FILED: APPELLATE DIVISION - 1ST DEPT 02/07/2020 10:36 PM
NYSCEF DOC. NO. 20

2019-05390
RECEIVED NYSCEF: 02/10/2020

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

New York Supreme Court

Appellate Division—First Department

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

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.

REPLY BRIEF FOR PETITIONER-APPELLANT AND NOMINAL RESPONDENTS-APPELLANTS

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

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PRELIMINARY STATEMENT

As this Court's July 13, 2017 dissent (Acosta and Gesmer, JJ.) predicted, MLB and its RSDC continued their evident partiality in the second arbitration and again subjected MASN and the Orioles to an unfair process. *TCR II*, 153 A.D.3d at 162-63, 175-77 (Acosta, P.J., dissenting). The dissent forecast that the second RSDC would reach the same result as the first. *Id.* at 162-63. That is what happened. Only a rehearing before an arbitrator outside of MLB will provide MASN and the Orioles with a fair and impartial proceeding.

1. The Nationals broke their promise to this Court, which four Justices reported, "to post a bond to guarantee repayment of" MLB's $25 million advance to the Nationals "regardless of the outcome of the arbitration." *Id.* at 158 (Andrias, J., plurality); *id.* at 176 n.6 (Acosta, P.J., dissenting) (reporting "the Nationals' proposal to post a bond to guarantee repayment of the $25 million advance to MLB . . . raised for the first time at oral argument before this Court"). The plurality concluded that the Nationals' promise "to post a bond to guarantee repayment" eliminated MLB's $25 million financial interest in the proceedings. *Id.* at 158 (Andrias, J., plurality). The plurality voted to send the proceedings back to MLB on the premise that MLB would no longer have any financial interest in any matter before its arbitrators. *Id.*

But after this Court remanded the proceedings back to MLB based on the Nationals' promise, the Nationals failed to honor it. Instead, the Nationals and MLB secretly negotiated an agreement which they signed on February 9, 2018 without MASN's or the Orioles' knowledge. A.941. In the agreement, the Nationals *conditioned* their repayment of the $25 million to MLB on its RSDC holding a new arbitration hearing. *Id.*

Because this agreement mandated MLB's arbitrators to schedule and hold a hearing before MLB could receive the $25 million, the arbitrators could not impartially consider whether to recuse themselves, as MASN and the Orioles demanded. A.1138-42. Arbitrators should recuse themselves if there are facts that they "believe might cause their impartiality to be questioned." *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 174 (2d Cir. 1984). But because of MLB's $25 million interest in holding the hearing, the RSDC—which MLB's lawyer Joseph Shenker admitted "is not a separate entity from MLB," A.1051—could not impartially consider their fitness to preside over the arbitration.

A $25 million financial stake held by MLB in its arbitrators' decision whether to recuse is "evident partiality" under the FAA. 9 U.S.C. § 10(a)(2). Any "objective facts inconsistent with impartiality" establish evident partiality. *Pitta v. Hotel Ass'n of N.Y.C., Inc.*, 806 F.2d 419, 423-24 n.2 (2d Cir. 1986). That includes a financial interest in the decision of whether to recuse, as *Pitta* holds. *Id.* at 424.

The FAA prohibits the arbitral forum or arbitrator from having a financial interest in favor of holding the hearing due to a financial arrangement with one of the parties. MLB's direct $25 million financial interest in making sure its RSDC heard the arbitration requires vacatur of the RSDC award.

In their brief, the Nationals now misrepresent the promise they made to this Court at oral argument. The Nationals assert that "a bond would have required the Nationals to make the $25 million in cash available only *after* the new hearing took place." Respondents' Brief ("Resp. Br.") 31. But that is not the promise the Nationals made and which *four Justices* reported. *TCR II*, 153 A.D.3d at 158 (Andrias, J., plurality), 176 n.6 (Acosta, P.J., dissenting). As the plurality and dissent unambiguously stated, the Nationals promised this Court "to guarantee repayment." A guarantee is a guarantee: regardless of the result of any RSDC award, or if the RSDC recused itself and did not render an award, MLB could collect on the Nationals' bond. But that is not what happened.

No evidence in the record supports the condition the Nationals *now* assert that they placed on the bond. That condition would add a corrupt, partial element to the bond: the RSDC must hold the hearing in order for MLB to collect on the bond. The Nationals are now mischaracterizing their promise to the Court because their agreement with MLB to make their repayment of the $25 million contingent on the RSDC holding a hearing is not the express promise they made, and on

which the Court relied to rule in the Nationals' favor and remand the proceedings to MLB.

2. The Court should also vacate the award because the RSDC refused to disclose MLB's communications with the RSDC. The FAA, 9 U.S.C. § 10(a)(2), requires "broad disclosure" by arbitrators of anything 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). The Commissioner exercises plenary power over MLB, the RSDC and each of its members' teams. Directions by the Commissioner and his staff undoubtedly influence the RSDC. Because the Commissioner has repeatedly and publicly demonstrated that he has prejudged the matter, A.959-1007, 1009-11, 1205, his and his staff's communications to the RSDC about this dispute "might create an impression of possible bias." MASN and the Orioles have the right to know what the Commissioner told the RSDC to do. But the RSDC refused to disclose anything it discussed with MLB. A.948, 954-55.

