*. *Id.* In sum, with respect to the $25 million, the following occurred, in chronological order:

1. On August 26, 2013, MLB paid $25 million to the Nationals.

2. Under the August 26, 2013 agreement, MLB could only recover the $25 million from MASN, not the Nationals, and only if (i) the RSDC "issue[d] a decision," and (ii) that RSDC decision awarded the Nationals at least $25 million more than the Nationals had already received from MASN for 2012 and 2013. A.1134-35, 464.28.

3. On November 4, 2015, Justice Marks stated in dicta that the August 26, 2013 agreement did not give MLB a financial stake in the arbitration because the RSDC reached its decision in 2012 *before* the

August 26, 2013 agreement was entered. *TCR I*, 2015 WL 6746689 at *8. Justice Marks stated that MASN's and the Orioles' argument that the August 26, 2013 agreement gave MLB a financial stake in the arbitration "would be stronger" if the August 26, 2013 agreement had been made *before* the RSDC had reached a decision. *Id.*

4. On March 31, 2017, at oral argument before this Court, the Nationals promised to "post a bond to guarantee repayment of the advance to MLB regardless of the outcome of the arbitration." *TCR II*, 153 A.D.3d at 158. The plurality concluded that the Nationals promise of a guarantee of repayment would ameliorate the dissent's concern that MLB had a financial stake in the arbitration. *Id.*

5. The Nationals did not post a bond and have never posted a bond, despite the Nationals' express promise to this Court.

6. Instead of posting a bond, MLB and the Nationals entered into an agreement on February 9, 2018 conditioning the Nationals' repayment of the $25 million. A.941-42. Under the February 9, 2018 agreement, the Nationals were only required to repay the $25 million to MLB if the RSDC held the hearing. *If anyone other than the MLB-controlled RSDC presided over the hearing*, *the Nationals could keep the $25 million*. This agreement gave MLB a direct $25 million financial stake in MLB's and the RSDC's decision of whether to recuse.

7. On March 6, 2018, MASN and the Orioles demanded that MLB and the RSDC recuse themselves because, due to MLB's bias and control over the RSDC, the RSDC cannot act impartially. A.1138-42.

8. On March 12, 2018, *after* MASN's and the Orioles' recusal demand, the Nationals revealed the February 9, 2018 agreement. A.940.

9. On April 11, 2018, MASN and the Orioles strenuously objected to the February 9, 2018 agreement on the ground that it gave MLB a $25 million financial interest in holding the hearing. A.943-46.

10. On May 10, 2018, MLB denied MASN's recusal demand, and denied MASN's objection to the February 9, 2018 agreement. A.953-56.

11. On November 5, 2018, ten days before the scheduled hearing, the Nationals repaid the $25 million to MLB. A.556

The Nationals therefore induced MLB to ensure a hearing occurred before the RSDC. Unlike the promised (but never obtained) bond, under which the Nationals' repayment of the $25 million would have been guaranteed "regardless of the outcome of the arbitration," *TCR II*, 153 A.D.3d at 158, under the February 9, 2018 agreement, the Nationals' repayment of the $25 million was *conditioned* on an RSDC hearing. A.941. The Nationals provided a $25 million incentive to MLB to ensure that the hearing occurred before the Nationals' preferred partial forum, knowing that the RSDC would produce the result the Nationals desired and that which had been expressed publicly by the MLB Commissioner.

Predictably, the MLB-controlled RSDC denied MASN's and the Orioles' recusal demand—recusal would have cost MLB $25 million. Despite the fact that the July 13, 2017 plurality only garnered two votes and did not address the RSDC's recusal obligations in the second arbitration, the RSDC relied on the plurality to deny MASN's and the Orioles' recusal demand. A.953-54. The RSDC did not cite any other authority that would justify their refusal to recuse. Due to the Commissioner's bias against MASN and the Orioles, and his and his agents' plenary power over the league, the RSDC, the arbitrators, and their teams, the RSDC could not evaluate this dispute independently and impartially.

MLB and the RSDC did not stop there. Despite MASN's and the Orioles' repeated requests to the RSDC to disclose their communications with the Commissioner and his staff, MLB and the RSDC took the unlawful position that MASN and the Orioles *could not review* what the Commissioner and his staff told the new RSDC about this dispute. A.948, 954-55. MLB confirmed that it was communicating with the RSDC about the dispute in a March 22, 2018 letter from MLB's lawyer, Joseph Shenker of Sullivan & Cromwell. A.1051. In other words, not only did the RSDC deny MASN's recusal request, the RSDC denied it without allowing MASN and the Orioles to review what the prejudiced Commissioner and MLB staff told the RSDC. MLB and the RSDC relied on the July 13, 2017 plurality to support their refusal to disclose these communications, A.948, 954-55, but the plurality had said nothing about the new RSDC's disclosure obligations.

The Commissioner *continued* to publicly comment on the dispute during the second arbitration, including at the July 17, 2018 All-Star Game—an event where all or most owners, and many league and team executives, were present and paying particular attention to the statements of the Commissioner. At the All Star Game, the Commissioner referred to the dispute as an "unfortunate boat trip," claimed that MLB treated the Orioles "leniently" in the dispute, and accused the Orioles of failing to "honor" their "agreements." A.1143. He then stated that "the appropriate course is to try and enforce the agreement and get this dispute behind

us." *Id.* The RSDC arbitrators surely understood their marching orders: "enforce the agreement" meant reaching the same result as the first RSDC.

H. The RSDC Issues the Second Award

The RSDC issued the second award on April 15, 2019. A.736-85. As Justice Acosta's dissent predicted, the second RSDC award *reached the same* result as the first, a fair market valuation of approximately $59,400,000 per team per year—an amount that is within 0.2% of the first award. *Compare* A.785 *with* A.833. Yet, remarkably, the second RSDC applied a completely different methodology from the first RSDC to reach that same result, despite the RSDC's contractual mandate to use "the RSDC's established methodology for evaluating all other related party telecast agreements in the industry." A.793. The RSDC's use of two completely different methodologies demonstrates that it is not using any "established methodology for evaluating all other related party telecast agreements in the industry," but rather is simply trying to justify a predetermined result that the Commissioner guaranteed would come "sooner or later." A.1009-11.

