New York Supreme Court

Appellate Division—First Department

In re TCR SPORTS BROADCASTING HOLDING, LLP,

Petitioner-Appellant,

– against –

WN PARTNER, LLC, *et al.*,

Respondents,

– and –

WASHINGTON NATIONALS BASEBALL CLUB, LLC,

Respondent-Respondent.

THE BALTIMORE ORIOLES BASEBALL CLUB, *et al.*,

Nominal Respondents-Appellants.

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

OPPOSITION TO MOTION FOR LEAVE TO REARGUE AND/OR LEAVE TO APPEAL TO THE COURT OF APPEALS

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PRELIMINARY STATEMENT

Respondent Washington Nationals Baseball Club, LLC (the "Nationals") respectfully submits this memorandum in opposition to the motion by Appellants TCR Sports Broadcasting Holding, LLP, d/b/a Mid-Atlantic Sports Network ("MASN") and The Baltimore Orioles Baseball Club and Baltimore Orioles Limited Partnership (together, "the Orioles") for reargument before this Court and for leave to appeal to the Court of Appeals.

MASN's and the Orioles' motion to reargue and for leave to appeal is meritless. Applying well-settled law, this Court on October 22, 2020 ruled 4-0 to affirm both Supreme Court's (Cohen, J.) confirmation of the April 2019 arbitration award by Major League Baseball's Revenue Sharing Definitions Committee (the "RSDC") and the judgment Supreme Court entered in favor of the Nationals. Among other things, this Court held: "Petitioner failed to establish evident partiality in the RSDC in the second arbitration. Moreover, we reject petitioner's arguments that the RSDC otherwise violated its obligations, exceeded its powers or denied petitioner a fair hearing. To the extent petitioner makes arguments about the RSDC's ability to be impartial that it did not advance in the prior appeal, we reject them." Dkt. 28 at 2.[1] This Court also rejected MASN's and the Orioles' argument

[1] The "prior appeal" referenced by this Court was the 2017 decision of this Court, *TCR Sports Broad. Holding v. WN Partner, LLC*, 153 A.D.3d 140 (1st Dep't 2017),

– addressed at length in MASN's and the Orioles' appeal papers and at oral argument before this Court – that Supreme Court purportedly had "unlawfully modified the award in its confirmation order by performing a calculation of the Nationals' damages." Dkt. 28 at 2 (citing *Morgan Guar. Trust Co. of N.Y. v. Solow*, 114 A.D.2d 818, 821-822 (1st Dep't 1985), *aff'd* 68 N.Y.2d 779 (1986)).

In seeking reargument, MASN and the Orioles simply repeat their argument, previously advanced in briefing and oral argument before this Court, that Supreme Court "unlawfully modified" the RSDC's award. But a motion to reargue is not "a vehicle to permit the unsuccessful party to argue once again the very questions previously decided." *Pro Brokerage, Inc. v. Home Ins. Co.*, 99 A.D.2d 971, 971 (1st Dep't 1984) (quoting *Foley v. Roche*, 68 A.D.2d 558, 567 (1st Dep't 1979)). MASN and the Orioles now attempt to repackage their same previously-advanced argument by suggesting that this Court somehow misapprehended or misapplied *Morgan Guaranty Trust Co. v. Solow*, 114 A.D.2d 818 (1st Dep't 1985). But the purpose of a motion to reargue is not to give MASN and the Orioles such a second bite at the apple. Moreover, MASN and the Orioles are wrong on the merits: in entering

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that remanded the parties for a new arbitration of their dispute before the RSDC, the exclusive forum for arbitration of the dispute identified in the parties' March 2005 Agreement. MASN and the Orioles had argued in that earlier appeal that the RSDC was not an impartial forum and that therefore this Court should order the parties to arbitrate in a different forum.

judgment, Supreme Court did not "modify" anything, but simply performed ministerial calculations based on the RSDC's award. This Court's citation to *Morgan Guaranty Trust Co.* was entirely appropriate.

At the same time, MASN and the Orioles come nowhere close to satisfying their burden for obtaining leave to appeal from this Court's unanimous October 22, 2020 decision. That decision involves straightforward application of well-established jurisprudence on the confirmation of arbitration awards and the entry of judgments thereon, and involves no novel or unsettled legal issues of public importance. MASN and the Orioles suggest that specific *factual* issues here somehow have unsettled the law of arbitration awards. But this Court's holding involved the application of settled law to the unique facts of this case – precisely where leave to appeal is *not* warranted.[2]

MASN and the Orioles falsely assert that the Court of Appeals is *already* reviewing this Court's 2017 decision remanding the parties to the RSDC for a new arbitration. In fact, however, MASN and the Orioles have merely *noticed* (on November 19, 2020) an appeal to the Court of Appeals, purportedly pursuant to

[2] Notably, this Court previously denied MASN's and the Orioles' request for leave to appeal to the Court of Appeals from this Court's 2017 decision to remand the parties to the RSDC for a new arbitration. *See In re TCR Sports Broad. Holding, LLP v. WN Partner, LLC*, 2018 WL 457101 (1st Dep't Jan. 18, 2018) (the same panel that had ruled 3-2 to remand the parties to the RSDC ruled 5-0 to deny Appellants' motion for leave to appeal to the Court of Appeals).