MLB's admissions refute the Nationals' assertion that MASN and the Orioles are "speculat[ing]" about MLB's role in the second arbitration. Resp. Br. 38. Mr. Shenker admitted that MLB would confer with the RSDC in the second arbitration and that "the RSDC is not a separate entity from MLB." A.1051.

The Nationals argue that the plurality permitted the RSDC to shield MLB's instructions from disclosure. Resp. Br. 36. But the plurality did not address the

new RSDC's disclosure obligations under the FAA. Nor is this a dispute over "discovery" as the Nationals assert. Resp. Br. 4, 34. Section 10(a)(2) of the FAA imposes a requirement of "broad disclosure" on the arbitrators of anything that "might create an impression of possible bias." *Sanko*, 495 F.2d at 1263. The Court reviews challenges to *arbitrator* disclosure *de novo* and should vacate the award because it was issued without the arbitrators' required disclosures.

3. The award also cannot stand because the RSDC engaged in prejudicial misconduct during the arbitration. 9 U.S.C. § 10(a)(3); *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 146 (2d Cir. 1992). The central issue in the arbitration was the proper methodology to value the Nationals' and Orioles' rights fees. The parties' March 2005 Settlement Agreement directs the RSDC to use "the RSDC's established methodology for evaluating all other related party telecast agreements in the industry." A.793. Prior to the hearing, MLB refused to disclose any of its communications about the established methodology after March 2005 (the date of the Settlement Agreement) on the ground that such post-Settlement Agreement communications were not "relevant" and not "probative." A.1057. Yet in the award, the RSDC concluded that a *November 2011* letter written by the Commissioner was dispositive. A.764.

Refusing to disclose critical documents on the ground they are irrelevant, but then relying on such documents to rule against a party, is prejudicial misconduct.

Iran Aircraft, 980 F.2d at 146. Again, this was not merely a matter of restricting or denying discovery. It was a fundamentally unfair *process*: The RSDC denied MASN and the Orioles access to information on the ground that it was irrelevant, creating an incomplete record, but then relied on that same category of information, and that incomplete record, to rule against MASN and the Orioles. The Nationals cite no case permitting an arbitrator to engage in this kind of prejudicial conduct.

4. Further, the RSDC "exceeded its powers." 9 U.S.C. § 10(a)(4); *Barbier v. Shearson Lehman Hutton, Inc.*, 948 F.2d 117, 122 (2d Cir. 1991). The Nationals concede that arbitrators exceed their powers when they "exceed[ ] the scope of their contractual mandate or law." Resp. Br. 49 (citing *Barbier*). The RSDC violated its contractual mandate and controlling Maryland law here. There is only *one* authorized methodology under the Settlement Agreement: "the RSDC's established methodology for evaluating all other related party telecast agreements in the industry." A.793. To determine the methodology the parties agreed to use, Maryland law required the RSDC to determine the intentions of the parties "at the time of [contract] execution." *Ocean Petrol., Co., Inc. v. Yanek*, 5 A.3d 683, 691 (Md. 2010). MASN and the Orioles presented the RSDC with this controlling law but the RSDC refused to follow it. Instead, the RSDC ruled based on its subjective

opinion that the Orioles had received enough money from the contract in the years after it was signed. A.759-60, 784.

* * *

Even if the Court affirms confirmation of the award, it should vacate the money judgment. The RSDC had no authority to, and did not, award money damages to the Nationals. Nor did the award set forth a formula to calculate damages. This fact distinguishes the cases cited by the Nationals, which authorize the Court to calculate damages when the award contains such a formula. *E.g.*, *Morgan Guaranty Trust Co. of N.Y. v. Solow*, 114 A.D.2d 818 (1st Dep't 1985). The Court cannot modify the award by making a damages calculation the arbitrators did not make. *Weiss v. Metalsalts Corp.*, 15 A.D.2d 46, 47 (1st Dep't 1961).

ARGUMENT

I. MLB's February 9, 2018 Agreement with the Nationals Constitutes Evident Partiality Under the FAA

The Nationals broke their promise to this Court at oral argument "to post a bond to guarantee repayment of the advance to MLB regardless of the outcome of the arbitration." *TCR II*, 1532 A.D.3d at 158 (Andrias, J., plurality). The Nationals' promise "to guarantee repayment," without any conditions, was reported by both the plurality and the dissent. *TCR II*, 153 A.D.3d at 158 (Andrias, J., plurality) ("the Nationals have offered to post a bond to guarantee repayment of

the advance to MLB regardless of the outcome of the arbitration"); *id.* at 176 n.6 (Acosta, P.J., dissenting) ("the Nationals' proposal to post a bond to guarantee repayment of the $25 million advance to MLB . . . raised for the first time at oral argument before this Court"). The plurality *expressly relied* on the Nationals' commitment to post a bond "to guarantee repayment of" the $25 million when the plurality voted to send the arbitration back to MLB for further proceedings. *TCR II*, 153 A.D.3d at 158 (Andrias, J., plurality).