The RSDC justified its application of the new methodology by citing a November 2011 letter written by the Commissioner that purports to describe the methodology. A.762. Incredibly, the RSDC relied on this November 2011 letter despite the fact that MLB and the RSDC stated before the hearing that post-Settlement Agreement (post-March 28, 2005) communications were *not relevant* to

and *not probative* of the dispute between the parties over the required methodology. A.1057. In this pre-hearing ruling, the RSDC refused to disclose any of its post-2005 communications about the required methodology on the ground that they were *not relevant or probative.* A.1057. But the RSDC then used that very type of evidence in the award to rule against MASN. A.762, 764-65.

The second award demonstrated that the RSDC imposed disparate and inferior treatment on MASN and the Orioles compared to other team-owned networks (related-party telecast agreements). In the award, the RSDC asserted that, under its "established methodology for evaluating all other related party telecast agreements in the industry," the *maximum* profit margin that a team-owned network is allowed to achieve under a related-party telecast agreement is *20%.* A.678. Yet in its evaluation of the Boston Red Sox telecast agreement with New England Sports Network ("NESN"), the RSDC ruled that NESN may generate a *minimum* margin of 19%, increasing up to *30%* after five years. A.1552. The second award constituted blatant, and unexplained, disparate treatment of MASN compared to the RSDC's evaluations of other team-owned networks.

I. The Supreme Court Confirms the Award and Then Modifies the Award by Calculating Damages Not Calculated in the Award

In an August 22, 2019 decision and order, the Supreme Court confirmed the second award, but then improperly modified it. As explained below, in its confirmation decision, the Supreme Court relied heavily on the two-Justice

plurality opinion in this Court's July 13, 2017 order, despite the fact that the plurality did not receive the support of three Justices and did not address MLB's and the RSDC's FAA obligations on rehearing. The Supreme Court failed to cite, much less substantively address, the FAA precedent, including from the Second Circuit, that MASN and the Orioles discussed at length in their briefing and at oral argument. The Supreme Court also materially misinterpreted the record, including by severely misinterpreting the February 9, 2018 agreement and the prior August 26, 2013 agreement between MLB and the Nationals concerning the $25 million.

The Supreme Court then improperly *modified the award* in its decision confirming it by calculating what the Supreme Court believed were the monetary damages due the Nationals. The arbitration award, however, does not contain such a damages calculation. The RSDC's only conclusion was a declaration of "the fair market value of MASN's rights to the telecast of each of the Orioles and Nationals." A.785. The RSDC observed that the damages due the Nationals would be *lower* than its fair market value determination, because the sum due the Nationals must account for rights fees and profit distributions MASN *had already pai*d the Nationals during the 2012-2016 period. A.784. However, the RSDC did not calculate any damages award to the Nationals. *Id.* By calculating damages that the RSDC did not, the Supreme Court unlawfully modified the award.

The Supreme Court permitted MASN and the Orioles to reargue the issue of whether the award actually awarded the Nationals monetary damages, or was limited to a declaration of the fair market value of the teams' rights. The Supreme Court acknowledged at oral argument that it was a "close question," A.46, but in a November 14, 2019 decision and order the Court adhered to its prior erroneous decision that the Court could calculate monetary damages. A.39.

For the reasons stated herein, the Supreme Court's December 9, 2019 judgment, A.90, and its August 22, 2019 and November 14, 2019 decisions and orders on which the judgment was based, A.7, 39, must be reversed and the RSDC's arbitration award must be vacated. The Court should order rehearing of the arbitration before an independent arbitrator. MLB's and the RSDC's conduct over two consecutive arbitrations, which both exhibited evident partiality in reaching essentially the same result that the Commissioner declared would come "sooner or later," has demonstrated that such a genuinely impartial rehearing before an unbiased arbitral tribunal is the only way to end this matter.

ARGUMENT

I. MLB's Ex Parte February 9, 2018 Agreement with the Nationals Demonstrates Evident Partiality and Requires Vacatur

Section 10(a)(2) of the FAA, 9 U.S.C. § 10(a)(2), requires the Court to vacate an arbitration award "where there was evident partiality." The Second Circuit has held that "evident partiality" exists, requiring vacatur, when there is an

"objective fact inconsistent with impartiality." *Pitta v. Hotel Ass'n of New York City, Inc.*, 806 F.2d 419, 423 n.2 (2d Cir. 1986); *see TCR II*, 153 A.D.3d 140, 169 (Acosta, P.J., dissenting). In *Pitta*, the Second Circuit held that an arbitrator's failure to recuse himself from deciding whether he was properly dismissed from employment as an arbitrator for a hotel association created "evident partiality" because of the "risk of unfairness" in an arbitrator's deciding the validity of the arbitrator's own dismissal from a lucrative position. *Pitta*, 806 F.2d at 424.

Evident partiality requires vacatur of an award even where there is no direct evidence that it affected the result. Thus, the Second Circuit found evident partiality where the father of the arbitrator was the president of an international labor union, and the district union of that international union was a party to the arbitration, despite no evidence that the father-son relationship affected the arbitrator's decision. *Morelite Const. Co. v N.Y.C. Dist. Council Carpenters Ben. Funds,* 748 F.2d 79, 84-85 (2d Cir. 1984); *see U.S. Elecs., Inc. v. Sirius Satellite Radio, Inc.*, 17 N.Y.3d 912, 914 (2011) (adopting Second Circuit's evident partiality test in 9 U.S.C. § 10). This bright-line rule is justified due to the binding nature of arbitration and limited judicial review. As the U.S. Supreme Court has cautioned, "we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free reign

to decide the law as well as the facts and are not subject to appellate review." *Commonwealth Coatings Corp. v. Cont. Cas. Co.*, 393 U.S. 145, 149 (1968).

MLB's February 9, 2018 agreement with the Nationals, an *ex parte* agreement negotiated by MLB and the Nationals in secret,[2] is an "objective fact inconsistent with impartiality." *Pitta*, 806 F.2d at 423 n.2; *U.S. Elecs.*, 17 N.Y.3d at 914 ("adopt[ing] the Second Circuit's reasonable person standard"); *Floss v. Ryan's Family Steak Houses, Inc*., 211 F.3d 306, 314 (6th Cir. 2000). The February 9, 2018 agreement gave MLB, which appoints the RSDC arbitrators, administers the arbitration, and exercises plenary control over the arbitrators' teams, a $25 million financial interest in ensuring that its RSDC did not recuse itself and that it held the hearing. Impartial arbitral forums do not enter into *ex parte* agreements with one party to an arbitration requiring the party to pay $25 million to the forum if a hearing is held, but allowing the party to keep the $25 million if the forum's arbitrators decide to recuse themselves. If the AAA entered into such an agreement with a party, it would shock the arbitration community. The February 9, 2018 agreement gave MLB a $25 million incentive to ensure that

[2] Contrary to the Supreme Court's characterization, A.22, the February 9, 2018 agreement *was* a secret agreement. The record demonstrates that MLB and the Nationals entered into it without the knowledge or consent of MASN or the Orioles. A.940-42. The Nationals revealed the February 9, 2018 Agreement to MASN and the Orioles more than one month after it was signed, A.940, and after MASN and the Orioles made their recusal demand on the RSDC, A.1138.

a hearing was held; it could not consider the issue of recusal impartially. MLB's entry into the February 9, 2018 agreement is the *antithesis* of impartiality.