But the Nationals never posted a bond, and they do not contend otherwise. Resp. Br. 26. Instead, in January and February 2018—after this Court issued its order remanding the proceedings to MLB—the Nationals and MLB secretly negotiated a different agreement that *conditioned* the Nationals' repayment of the $25 million on MLB holding the hearing. A.941-42. Under this agreement, which MLB and the Nationals signed on February 9, 2018 without MASN's or the Orioles' knowledge, the Nationals were obligated to repay the $25 million to MLB *only if* the RSDC held a hearing. A.941. If MLB did not hold the hearing for any reason—including if the RSDC recused itself—the Nationals would not be obligated to repay the $25 million. *Id.* And since MLB's prior agreement with the Nationals (the August 26, 2013 agreement) conditioned MLB's recovery of the $25 million on an RSDC award being issued, A.1134-35, 464.28, if the RSDC did

not hold the hearing, MLB was out $25 million. The only way MLB could get repaid was if the Nationals got what they wanted—an RSDC hearing.

The Nationals now claim that their February 9, 2018 agreement with MLB is "one better" than the bond they promised this Court they would post, because "a bond would have required the Nationals to make the $25 million in cash available only *after* the new hearing took place." Resp. Br. 31. But nothing in the plurality or the dissent suggests that the Nationals' promise to this Court, reported by four Justices, was subject to the corrupt and partial condition that MLB could only collect on the bond after the new hearing took place. The Nationals are fabricating that condition now because they failed to honor their actual promise of a guarantee that both the plurality and dissent reported. A bond "guarantee[ing] repayment," which is what the Nationals actually promised this Court, would ensure repayment even if MLB did not hold a hearing.

The question before the Court is whether MLB's $25 million financial interest in its hand-picked arbitrators denying MASN's and the Orioles' recusal demand and holding the hearing is "evident partiality." 9 U.S.C. § 10(a)(2). The answer is yes. "An arbitration award may be vacated if there is 'evident partiality' of the arbitrator . . . a standard that may be met by inferences from objective facts inconsistent with impartiality." *Pitta v. Hotel Ass'n of N.Y.C., Inc.*, 806 F.2d 419, 423-24 n.2 (2d Cir. 1986) (citing *Commonwealth Coatings Corp*. v. *Continental*

Cas. Co., 393 U.S. 145 (1968); *Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds*, 748 F.2d 79 (2d Cir. 1984)).

Pitta is on point. There, the parties designated an individual (Cass) as the arbitrator of all disputes under a collective bargaining agreement. When one of the parties sought Cass's dismissal, he proceeded to arbitrate the question of whether he had been validly dismissed. The court held that the FAA prohibited Cass from arbitrating that dispute because he had a substantial financial incentive (beyond his hourly charges) to conclude that he had not been validly dismissed. The court vacated the award and remanded the issue to be heard before a different, independent arbitrator. *Pitta*, 806 F.2d at 423-24.

Pitta confirms the obvious proposition that arbitrators (or arbitral forums) cannot take a significant financial interest in the decision of whether to recuse. Indeed, arbitrators may never adopt a "direct financial interest" in any matter before them. *See Coty Inc. v. Anchor Const., Inc.*, 7 A.D.3d 438, 439 (1st Dep't 2004) (affirming vacatur where arbitrators involved themselves "in the parties' dispute over prepayment of arbitration fees, a matter in which the arbitrators had a direct financial interest"). A financial stake in the arbitrators' decision of whether to recuse—a critical issue the arbitrators must decide—constitutes "evident partiality" under the FAA.

The Nationals cite no case supporting the bizarre notion that an arbitral forum subject to the FAA can enter an agreement with one party that requires the party to pay the forum millions of dollars—but only if the forum holds a hearing. The Nationals cite *U.S. Electronics, Inc. v. Sirius Satellite Radio, Inc.*, 17 N.Y.3d 912 (2011), but this case supports MASN and the Orioles. There, the Court of Appeals *adopted* the Second Circuit's standard for evident partiality under the FAA: "where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." *Id.* at 914 (citing *Morelite*, 748 F.2d at 84). In doing so, the Court of Appeals held that "proof of actual bias" is not required, nor is "clear and convincing evidence that any impropriety of the arbitrator prejudiced [the petitioner's] rights." *Id.*[1] The Court confirmed that award only because the fact alleged to constitute partiality, that an arbitrator's son had endorsed an unrelated merger of a party to the arbitration, had no relationship to the dispute. *Id.* at 915. There was no evidence that the forum or arbitrator had any financial interest in any decision. The $25 million interest at stake here is a *direct financial interest* in a crucial decision that MLB's arbitrators had to make.

[1] The Court of Appeals' decision in *U.S. Electronics* directs the New York courts to enforce the FAA's express prohibition of "evident partiality" in arbitrations. Indeed, no parties will provide for arbitration in New York if they cannot rely on the New York courts to enforce the FAA's requirement that all arbitrations be free of "evident partiality."