The Supreme Court cited *no case* stating that the FAA permits MLB to take a substantial financial interest in the arbitrators' decision of whether to recuse. The *only* authority the Supreme Court cited to support its conclusion was the July 13, 2017 plurality opinion. A.21-25. But the plurality *could not and did not address* the February 9, 2018 agreement, which was entered after the July 13, 2017 plurality. Instead, the plurality relied on the Nationals' promise at oral argument to "post a bond to guarantee repayment of the advance to MLB regardless of the outcome of the arbitration," *TCR II*, 153 A.D.3d at 158, which the Nationals never did. Unlike the bond guaranteeing repayment that the Nationals promised this Court they would post, and which the plurality relied upon in denying the motion to remand the arbitration to a neutral forum, the February 9, 2018 agreement *did not* guarantee repayment of the $25 million. The February 9, 2018 agreement *conditioned* repayment of the $25 million *on the RSDC holding a hearing.*

The Supreme Court also materially misinterpreted the relationship between the February 9, 2018 agreement between MLB and the Nationals, A.941, and the prior August 26, 2013 agreement between MLB and the Nationals, A.1134-35. The Supreme Court appeared to believe that the February 9, 2018 agreement could not have influenced the RSDC's recusal decision because MLB would still have

been entitled to repayment of the $25 million under the August 26, 2013 agreement *even if* the RSDC recused itself. A24. But the Supreme Court's interpretation is contrary to the plain terms of the August 26, 2013 agreement. Under the August 26, 2013 agreement, MLB could only recover the money from MASN, not the Nationals, and only if (i) the RSDC "issue[d] a decision," and (ii) the RSDC decision awarded the Nationals at least $25 million more than the Nationals had already received from MASN for 2012 and 2013. A.1135. The Commissioner confirmed these terms in contemporaneous emails. A. 464.28. If the RSDC did not issue a decision, MLB could not recover the $25 million under *either* the February 9, 2018 agreement or the August 26, 2013 agreement. The February 9, 2018 agreement did not, as the Supreme Court asserted, A.24, merely convert a prior obligation to repay the money into a lump sum. The February 9, 2018 agreement *created a new contractual right* of MLB to receive $25 million from the Nationals if MLB held the hearing. Contrary to the Supreme Court's ruling, MLB *did not* have that contractual right under the August 26, 2013 agreement.

The Supreme Court also reasoned that the February 9, 2018 agreement is permissible because, in contrast to the general dispute resolution provision of the Settlement Agreement (section 8), section 2.J.3, which governs disputes over rights fees, does not provide for an alternative forum if MLB has a financial interest in the Nationals. A.23-24. The Supreme Court's reasoning cannot be squared with

the FAA. While section 8 of the Settlement Agreement requires AAA arbitration if MLB has "an ownership or financial interest in the Nationals or [MASN]," A.798, section 8 does not abrogate the FAA's requirement that *all* arbitrations be free from evident partiality. The parties agree that the FAA applies here.

The Supreme Court also based its decision on its apparent view that MASN's and the Orioles' demand that the RSDC recuse itself was "thin and speculative." A.23. But the FAA requires vacatur for evident partiality when the "particular relationship at issue" is inconsistent with impartiality. *Morelite*, 748 F.2d at 84; *see U.S. Elecs.*, 17 N.Y.3d at 914 (adopting Second Circuit's standard in determining "evident partiality" under FAA). The February 9, 2018 agreement, which created a financial stake by MLB in the recusal decision by the arbitrators, is a fact that is inconsistent with impartiality. As the Second Circuit held in *Morelite*, when there is evident partiality, vacatur is required even when there is no evidence that the relationship affected the decision. *Id.* at 84-85.

MASN's and the Orioles' recusal argument was strong and grounded in tangible evidence. The July 13, 2017 plurality, on which the Supreme Court relied, only addressed whether the *Court* must *preemptively* disqualify the RSDC, and only two out of five Justices agreed with the plurality's reasoning. Arbitrators have an independent obligation under the FAA to both "declare any possible disqualification" and "determine whether to withdraw" from sitting on a case.

Marc Rich & Co., A.G. v. Transmarine Seaways Corp. on Monrovia, 443 F. Supp. 386, 388 (S.D.N.Y. 1978); *accord Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 174 (2d Cir. 1984). If the arbitrator's investigation reveals that the arbitrator's continued service is against the interests of the parties, the arbitrator has the "responsibility to resign." *Florasynth*, 750 F.2d at 174. In light of the fact that the Commissioner and his staff, who repeatedly demonstrated bias against MASN and the Orioles, *were communicating* with the RSDC arbitrators about this dispute, A.1051, and held plenary power over the arbitrators and each of their teams, MLB's influence on the arbitrators was all but certain. A.1138-42. The RSDC was required to consider whether to recuse free from evident partiality, which they could not do because recusal would have cost MLB $25 million.

II. The RSDC Arbitrators Violated their Obligation Under the FAA to Disclose Communications with the Commissioner and his Staff About the Subject Matter of the Arbitration

The FAA's prohibition against "evident partiality" also requires arbitrators to disclose, prior to the hearing, "any dealings that might create an impression of possible bias." *Commonwealth*, 393 U.S. at 149 ; *Sanko S.S. Co. v. Cook Indus, Inc.*, 495 F.2d 1260, 1263-64 (2d Cir. 1973); *Marc Rich & Co.*, 443 F. Supp. at 388. "[A]ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth*, 393 U.S. at 150. Because the arbitrators may be in possession, unbeknownst to a

party, of information that would create an impression of bias, the FAA requires arbitrators to *disclose* all such information before the hearing. *Id.*

It cannot be disputed that the Commissioner has prejudged the law and the facts of the arbitration. He has demonstrated evident bias and, in some instances, outright hostility to MASN and the Orioles. The Commissioner has argued in favor of the Nationals' interpretation of what "the RSDC's established methodology" means in the Settlement Agreement, the key issue before the RSDC. The Commissioner has strenuously argued that MASN's and the Orioles' interpretation of the Settlement Agreement "does not conform to its text." A.1003. The Commissioner has publicly accused MASN and the Orioles of "engag[ing] in a pattern of conduct designed to avoid [the Settlement Agreement] being effectuated." A.1205. After the Supreme Court found that MASN and the Orioles were likely to *succeed* on the merits of their vacatur challenge to the first award, the Commissioner declared that MASN "will be required to pay" the rights fees set in the vacated first award "sooner or later." A.1009-11. During the July 2018 All-Star Game, four months before the second hearing, the Commissioner accused MASN and the Orioles of failing to "honor" their "agreement." A.1143.