The Nationals also cite *797 Broadway Group, LLC v. BCI Const., Inc.*, 59 N.Y.S.3d 657 (Sup. Ct. Albany Cnty. 2017), but this case likewise supports MASN and the Orioles. There, the court held that an arbitrator's "purely professional involvement in a short-lived and unrelated litigation matter from eight years prior is not even remotely suggestive of partiality or bias." *Id.* at 664. The court contrasted this remote professional relationship with facts where the arbitrators' "alleged interest or bias" is "direct, definite and capable of demonstration." *Id.* at 663. Unlike the remote relationship at issue in *797 Broadway Group*, MLB's $25 million financial interest in the pivotal recusal decision *in this very proceeding* was "direct, definite and capable of demonstration." A. 941.

The Nationals argue that *In re Falzone*, 15 N.Y.3d 530 (2010), supports their position, even citing it on the first page of their brief. Resp. Br. 1. But *Falzone* was a no-fault insurance arbitration that did not involve an FAA challenge to an arbitral award. Nor did it involve any allegation that the arbitrators acted with evident partiality or committed prejudicial misconduct. The only issue in *Falzone* was whether, under CPLR Article 75, the arbitrator exceeded his authority when making a finding that collateral estoppel did not apply. *Falzone* is wholly inapposite. Likewise, *Wien & Malkin LLP v. Helmsey-Spear, Inc.*, 6 N.Y.3d 471, 479 (2006), which the Nationals repeatedly cite, involved a challenge to an arbitrator's application of law to fact. It did not involve any allegation of evident

partiality or prejudicial misconduct, much less a direct $25 million financial interest in a decision by the arbitrators.

The Nationals also suggest that MLB could have recovered the $25 million under MLB's August 26, 2013 agreement with the Nationals even if the RSDC had recused itself and the case had been heard by an independent arbitrator. Resp. Br. 32-33. That is clearly wrong. Under the August 26, 2013 agreement, MLB could recover the money only if the RSDC "issue[d] a decision." A.1135. If the RSDC did not "issue[] a decision"—which would necessarily be true if it recused—MLB did not have the right to repayment. The Commissioner confirmed this in contemporaneous emails. A.464.28. Likewise, under the February 9, 2018 agreement, if the RSDC did not hold the hearing, the Nationals were not obligated to repay the $25 million. A.941. The documents, on their face, show that if the RSDC recused itself, MLB would lose $25 million.[2]

In sum, the Nationals' brief mischaracterizes the promise they made to this Court. The record establishes that the Nationals promised "to guarantee repayment of" the $25 million to persuade this Court to remand the proceedings back to MLB.

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[2] The Nationals also assert that their February 9, 2018 agreement with MLB was not secret. Resp. Br. 31-32. But the record demonstrates that MLB and the Nationals secretly negotiated and signed it without MASN's or the Orioles' knowledge. Opening Br. 21-23. The fact that the Nationals subsequently revealed the agreement on March 12, 2018, over a month after it was signed, and after MASN and the Orioles had made their recusal demand on the RSDC, A.940, 1138-42, does not cure the evident partiality caused by MLB's direct $25 million interest in the matter. Arbitrators and arbitral forums cannot hold direct financial interests in matters before them, whether those financial interests are secret or (as in *Pitta*) public.

But once the Nationals got the Court order they wanted, they reneged on their promise and conditioned their repayment on MLB holding the hearing. MLB's RSDC then acted in accordance with its $25 million financial incentive in the matter and denied MASN's and the Orioles' request for recusal. These facts establish "evident partiality."

II. The RSDC's Refusal to Disclose its Communications with MLB About this Dispute Violated the RSDC's Arbitrator Disclosure Obligation Under the FAA

The MLB Commissioner, who unilaterally appoints and removes the members of the RSDC, is not neutral in this dispute. He has made public and private statements demonstrating his bias in favor of the Nationals' positions on the key issues in this dispute. A.1003, 1009-11, 1205. For example, the Commissioner declared at a May 2015 press conference during MLB's quarterly owners meeting that "sooner or later" MASN "will be required to pay" the rights fees in the first award. A.1009-11. Subsequently, at another press conference during MLB's quarterly owners' meeting in May 2016, the Commissioner accused MASN and the Orioles of "engag[ing] in a pattern of conduct designed to avoid [the Settlement Agreement] being effectuated." A.1205.

The Commissioner has also actively litigated against MASN and the Orioles in this dispute, personally filing affidavits supporting the Nationals' litigation positions and attacking MASN's and the Orioles' arguments as "false,"

"groundless," "baseless," "inaccurate," and "misleading." A.989-1007 ¶¶ 11, 20, 38, 41; *see also TCR II*, 153 A.D.3d at 174 (Acosta, P.J., dissenting).

After this Court remanded the arbitration back to MLB, MLB's lawyer, Joseph Shenker of Sullivan & Cromwell, announced that he was representing the RSDC. A.583. Mr. Shenker was simultaneously representing MLB and had just represented MLB in a mediation in *this* dispute where he took positions *adverse* to MASN and the Orioles. A.1140-41. Mr. Shenker declared that "the RSDC is not a separate entity from MLB" and that the RSDC would confer with MLB staff about this dispute. A.1051. This is not mere "speculation regarding MLB's role," as the Nationals assert. Resp. Br. 38 (capitalization omitted). It comes directly from MLB's lawyer, who represented, and wrote on behalf of, the RSDC.