The Commissioner's public and private statements demonstrate his prejudgment and bias. No one can seriously doubt that if the AAA were to make public comments about a party to an arbitration that it is managing, the AAA

would not be a suitable forum for resolving the dispute. An authority has prejudged a dispute when "a disinterested observer may conclude that the [authority] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." *Cinderella Career & Finishing Sch., Inc. v. F.T.C.*, 425 F.2d 583, 590 (D.C. Cir. 1970) (quoting *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2d Cir. 1970)); *accord 1616 Second Ave. Rest., Inc. v. New York State Liquor Auth.*, 75 N.Y.2d 158, 162 (1990). This standard is met when the authority has made "public statements that indicate prejudgment." *1616 Second Ave., Inc.*, 75 N.Y.2d at 162. Public statements are "especially problematic," *id.*, because once the person overseeing a dispute has publicly taken a position, his statements "have the effect of entrenching [him] in a position which he has publicly stated, making it difficult, if not impossible, for him to reach a different conclusion." *Cinderella,* 425 F.2d at 583; *accord Antoniu v. SEC*, 77 F.2d 721, 723 (8th Cir. 1989).

In light of the Commissioner's clear prejudgment, the FAA required the RSDC arbitrators to disclose, before the hearing, *all communications they had with the Commissioner and his staff about this dispute*. The evidence demonstrates that the Commissioner and his staff unduly influenced the first award. In the prior arbitration, the Commissioner and his staff participated in deliberations, drafted the award, provided factual and legal analysis, and acted as gatekeepers of materials that the parties asked to review or submit to the RSDC. *See* A.975-76.

Although MLB's public participation in the second arbitration was less overt, there is no indication that its behind-the-scenes involvement changed. To the contrary, MLB appointed as legal counsel to the RSDC Joseph Shenker of Sullivan & Cromwell, who previously had advised MLB on the RSDC proceedings and took positions against MASN in those representations. A.1140. Mr. Shenker eventually withdrew in response to MASN's objections. But before he withdrew, Mr. Shenker confirmed that MLB would be communicating *ex parte* with the RSDC arbitrators about this dispute and refused, on behalf of MLB, to provide disclosures of any such communications. A.1051, 948. Indeed, Mr. Shenker went further and *expressly disclaimed* any distinction between the RSDC and MLB. A.1051 (stating that "the RSDC is not a separate entity from MLB").

The FAA required that communications about the dispute between the RSDC, on the one hand, and the biased Commissioner or his staff, on the other hand, be disclosed to the parties before the hearing. The Commissioner has sole authority to appoint or remove the RSDC members at will, exercises enormous control over all of MLB, including the teams of all three RSDC arbitrators, and has advocated publicly against MASN's position. Communications between the Commissioner and the RSDC would clearly create an "impression of possible bias." *Sanko*, 495 F. 2d at 1264; *Nat'l Hockey League Players' Ass'n v. Bettman*, No. 93 CIV. 5769 (KMW), 1994 WL 38130, at *3 (S.D.N.Y. Feb. 4, 1994).

The Supreme Court did not even cite the Second Circuit's decisions in *Commonwealth Coatings* and *Sanko*, which clearly require disclosure of the Commissioner's communications with the RSDC. Nor did the Supreme Court cite any case holding that the arbitrators may *withhold* communications with the Commissioner in these circumstances. Instead, while the Supreme Court found the Commissioner's public statements to be "troubling," the Supreme Court cited the July 13, 2017 plurality opinion as supporting confirmation of the award. A.27. But the plurality *did not address* the second RSDC's *disclosure* obligations under the FAA. Nor did the plurality address Mr. Shenker's statements, which *confirmed* that MLB *would be* communicating with the RSDC, and *disclaimed* the distinction drawn by the plurality between the new RSDC arbitrators and MLB. A.1051.

III. The RSDC Denied MASN and the Orioles Their Right to a Fair Hearing by Committing Prejudicial Misconduct

Section 10(a)(3) of the FAA requires vacatur of an award when the arbitrators "were guilty of misconduct in . . . refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced." One ground for vacatur under section 10(a)(3) is when arbitrators erroneously exclude central relevant evidence. *Hoteles Condado Beach v. Union de Tronquistas*, 763 F.2d 34, 40 (1st Cir. 1985). Courts have *also* vacated arbitral awards when the arbitrator refuses to consider evidence, but then relies on the absence of that same evidence to rule against the party in the award.

For example, in *Tempo Shain Corp. v. Bertek, Inc*., 120 F.3d 16, 20 (2d Cir. 1997), the Court vacated an award where, during the hearing, the arbitrators refused to hear evidence offered by a party on a disputed issue on the basis that the evidence would be cumulative, but then ruled against the party in the award based on a purported lack of evidence presented by the party on that very issue.

Likewise, in *Iran Aircraft Indus. v. Avco Corp*., 980 F.2d 141 (2d Cir. 1992), the arbitrator had directed a party (Avco) not to "burden the Tribunal by submitting" invoices as a means of proof. *Id.* at 146. The arbitral tribunal then ruled in part on the basis of the absence of those invoices. "Having thus led Avco to believe it had used a proper method to substantiate its claim, the Tribunal then rejected Avco's claim for lack of proof." *Id.* By performing what was effectively a bait and switch as to the relevancy of the requested evidence, "the Tribunal denied Avco the opportunity to present its claim in a meaningful manner." *Id.* The Fifth Circuit applied the same principle in *Gulf Coast Indus. Workers Union v. Exxon Co.*, 70 F.3d 847, 850 (5th Cir. 2017). There, the Court vacated an award where the arbitrators prevented a party from presenting evidence on an issue on the ground that it was cumulative, but then issued an award rejecting that party's argument based on a purported lack of evidence,

Together, section 10(a)(3) of the FAA and the cases applying it establish a baseline obligation on the arbitrators to ensure fundamental fairness:

the arbitrators cannot make rulings denying a party access to information on the ground that it is irrelevant, cumulative, or unnecessary, but then turn around and rule against the party based on the incomplete record the arbitrators created.

The RSDC refused to employ a fundamentally fair process in the second arbitration. As summarized above, a central dispute in the arbitration was the methodology required by section 2.J.3 of the March 2005 Settlement Agreement, which requires the RSDC to use "the RSDC's established methodology for evaluating all other related party telecast agreements in the industry." A.793.

Throughout this dispute, the Nationals have relied on a November 10, 2011 letter written by the Commissioner (then deputy Commissioner) that purports to describe "the RSDC's established methodology for evaluating all other related party telecast agreements in the industry." A.1153. MASN and the Orioles believe that MLB's November 10, 2011 letter is incorrect, and that MLB has made statements about "the RSDC's established methodology for evaluating all other related party telecast agreements in the industry" that are inconsistent with the Commissioner's November 10, 2011 letter. For example, in a December 14, 2010 letter, the Commissioner (then deputy Commissioner) agreed with MASN that "the RSDC's established methodology for evaluating all other related party telecast agreements in the industry" was the Bortz methodology. A.1174. That is directly contrary to the November 10, 2011 letter written one year later. In light of the

Commissioner's statements, MASN requested that MLB, a party to the Settlement Agreement, disclose its complete record regarding the meaning of "the RSDC's established methodology" in section 2.J.3. A.1021. MASN also requested that MLB disclose all of its evaluations of related party telecast agreements in the industry, A.1019-21, since, pursuant to section 2.J.3, the RSDC is required to apply the same methodology that the RSDC uses in "all other" evaluations.

Prior to the hearing, however, MLB refused to disclose *any* documents created after the Settlement Agreement was signed (i.e., post-March 2005), on the ground that: "Communications with MASN, the Orioles or the Nationals beyond the time frame of the negotiation of the contractual provision at issue are not probative of the parties' intentions at the time of contracting." A.1057. The RSDC *agreed* with MLB's blanket refusal to disclose any such documents: "To the extent that the intentions of the parties are relevant to the interpretation of ¶ 2.J.3, it is their intentions at the time of contract formation that are germane." *Id.*

MASN and the Orioles therefore went into the arbitration with a materially incomplete record with respect to MLB's statements about "the RSDC's established methodology for evaluating all other related party telecast agreements in the industry." Based on the RSDC's pre-hearing procedural orders, MASN and the Orioles reasonably believed that the RSDC would only consider *pre*-Settlement

Agreement communications and documents when ruling on the dispute between the parties over the methodology required by the Settlement Agreement.

Yet, in an unexplained and prejudicial change in rationale, not only did the RSDC rely on post-Settlement Agreement communications in the award, it found them to be *dispositive* in its ruling against MASN and the Orioles. A.762-65. The RSDC went so far as to draw an *adverse inference against* MASN and the Orioles based on an asserted lack of proof. A.762. In other words, the very post-Settlement Agreement communications that MLB and the RSDC rejected as not relevant later resurfaced as vital to (indeed, dispositive of) the award. MASN was deprived of a fundamentally fair hearing when it was unable to present its case in full. The RSDC's conduct misled MASN prior to the award by professing the utter irrelevance of this evidence before the arbitration, only to rely almost exclusively on that very same evidence in interpreting the Settlement Agreement.

The Supreme Court rejected MASN's and the Orioles' argument that they were denied the right to present their case by characterizing it as merely "an objection based on the RSDC's 'failure' to permit more searching discovery into certain issues during the course of the arbitration." A.28. Consistent with that characterization, the Supreme Court relied solely on cases holding that arbitrators are generally given broad discretion to regulate the scope of discovery. *Id.*

But what happened here is not merely a disagreement about the scope of discovery. What happened here, as in *Tempo Shain*, *Iran Aircraft*, and *Gulf Coast Industries*, was a bait and switch: the RSDC denied MASN access to an entire category of documents and discouraged the use of such documents at the hearing on the basis that they were not relevant, but then, in its award, cherry picked documents in that category as *dispositive* against MASN and the Orioles. The RSDC's pre-award ruling that the documents were irrelevant, and its subsequent contradictory reliance on this very type of evidence to rule against MASN and the Orioles in the award, was a fundamentally unfair process requiring vacatur.

IV. The RSDC Exceeded its Powers Under the Settlement Agreement in Violation of Section 10(a)(4) of the FAA

The second award must also be vacated because the RSDC "exceeded its powers" in violation of section 10(a)(4) of the FAA, 9 U.S.C. § 10(a)(4). In this context, the U.S. Supreme Court has distinguished between challenges to arbitral awards on the basis that the arbitrator exceeded its powers, and challenges to arbitral awards on the basis that the arbitrator misapplied the law. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 672 n.3, 683 (2010).

The plain language of section 10(a)(4) of the FAA requires vacatur of an award when the arbitrator "exceeds its powers." In *Stolt-Nielsen*, the United States Supreme Court held that an arbitrator exceeds its powers when it "strays from interpretation and application of the agreement and effectively dispenses his own

brand of industrial justice." 559 U.S. at 671 (internal quotation marks and citations omitted). "In that situation, an arbitration decision may be vacated under § 10(a)(4) of the FAA on the ground that the arbitrator 'exceeded [his] powers,' for the task of an arbitrator is to interpret and enforce a contract, not to make public policy." *Id.* at 672. Thus, "[w]hether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must give effect to the contractual rights and expectations of the parties." *Id.* at 683. In *Stolt-Nielsen*, the Court held that the arbitrator exceeded its powers when the arbitrator permitted class-wide arbitration of the dispute, despite no provision in the parties' contract or applicable law authorizing class-wide arbitration. *Id.* at 684-85. In so concluding, the Supreme Court explained that the basis for vacatur was its finding that the arbitrator "exceeded its powers," a statutory ground. A showing that the arbitrator manifestly disregarded the law is not required in this context. *Id.* at 672 n.3.

Likewise, in *Barbier v. Shearson Lehman Hutton, Inc.*, 948 F.2d 117, 122 (2d Cir. 1991), the Second Circuit held that, where a contract was governed by New York law, the arbitrators exceeded their powers by awarding punitive damages when caselaw of the New York Court of Appeals prohibited arbitrators from awarding punitive damages. The Court of Appeals cases' prohibition on awards of punitive damages in *Barbier* was sufficient to find that the arbitrator

exceeded its powers in awarding them. Like in *Stolt-Nielsen*, the Second Circuit did not apply a "manifest disregard of the law" standard. *Id.* at 121-22.