MASN and the Orioles had the statutory right under 9 U.S.C. § 10(a)(2) to obtain the communications between the Commissioner and his staff, and the RSDC, regarding this dispute. As stated above, the Commissioner has clearly prejudged this dispute in favor of the Nationals and against MASN and the Orioles. Further, the Commissioner appoints and removes the RSDC arbitrators at will and exercises broad powers over all MLB teams. The Commissioner's instructions to the RSDC members would plainly influence their deliberations. MASN and the Orioles have the right to know what MLB told the RSDC about this dispute, but the RSDC denied them this fundamental FAA right. A.948, 954-55.

Sanko S.S. Co. v. Cook Indus, Inc., 495 F.2d 1260 (2d Cir. 1973), requires disclosure of MLB's communications with the RSDC. There, the Second Circuit held that arbitrators have the obligation to disclose, prior to the hearing, any dealings that "might create an impression of possible bias." *Id.* at 1263 (citing *Commonwealth Coatings*, 393 U.S. at 149). Under the FAA, an arbitrator's disclosure requirement is one of "broad disclosure" that may result in "some unnecessary disclosure." *Id.* at 1263-64. This is not a mere dispute over a "discovery" ruling by an arbitrator, as the Nationals try to portray it. Resp. Br. 4, 34. This is about the RSDC arbitrators violating their FAA disclosure obligations, which give the parties the right to know in advance whether the arbitrators have had any dealings or communications that may unduly influence them.

Nat'l Hockey League Players Ass'n v. Bettman, 1994 WL 38130 (S.D.N.Y. Feb. 4, 1994), which cited *Sanko*, further demonstrates that the RSDC was required to disclose its communications with MLB. In *Bettman*, the court held that the NHL Commissioner, serving as arbitrator, was required to disclose his communications about the dispute to determine whether he was unduly influenced by biased owners and officials. *Id.* at *2-3. The documents the Court required the Commissioner to disclose included whether he "was given any instructions or advice by the League or team owners or their representatives as to the manner in which he was to exercise his authority under" the contract. *Id.* at *4. The court's

reasoning for requiring disclosure in *Bettman* applies here. MLB admitted it was communicating with the RSDC and its staff. In light of MLB's publicly and repeatedly demonstrated bias, MASN and the Orioles have the right to know what MLB instructed the RSDC to do.[3]

No case suggests that the RSDC members may refuse to disclose their communications with MLB—which has both a firm and public position on the proper outcome here and the ability to influence it—about the very dispute they are arbitrating. The cases relied on by the Nationals did not address any remotely similar situation. *Westinghouse Electric Corp. v N.Y.C. Transit Authority*, 82 N.Y.2d 47 (1993), held only that an agreement to arbitrate before the NYCTA, which also provided for judicial review, was not contrary to New York public policy. *Id.* at 54-55. *Westinghouse* did not address an analogous situation (for example a case where the head of the NYCTA publicly sided with one of the parties to a dispute and advocated for one of the parties). *NFL Management Council v NFL Players Ass'n*, 820 F.3d 527 (2d Cir 2016), merely upheld the facial validity of a clause appointing the NFL Commissioner as arbitrator. *Id.* at 548. The NFL Commissioner had not, in public and private statements, taken the side of one party to an NFL arbitration.

[3] Contrary to the Nationals' characterization of the case, Resp. Br. 39 n.8, *Bettman* addressed a disclosure dispute in the context of a challenge to an arbitration award. *Id.* at *3-4.

Nor does the fact that MASN and the Orioles agreed in the March 2005 Settlement Agreement to an RSDC arbitration circumscribe the FAA's reach here. When MASN and the Orioles signed the Settlement Agreement, there was no indication that the Commissioner (then Deputy Commissioner) would prejudge the dispute or vehemently argue, publicly and privately, in favor of the Nationals. *See* A.806-813. The changed circumstances since the Settlement Agreement was signed—including the Commissioner's prejudgment of the dispute, his ultimatum that MASN "will be required to pay" the rights fees in the first award "sooner or later," A. 1009-11, and his direct, personal role in the litigation against MASN and the Orioles—require the RSDC to disclose its communications with the Commissioner and his staff about this dispute. The problem is not "MLB's role" alone, *see* Resp. Br. 35–37, but MLB's role combined with its unanticipated and improper bias.

The FAA "ensure[s] a minimum level of due process for parties to an arbitration." *In re Wal-Mart Wage & Hour Empl. Practices Litig.*, 737 F.3d 1262, 1268 (9th Cir. 2013); *accord Hoeft v. MVL Grp., Inc.*, 343 F.3d 57, 66 (2d Cir. 2003), *overruled on other grounds by Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576 (2008). Thus, even when parties knowingly agree in advance to "non-neutral" arbitrators—which did not happen here—those arbitrators still must "participate in the arbitration process in a fair, honest and good-faith manner." *Matter of*

Excelsior 57th Corp. (Kern), 218 A.D.2d 528, 531 (1st Dep't 1995). At the very least, these minimum standards required the RSDC to disclose what MLB and the Commissioner told the RSDC members about this very dispute. That did not happen here.