The RSDC's "powers" here are *very narrowly circumscribed* by the mandate in section 2.J.3 of the Settlement Agreement. The *only* power the Settlement Agreement gives the RSDC is to "us[e] the RSDC established methodology for evaluating all other related party telecast agreements in the industry" to determine "the fair market value of [the Orioles and Nationals telecast rights]." A.793. The meaning of that mandate to the RSDC is governed by Maryland law, and the RSDC was required to apply Maryland law to determine its meaning. A.800.

Decisions by Maryland's highest court *unambiguously* r*equire* contracts to be interpreted solely by determining the intentions of the parties "at the time of execution." *Ocean Petrol., Co., Inc. v. Yanek*, 5 A.3d 683, 691 (Md. 2010) (parties to a contract are bound by "the plain language of the disputed provisions in context, which includes not only the text of the entire contract but also the contract's character, purpose, and the facts and circumstances of the parties at the time of execution"); *Sy-Lene of Wash., Inc. v. Starwood Urban Retail II, LLC*, 829 A.2d 540, 546 (Md. 2003) (under Maryland law, contracts must be interpreted based on the "intentions of the parties at the time of the execution of the contract." *Schneider Elec. Bldgs. v. Western Surety Co*., 149 A.3d 778, 787 (Md. App. 2016)

(under Maryland law, a contract means what "a reasonable person in the position of the parties would have meant at the time the agreement was effectuated").

The RSDC did not conduct this inquiry. Instead, it "imposed its own policy choice and thus exceeded its powers." *Stolt-Nielsen*, 559 U.S. at 678. The RSDC interpreted its mandate based on the RSDC's subjective opinion that the Orioles "have received substantial compensation such that it is ambiguous, at best, as to whether that purpose [of compensating the Orioles] should have any impact on the setting of telecast rights fees or the interpretation of the phrase 'established methodology.'" A.759; *see also* A.760. In violation of Maryland law, the RSDC based its interpretation of the March 2005 Settlement Agreement, at least in part, on the RSDC's subjective opinion of how much the Orioles were paid in the years after. Maryland law prohibits interpreting the contract based on whether the arbitrator thinks the Orioles received enough money in the decade after it was signed. (The Orioles believe their damages caused by the Nationals' presence in Washington D.C. are much greater than the profits they have received.)

The Supreme Court erred by applying the "manifest disregard" standard of review. *See* A.29-30. The manifest disregard standard does not govern the Court's determination whether an arbitrator exceeded its powers, which is a statutory ground for vacatur under section 10(a)(4) of the FAA. *See Stolt-Nielsen*, 559 U.S. at 672 n.3. The Supreme Court's application of the "manifest disregard" standard

of review is inconsistent with the plain language of section 10(a)(4) as interpreted by the United States Supreme Court. The question for this Court is whether the RSDC exceeded its powers by allowing its subjective view that the Orioles had received enough money to influence the valuation methodology the RSDC used. A.759-60. The RSDC's reliance on that subjective opinion when deciding what "the RSDC's established methodology" was exceeded its powers.

V. Pursuant to its Authority Under Sections 2 and 10 of the FAA, the Court Should Order Rehearing in an Independent Forum

As discussed above, when this Court considered whether to remand the arbitration to an independent forum after the first arbitration, the Court divided 2-1-2 on that decision. The first legal issue, which divided the concurrence from the remaining opinions, was whether the Court had *the power* to order rehearing in a forum other than the contractually designated forum to ensure fundamental fairness. The concurrence's reasoning, that the Court did not have the power to order rehearing in a new forum except when the arbitration clause is *procured by* fraud, duress, coercion, or unconscionability, only received one vote. As the dissent (Acosta and Gesmer, JJ.) described, the concurrence's view is against the weight of authority and it would lead to an unjust and unworkable outcome.

As the dissent explained, the FAA grants the Court the power to order rehearing in an independent forum on the ground that a rehearing in the contractually designated forum would be fundamentally unfair. Section 2 of the

FAA, 9 U.S.C. § 2, grants courts power over arbitration agreements "upon such grounds as exist at law or in equity," which includes the "inherent equitable power to reform the contract and refer the matter to a neutral arbitral forum." *TCR II*, 153 A.D.3d at 170 (Acosta, P.J., dissenting). The dissent specifically cited the equitable doctrine of frustration of purpose as applicable to this case, explaining that where the arbitral forum's "pervasive bias" has "frustrate[d] the parties' intent," "reformation of the agreement to require a rehearing not administered" by the same forum "is warranted." *Id.* at 181. Furthermore, Section 10 of the FAA, 9 U.S.C. § 10(b), "explicitly permits courts 'in their discretion' to 'direct a rehearing' once an arbitral award is vacated." *Id.* at 180 (quoting 9 U.S.C. § 10(b)). The dissent held that these two FAA provisions, sections 2 and 10(b), each provide courts with the "power to order an arbitration in a new forum where the parties' only selected forum is too biased to fairly arbitrate the dispute." *Id.* at 179. Under both FAA provisions, the dissent concluded that the applicable standard for ordering a new forum was whether MLB's conduct "frustrate[d] the parties' intent to submit their dispute to a fundamentally fair arbitration." *Id.* at 174, 181.

As the dissent also recognized, federal courts and New York state courts (applying New York's analogue to the FAA) have ordered rehearing before an arbitrator or forum *other than* that specified in the arbitration clause on the ground that rehearing the arbitration before the contractually-designated arbitrator or

forum would be unfair. In *Erving v. Virginia Squires Basketball Club*, 349 F. Supp. 716, 719 (E.D.N.Y.1972), *aff'd*, 468 F.2d 1064 (2d Cir. 1972), the contract provided for arbitration before the Commissioner of the American Basketball Association. However, because the Commissioner was conflicted, the Court *reformed the contract* to require arbitration for a different arbitrator to "ensure a fair and impartial hearing." *Erving*, 468 F.2d 1064, 1067 n.2 (2d Cir. 1972); *Marc Rich & Co.*, 443 F. Supp. at 388 (explaining that the court in *Erving* was "in effect reforming the contract" to provide for a different, independent arbitrator). In *Seidman v. Merrill Lynch*, 75 Civ. 6316 (S.D.N.Y. Aug. 24, 1977), the Court also reformed the contract, which required arbitration before the New York Stock Exchange, to require rehearing of the arbitration before the American Arbitration Association. *Marc Rich & Co.*, 443 F. Supp. at 388 (describing the decision in *Seidman* as reforming the contact to replace the arbitral forum). And in *Rabinowitz v. Olewski*, 100 A.D.2d 539 (2d Dep't 1984), which arose under New York's analogue to the FAA, the Court ordered rehearing of the arbitration in a different forum on fairness grounds because, due to a letter of which all of the designated forum's potential arbitrators were likely on notice that disparaged one of the parties, "the appearance of bias permeated the entire [forum]." *TCR II*, 153 A.D.3d at 172 (Acosta, P.J., dissenting) (discussing the *Rabinowitz* case).