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

The RSDC denied MASN and the Orioles a fair hearing on the central issue in dispute: "the RSDC's established methodology for evaluating all other related party telecast agreements in the industry," the methodology required by the March 2005 Settlement Agreement. A.793. Prior to the hearing, the RSDC refused to require MLB to disclose any documents from after March 2005 about the meaning of the Settlement Agreement's mandate. The RSDC withheld these post-Settlement Agreement (i.e., post-2005) documents on the basis that they were not "relevant" or "probative." A.1057.

But in the award, the RSDC treated a November 2011 letter written by MLB as *dispositive*. A.764 ("The Committee concludes that the applicable methodology is the methodology set forth in the 2011 letter.").[4] By selectively disclosing and relying on MLB's November 2011 letter, but withholding as *not relevant* and *not*

[4] Contrary to the Nationals' characterization, the award expressly states that it is adopting the 2011 letter, A.764, as the Nationals admit elsewhere in their brief, Resp. Br. 48. Indeed, the RSDC adopted the 2011 letter at *the Nationals'* urging. Resp. Br. 22-23.

probative MLB's *other* post-2005 communications about the methodology, MLB and the RSDC manipulated the evidentiary record to reach the result they wanted. These contradictory rulings constitute prejudicial misconduct under section 10(a)(3) of the FAA. 9 U.S.C. § 10(a)(3).

Iran Aircraft Indus. v. Avco Corp., 980 F.2d 141 (2d Cir. 1992), is on point. There, the Court vacated an arbitration award where the arbitrator refused to accept certain evidence from a party, but then ruled against that party based on the lack of proof from that party. *Id.* at 146; *accord Tempo Shain Corp. v. Bertek, Inc*., 120 F.3d 16, 20 (2d Cir. 1997) (vacating award where arbitrator refused to hear evidence but then ruled against the party based on the lack of that evidence).

The Nationals cite no case permitting an arbitrator to deny a party access to evidence—here, documents *that MLB possessed*—and then use the resulting incomplete record to rule against that party. The RSDC's exploitation of the incomplete record it created is prejudicial misconduct.

The cases cited by the Nationals addressed ordinary discovery issues, not prejudicial misconduct of the type that occurred here. In *Glen Rauch v Weintraub*, 2 A.D.3d 301 (1st Dep't 2003), the arbitrators properly sanctioned a party for refusing to disclose documents. *Id.* at 302. In *Fairchild Corp v. Alcoa, Inc.*, 510 F. Supp. 2d 280 (S.D.N.Y. 2007), the complaining party *had* obtained, through discovery, a complete record and could have presented it but did not. *Id.* at 288.

Indeed, *Fairchild* acknowledged the Southern District's decision in *Home Indemnity Co. v. Affiliated Food Distrib. Inc.*, 1997 WL 773712 (S.D.N.Y. Dec. 12, 1997), which held that an arbitrator cannot "bar a party from defending itself by precluding discovery of files central and dispositive to the dispute before it." *Id.* at *4. That holding applies fully here.

The Nationals' brief highlights why the RSDC's and MLB's refusal to disclose their records about the established methodology was prejudicial. As the Nationals admit, the RSDC's first and second awards in this dispute applied *different* methodologies. Resp. Br. 6, 7, 52. Since the contract contemplates just *one* methodology, the RSDC's use of two different methodologies in two different awards shows that at least one of them is wrong. (Indeed, both are wrong.) MLB's and the RSDC's inconsistent statements demonstrate that a fair hearing required, and still requires, MLB and the RSDC to disclose a complete record regarding "the RSDC's established methodology" to evaluate "all other" telecast agreements.

The RSDC's use of yet another methodology to evaluate the Boston Red Sox telecast agreement with NESN also demonstrates that a fair hearing required a complete record regarding the established methodology. There, the RSDC permitted NESN to generate a profit margin of *30%*. A.1552. Yet in its decision against MASN and the Orioles, the RSDC said that its "established methodology

for evaluating all other related party telecast agreements in the industry" permits a "maximum" profit margin of *20%.* A.768. The Nationals do not rebut these clear inconsistencies. *See* Resp. Br. 50 n.12.

IV. The RSDC Exceeded its Powers by Going Beyond the Scope of its Narrow Contractual Mandate and Maryland Law

The Nationals do not dispute that arbitrators exceed their powers when they "exceed[ ] the scope of their contractual mandate or the law." Resp. Br. 49; *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 672 n.3, 683 (2010) (exceeding the contract); *Barbier v. Shearson Lehman Hutton, Inc.*, 948 F.2d 117, 122 (2d Cir. 1991) (exceeding caselaw). That is what the RSDC did here.

Unlike other arbitration agreements that grant the arbitrator broad authority to construe the contract and apply the law, the Settlement Agreement's mandate is very narrow and specific. The RSDC must use "the RSDC's established methodology for evaluating all other related party telecast agreements in the industry." A.793. The RSDC has no other authority. To determine the methodology this mandate requires, Maryland law required the RSDC to look *solely* to the parties' intentions "at the time of [contract] execution." *Ocean Petrol., Co., Inc. v. Yanek*, 5 A.3d 683, 691 (Md. 2010). The RSDC was not authorized to interpret the mandate based on what happened *years after* the contract was signed.

The RSDC's analysis violated these blackletter principles of Maryland law. The RSDC did not look solely to the intentions of the signatories to the Settlement Agreement—the Orioles, MASN, the Commissioner, and MLB—as of March 2005. Rather, the RSDC analyzed how much money the Orioles had received from the agreement *since* 2005. A.759-60, 784. The RSDC then opined that "the Agreement has already provided the Orioles with substantial compensation"—a subjective answer to a question the Settlement Agreement neither poses nor empowers the RSDC to answer. A.760; *see also* A.784. The RSDC then relied on a *November 2011* letter written by the Commissioner over six years after the Settlement Agreement was signed. A.764.

The RSDC did not simply misapply Maryland law. The RSDC *violated Maryland law's requirement* to determine the parties' intent at the time they signed the contract, not on what the RSDC thought happened later.

The Nationals argue the Court must defer to the arbitrators' interpretation, but that deference does not apply here because the award demonstrates that the RSDC exceeded the scope of its contractual mandate and the law. *See Stolt-Nielsen*, 559 U.S. at 672 n.3, 683. The cases cited by the Nationals concerned challenges to arbitrators' application of law to facts under broad arbitration agreements. *See Nat'l Union Fire Ins. Co. v. Dana Corp.*, 2005 WL 857352, at *4-5 (S.D.N.Y. 2005); *T. Co. Metals v. Dempsey Pipe & Supply, Inc.*, 592 F.3d

329, 341 (2d Cir. 2010); *Cantor Fitzgerald Servs. v. Refco Sec., LLC*, 83 A.D.3d 592, 593 (1st Dep't 2011).

V. The Court Should Order Rehearing in an Independent Arbitral Forum Under FAA Sections 2 and 10

If the Court reverses Supreme Court's judgment confirming the RSDC award—as it should—it should also order the arbitration to be reheard in an independent arbitral forum unaffiliated with MLB. Opening Br. 47-52. As Justice Acosta's dissent stated, sections 2 and 10 of the FAA empower the Court to order the arbitration to be reheard in a new forum when the contractually-designated forum has shown that it is too biased to fairly arbitrate the dispute. 9 U.S.C. §§ 2, 10; *TCR II*, 153 A.D.3d at 170, 174, 179-81 (Acosta, P.J., dissenting); *Sawtelle v. Waddell & Reed, Inc.*, 304 A.D.2d 103, 117 (1st Dep't 2003) ("courts have discretion [under the FAA] to remand a matter to the same arbitration panel or a new one"). The Nationals' contrary arguments are inaccurate and unavailing.

The Nationals assert that the July 13, 2017 plurality and dissent applied the same legal standard. Resp. Br. 51. But the opinions demonstrate that they applied different legal standards. Specifically, the plurality required "something overt, some misconduct on the part of" the *proposed replacement arbitrators*, for the court to order rehearing before a forum unaffiliated with MLB. *TCR II*, 153 A.D.3d at 157 (Andrias, J., plurality). By contrast, the dissent concluded as a matter of law that the dispute could not be reheard before the RSDC because "the

arbitral forum selected by the parties," MLB, "is tainted by 'the appearance of bias,' which 'permeates the entire arbitral forum.'" *Id.* at 177 (quoting *Rabinowitz v. Olewski*, 100 A.D.2d 539, 540 (2d Dep't 1984)).

Neither the plurality nor the dissent received "the concurrence of three" Justices and therefore neither opinion resulted in a binding holding. N.Y. Const. Art. VI § 4.b. But the dissent's legal standard is correct and well supported by precedent and first principles. As the dissent recognized, a party seeking disqualification often cannot show (and certainly not before the arbitration even begins) that the *replacement* arbitrators are *overtly* biased. Nor is that showing required for the Court to order rehearing in an independent, neutral forum. *Cf. U.S. Elecs.*, 17 N.Y.3d at 914 (rejecting a "proof of actual bias" standard for evident partiality, since such proof "is rarely adduced"). Indeed, courts have disqualified contractually designated arbitrators or arbitral bodies to ensure fundamental fairness without a showing of overt bias by the *new* arbitrators. *See Rabinowitz*, 100 A.D.2d 539; *Pitta*, 806 F.2d at 423-24 n.2; *Erving v. Va. Squires Basketball Club*, 349 F. Supp. 716, 719 (E.D.N.Y.), *aff'd*, 468 F.2d 1064 (2d Cir. 1972).[5]

[5] The cases cited by the Nationals did not address the power of the Court under the FAA to order rehearing in a new forum. *Am. Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) (the court could not order class-wide arbitration when the contract waived class-wide arbitration); *Salvano v. Merrill Lynch*, 85 N.Y.2d 173 (1995) (cited in concurrence of Kahn, J.) (court could not order expedited arbitration when the contract did not permit it).

These decisions embody the common-sense principle that a decisionmaker, already shown to be biased once, cannot be trusted to render a fair ruling. *Hyman v. Pottberg's Ex'rs*, 101 F.2d 262, 266 (2d Cir. 1939). The same reasoning applies to an arbitral forum that has the ability to influence the proceedings and the outcome. *E.g.*, *Rabinowitz*, 100 A.D.2d 539. And it applies even more strongly when the forum has conducted an evidently partial arbitration not once, but twice.