The concurrence did not address, and is contrary to, this statutory and judicial authority. The cases relied on by the concurrence do not support its conclusion that the Court is simply powerless to reform the contract absent some infirmity in the *inducement* of the arbitration clause. *See Salvano v. Merrill Lynch*, 85 N.Y.2d 173 (1995) (the court did not have the power to order expedited arbitration where the contract did not provide for that procedure); *Matter of Cullman Ventures*, 252 A.D.2d 222 (1st Dep't 1998) (the court did not have the power to consolidate two arbitrations commenced under separate contracts).

Here, the Court should exercise its power to order the arbitration to be reheard before an independent forum unaffiliated with MLB, and allow this dispute to finally be resolved without further partiality. MLB has now conducted not one, but two, arbitrations tainted by evident partiality in favor of the Nationals and against MASN and the Orioles. Even applying the legal standard espoused by the July 13, 2017 plurality (which MASN and the Orioles submit is incorrect), the second arbitration confirms that MLB is irreparably biased and partial. The central difference between the standards applied by the plurality and the dissent regarding when to remand to an independent forum was that the plurality remanded the case back to the RSDC on the basis that *the new arbitrators* had not, as of the time of this Court's July 13, 2017 order, demonstrated any outward bias. *See TCR II*, 153 A.D.3d at 160 (plurality opinion) (disagreeing with the dissent).

The second arbitration demonstrates, however, that MLB's and its RSDC's evident partiality continued. MLB and the Nationals secretly negotiated and entered the February 9, 2018 agreement, giving MLB a $25 million financial interest in its RSDC holding the hearing. A.941-42. The RSDC engaged MLB's counsel Joseph Shenker of Sullivan & Cromwell, who previously represented *MLB* against MASN and the Orioles. A.1140. Mr. Shenker asserted that MLB and the RSDC are one and the same, and that RSDC had communicated, and would continue to communicate, about the dispute with the Commissioner and his agents. A.1051. The RSDC refused to disclose what MLB told them about the dispute. A948, 955. MLB and its RSDC also concealed necessary information, including prior statements by MLB and the RSDC about the RSDC's methodology and the RSDC's evaluations of "other related party telecast agreements in the industry." A.1055-57. The RSDC then ruled *against* MASN and the Orioles on the basis of the very type of evidence that it had ruled before the hearing was irrelevant. A.762-65. Finally, the RSDC imposed disparate treatment on MASN by applying a methodology that permitted a *maximum* profit margin of 20%, A.768, despite using a different methodology for evaluating another related-party network that permitted a *minimum* margin of 19% and a maximum of *30%.* A.1552.

Given the Commissioner's and his staff's plenary power over the administration of the RSDC, the RSDC members' teams, and MLB's demonstrated

refusal to disclose its communications with the RSDC, remand back to the RSDC for a *third* arbitration would lead to the same result. It is time for this dispute to be resolved before an independent arbitrator unaffiliated with MLB, who will act impartially and conduct a fair arbitration in compliance with the FAA.

VI. The Supreme Court Unlawfully Modified the Award in its Confirmation Order by Performing a Calculation of the Nationals' Damages that the RSDC Arbitrators Did Not Perform

Finally, even if this Court affirms the Supreme Court's confirmation of the second award, the Court must still vacate the money judgment entered by the Supreme Court. It is a bedrock principle of arbitration law that "the judgment to be enforced encompasses the terms of the confirmed arbitration awards and may not enlarge upon those terms." *Zeiler v. Deitsch*, 500 F.3d 157, 170 (2d Cir. 2007). A court confirming an award can do "little more than give the award the force of a court order." *Id.* at 169. Thus, a court cannot modify an arbitration award in an order confirming it. *See Daly v. Lehman Bros, Inc.*, 252 A.D.2d 357, 357 (1st Dep't 1998); *City of Troy v. Village of Menands*, 48 A.D.2d 833, 733 (3d Dep't 1975). A narrow exception to this rule exists allowing the Court to modify an award to correct an obvious mathematical miscalculation of figures. However, that exception *does not* authorize the Court to perform a damages calculation that the arbitrator did not perform. This Court has explicitly held that the Court has no

authority to perform a damages calculation when the arbitrators "made no award of damages." *Weiss v. Metalsalts Corp.*, 15 A.D.2d 46, 47 (1st Dep't 1961).

Thus, where an arbitration award is in the nature of a declaratory judgment, a court may not improperly modify the arbitration award by changing it into a monetary judgment. Rather, at most, the court may only confirm the award into a declaratory judgment. *See, e.g., Canada Dry Delaware Valley Bottling Co. v. Hornell Brewing Co*., No. 11 CIV. 4308 PGG, 2013 WL 5434623, at *10 (S.D.N.Y. Sept. 30, 2013) ("The Judgment entered by this Court is in the nature of a declaratory judgment, because it confirms a declaratory award issued by an arbitration panel."); *W. Massachusetts Elec. Co. v. Int'l Bhd. of Elec. Workers, Local 455*, No. Civ.A. 11-30106-DPW, 2012 WL 4482343, at *7-8 (D. Mass. Sept. 27, 2012) (holding that an arbitral decision "was in the nature of a declaratory judgment" where "the arbitrator did not assess any damages that can be enforced through a writ of execution, nor … provide … an equitable remedy.").

The Second Award was only a declaratory award. It was not an award of money damages to the Nationals. The award only addressed the fair market value of the teams' rights licensed to MASN. The award did not calculate any amount of money damages owed by MASN. A.785 (reaching only a conclusion as to "the fair market value of MASN's rights to telecast each of the Orioles and Nationals"). Importantly, the RSDC acknowledged that the damages owed to the Nationals

would be less than the fair market value numbers in the award because MASN *has already paid* $197.2 million in rights fees to the Nationals for the 2012-2016 period, as well as $41.2 million in profit distributions—profit distributions that MASN would not have been able to pay if it had paid the higher telecast rights fees. A.745, 784. The RSDC went on to calculate the total amount of money that it believed the Nationals should have received for the 2012-2016 period: $308.8 million. *Id*. It did not calculate the amount remaining unpaid, i.e., any damages owed the Nationals based on the higher telecast rights fees, which would require subtracting the amount paid from that ultimate total amount. A.785.

The award's rejection of the Nationals' request for pre-award interest also demonstrates that the award is declaratory, not an award of money damages. The RSDC admitted it did not have authority to award prejudgment interest because it "lacks authority to enter a judgment." A.754. The RSDC then stated that calculating any prejudgment interest would require the RSDC to "offset any net increase in Nationals' license fees determined by the Committee by both the $24.6 million loan (less interest payments made) and profit distributions [from MASN] the Nationals have received." *Id.* The RSDC did not perform those calculations.

The Settlement Agreement, which gives the RSDC its authority, and the Nationals' conduct, also demonstrate that the award is declaratory. The Settlement Agreement limits the RSDC's authority to determining "the fair market value of

the Rights[.]" A.793. The Settlement Agreement does not give the RSDC the power to do anything beyond that discrete valuation, and it certainly does not authorize the RSDC to award damages. The RSDC acknowledged this when it held, based on its mandate in the Settlement Agreement, "that its authority runs no further than determining the fair market value of the rights at issue." A.754.

During the arbitration, *the Nationals never provided the RSDC with any proposed calculation of damages*. The Nationals' briefs to the RSDC, like the briefs of MASN and the Orioles, only set forth the Nationals' position as to the fair market value of the rights. A.1865, 1924, 1963. In fact, in the Nationals' pre-hearing submission to the RSDC, the Nationals *argued*:

> "On these facts, the question for the RSDC is *not* whether MASN should be required to draw down on cash reserves in order to pay the Nationals. Rather, the question is whether funds *that MASN has already distributed, primarily to the Orioles*, *should be reallocated* from non-revenue-shareable profits distributions to revenue-shareable rights fees." A.1917 (emphasis added).

Nor did the Nationals submit any proposed calculation of an amount they claimed the RSDC awarded in *either* the Nationals' motion to confirm the second award, or in their reply brief in support of their motion to confirm. A. 508, 1289. It was only *at oral argument* on July 12, 2019, that the Nationals produced, for the first time, a *demonstrative* containing what the Nationals claimed was the amount

of damages that the RSDC awarded them. A.1410-11. But *nowhere in the award* did the RSDC perform any calculation like that in the Nationals' demonstrative.

The Supreme Court unlawfully modified the award by performing a calculation that the award *did not perform*, A.39, and then unlawfully entered a money judgment against MASN based on that calculation. A.89-90. The Supreme Court's calculation of damages that the RSDC did not calculate is not, as the court asserted, "ministerial." A.46. The RSDC *did not perform* that monetary damages calculation. It did the opposite: it acknowledged calculations would have to be performed to calculate the Nationals' damages, but the RSDC did not have authority to perform them. A.754, 784-85. The Supreme Court's unlawful money damages calculation went well beyond its authority to correct *miscalculations* (there were no calculations to correct), and unlawfully modified the award.

Even if this Court determines that the above stated grounds do not require vacatur of the award, the Court must *reverse* the money judgment entered by the Supreme Court, which was based on an unlawful modification of the award.

CONCLUSION

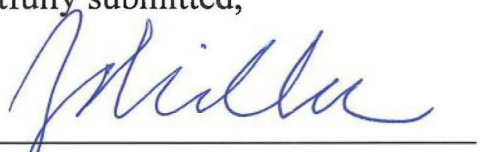
For the foregoing reasons, the Court should reverse the judgment of the Supreme Court of December 9, 2019, A.88-90, the decision and order of the Supreme Court of August 22, 2019, A.7-33, and the decision and order of the Supreme Court of November 14, 2019, A.39-40. The Court should order the

arbitration to be reheard before an independent arbitrator unaffiliated with MLB, pursuant to the Court's authority as summarized herein and in Presiding Justice Acosta's dissent, *TCR II*, 153 A.D.3d at 162-81 (Acosta, P.J., dissenting).

Even if the Court affirms the Supreme Court's confirmation of the award, the Court should reverse the Supreme Court's money judgment, and the portions of the Supreme Court's orders of August 22, 2019 and November 14, 2019 which purported to calculate money damages that the award did not calculate.

Dated: New York, New York
December 30, 2019

Respectfully submitted,



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Dated: New York, New York
December 30, 2019

STATEMENT PURSUANT TO CPLR § 5531

New York Supreme Court

Appellate Division—First Department

TCR SPORTS BROADCASTING HOLDING, LLP,

Petitioner-Appellant,

– against –

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

Respondents-Respondents,

– and –

THE COMMISSIONER OF MAJOR LEAGUE BASEBALL,

Respondent,

– 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.

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1. The index number of the case in the court below is 652044/14.

2. The full name of the original Petitioner is as set forth above. The original Respondents named in the Summons with Notice were WN Partner, LLC, Nine Sports Holding, LLC, Washington Nationals Baseball Club, LLC, and the Officer of Commissioner of Baseball. Allan H. “Bud” Selig was named as an additional Respondent in the Petition for Confirmation of Arbitration Award, and the Nominal Respondents were added to the caption of the Notice of Appearance.

3. The action was commenced in Supreme Court, New York County.

4. The action was commenced on or about July 2, 2014 by filing of a Summons with Notice. Notice of Verified Petition to Confirm Arbitration Award was filed on July 24, 2014, and Notice of Verified Petition to Vacate Arbitration Award was filed on August 7, 2014. Respondents The Office of Commissioner of Baseball and Alan H. “Bud” Selig, as Commissioner of Major League Baseball, filed a Verified Answer on October 20, 2014. Respondents WN Partner, LLC, Nine Sports Holding, LLC, and Washington Nationals Baseball Club, LLC filed a Verified Answer on October 20, 2014.

5. The nature and object of the action involves parties seeking to Confirm or Vacate the Arbitration Award.

6. This appeal is from the Orders of the Honorable Joel M. Cohen, dated August 22, 2019 and November 14, 2019, and the Judgment, dated December 9, 2019.

7. This appeal is on the Appendix method.