The Nationals' assertion that the second award reached a different result than the first is laughable. The Nationals' brief misleads the Court by citing only the fair market value figures for *2016*, not 2012-2016. Resp. Br. 7, 52-53. The first award's value for 2012-2016 ($298.1 million, A.833) is within *0.2%* of the value in the second ($296.8 million, A.784). That is surely not a coincidence. It is what the Commissioner wanted, and his wish was the RSDC's command, as Presiding Justice Acosta's 2017 dissent predicted.

VI. Supreme Court Unlawfully Modified the Arbitration Award by Awarding Money Damages the RSDC Did Not Award

Even if the Court affirms the confirmation of the RSDC award, Supreme Court erred by modifying the award to include damages. The RSDC had no authority to award monetary damages to the Nationals. A.753-54, 793. The RSDC did not calculate or award any damages. Rather, the RSDC's award was only a declaration of "the fair market value of MASN's rights to the telecast of each of the Orioles and Nationals," A.785, not a sum owed to the Nationals.

As the award noted, the calculation of the sum due to the Nationals must account for MASN's prior payments to the Nationals of (1) telecast rights fees and (2) profit distributions—which were overpayments because the higher rights fees in the award necessarily reduced profits for 2012-2016. A.745, 754, 784.

The award did not undertake the calculation of any incremental sum that MASN owes the Nationals. Although the Nationals assert that Supreme Court performed "the calculations called for by the Award," Resp. Br. 54, the award contains no formula for any calculation. Nor did the Nationals ever provide the RSDC with any proposed damages calculation. Opening Br. 55-56; A.1865, 1924, 1963.

The RSDC did "estimate[ ]" the total amount of payments from all sources that the RSDC believed the Nationals should have received in 2012-2016—$308.8 million. A.784. But that "estimate[ ]," which the RSDC offered merely to support its (mistaken) claim that the "Agreement's compensatory purpose[ ] is still fulfilled" if the Nationals receive the rights fees the RSDC declared, A.784, is not a damages calculation or formula. The RSDC did not purport to award this amount (or any other) to the Nationals. The RSDC determined only the supposed "fair market value of the rights." A.754, 793.

When an arbitration award does not award damages, the Court cannot do so. *Weiss v. Metalsalts Corp.*, 15 A.D.2d 46, 47 (1st Dep't 1961). The cases the

Nationals cite are all distinguishable for this reason. In those cases, unlike here, the award itself "fixed the formula upon which" the damages calculation was based, and "[a]ll that remained was a calculation of the amount due based on that formula." *Morgan Guaranty Trust Co. v. Solow*, 114 A.D.2d 818, 821-22 (1st Dep't 1985) (cited by the Nationals). Since the award here includes no "formula," Supreme Court did not have authority to calculate and award a fixed sum of damages.

Indeed, the Nationals' calculation of money damages is *inconsistent* with the award. Under the Nationals' calculation, the Nationals would receive a total of *$338.3 million* for 2012-2016: $197.6 million of rights fees already paid (A.745) + $41.5 million in profit distributions already paid (A.745) + $99.2 million in additional rights fees the Nationals claim constitute their damages (Resp. Br. 54).[6] But the award "estimate[d]" that the Nationals are entitled to a total of only *$308.8 million*, $239.2 million of which MASN has already paid. A.784-Bullet Point 4. That is because past rights fees *and* past profit distributions offset the higher rights fees. A.753-54. The Nationals are thus asking the Court to *overpay* them by *$30 million* compared to the *award's* estimate.

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[6] Nothing in the award specifies this (or any) calculation. The statements in the award (A.745, 753-54, 784) are explicitly inconsistent with the Nationals' proposed calculation.

Because the RSDC could not and did not award damages, Supreme Court could not do so either—let alone award tens of millions more than the RSDC estimated. Thus, even if it confirms the award, the Court should vacate the money judgment. Calculation of the monetary sum that MASN owes the Nationals for 2012-2016 is a complex task that is to be resolved under the dispute resolution procedure in section 8 of the Settlement Agreement. A.798-99.

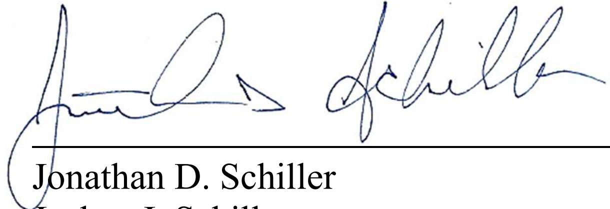
CONCLUSION

The Court should reverse Supreme Court's judgment of December 9, 2019, A.88-90, and its decisions and orders of August 22, 2019 and November 14, 2019, A.7-33, 39-40. The Court should order the arbitration to be reheard before an independent arbitrator unaffiliated with MLB.

Even if the Court affirms Supreme Court's confirmation of the award, the Court should reverse the money judgment, and the portions of Supreme Court's orders of August 22, 2019 and November 14, 2019 which calculated and awarded purported damages not set forth in the arbitration award.

Dated: New York, New York
February 7, 2020

Respectfully submitted,



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**pro hac vice* application to be filed

PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 N.Y.C.R.R. § 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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

Name of typeface: Times New Roman
Point size: 14 Point
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 6,998.

Dated: New York, New York
February 7, 2020