C.P.L.R. §5601(d), and submitted (on November 25, 2020) a preliminary appeal statement to the Court of Appeals. The Court of Appeals has neither agreed to accept the appeal nor determined that the statutory requirements for appeal under C.P.L.R. §5601(d) are satisfied here. And there is no basis to assume that the Court of Appeals will do so. MASN's and the Orioles' attempted appeal disregards that the Court of Appeals is a court of limited jurisdiction under the New York Constitution and the C.P.L.R. In fact, MASN and the Orioles have *twice before* attempted to appeal to the Court of Appeals concerning this Court's 2017 decision and did so where the Court of Appeals lacked jurisdiction: first, in 2017, when MASN and the Orioles sought to appeal directly after this Court's 2017 decision, the Court of Appeals dismissed the appeal "sua sponte, upon the ground that the order appealed from does not finally determine the proceeding within the meaning of the Constitution," *TCR Sports Broad. Holding, LLP v. WN Partner, LLC*, 30 N.Y.3d 1005 (2017); and, second, in 2019, when MASN and the Orioles sought a direct appeal to the Court of Appeals, pursuant to C.P.L.R. § 5601(d), following the RSDC's 2019 arbitration award, the Court of Appeals again dismissed the appeal, on the ground that the arbitration award appealed from did "not finally determine an action within the meaning of the Constitution." *TCR Sports Broad. Holding, LLP v. WN Partner, LLC*, 34 N.Y.3d 1011 (2019).

MASN and the Orioles have yet again disregarded that the Court of Appeals is a court of limited jurisdiction by noticing a third purported appeal from this Court's 2017 decision. But again, MASN and the Orioles fail to satisfy the jurisdictional requirements under the C.P.L.R. *First*, C.P.L.R. § 5601(d) requires that the appealed-from Appellate Division decision "necessarily affects" a subsequent final decision. This requirement is not satisfied where, as here, the Appellate Division decision remanded a case for a new plenary hearing. *Second*, C.P.L.R. § 5601(d) also requires that C.P.L.R. § 5601(a) be satisfied, and that requirement is not met here, because this Court's 2017 decision did not include a two-justice dissent "on a question of law," C.P.L.R. § 5601(a). The dissent in the 2017 decision instead was premised on a dispute of fact: the plurality and the dissent *agreed* on the well-established *legal* principle that in extraordinary circumstances, a court may exercise its equitable authority to reform an arbitration agreement and direct that a dispute be arbitrated in a forum other than the one to which the parties agreed in their contract. The plurality and dissent divided only on the *factual* question of whether the circumstances here satisfied the agreed standard for directing the parties to arbitrate in a forum different from the RSDC.

In any event, the premise of MASN's and the Orioles' position – that their attempted appeal from this Court's 2017 decision supports having the Court of Appeals also hear the issues they seek to appeal from this Court's October 22, 2020

decision – is misplaced: if the Court of Appeals were to accept MASN's and the Orioles' appeal from this Court's 2017 decision pursuant to C.P.L.R. § 5601(d), ***only*** the 2017 order could be reviewed; the Orioles and MASN would have ***waived*** their right to seek any further review of issues arising from the RSDC's 2019 arbitration award, including all of the issues addressed in this Court's October 22, 2020 decision. *See Parker v. Rogerson*, 35 N.Y.2d 751, 753 (1974); *Hirsch v. Lindor Realty Corp.*, 63 N.Y.2d 878, 881 (1984) ("By choosing to appeal directly to this court from the Supreme Court judgment [under C.P.L.R. § 5601(d)], plaintiff has waived review of the new matter." (citations omitted)); Karger, Powers of the New York Court of Appeals, § 9:4 (rev. 3d ed.) ("[T]he general rule is that by taking a direct appeal, the appellant waives the right to seek review, either in the Appellate Division or the Court of Appeals, of the merits of the final determination.").

At bottom, MASN's and the Orioles' motion to reargue points already presented to and ruled upon by this Court, and for leave to appeal from this Court's 4-0 October 22, 2020 decision, offers no legitimate basis for further prolonging this long-running dispute over rights fees owed for the years 2012-2016.

Finally, MASN's and the Orioles' motion to reargue and for leave to appeal is procedurally deficient. Because the motion seeks leave to appeal, it needed to be "noticed to be heard at a motion day . . . not more than fifteen days after notice of the motion [was] served." C.P.L.R. § 5516. Yet MASN and the Orioles noticed

their motion to be heard on December 7, 2020, more than fifteen days after they served it on November 20, 2020. Dkt. 29 at 1-2. This provides an additional, independent reason to deny the motion as procedurally improper. *See, e.g.*, *Bd. of Educ., Shoreham-Wading Cent. Sch. Dist. v. State*, 66 N.Y.2d 854, 854 (1985).

STATEMENT OF FACTS

A. The Parties' March 2005 Agreement

Under the parties' March 2005 Agreement, MASN has the exclusive right to televise all Orioles and Nationals baseball games. The Agreement provides that for each five-year period beginning in 2012, MASN is obligated to pay the Nationals "the fair market value of the telecast rights" for their games. A.541-42. In the event that the parties are unable to agree on the fair market value of those telecast rights, the Agreement provides that "the fair market value of the Rights shall be determined by the" RSDC. A.542.

B. The 2012 Arbitration And Related Court Proceedings

In late 2011, the Nationals and MASN were unable to agree on the fair market value of the Nationals' telecast rights for the 2012-2016 period, and ultimately submitted the dispute to the RSDC, which held a hearing in April 2012. *See TCR Sports Broadcasting Holding, LLP v. WN Partner, LLC*, 2015 WL 6746689, at *2-3 (Sup. Ct. N.Y. Cnty. Nov. 4, 2015). Later that year, the parties were informally notified of the approximate value the RSDC had determined, but the MLB delayed issuance of a formal award to allow time for the parties to negotiate. MASN,

however, was continuing to pay the Nationals lower rights fees than MASN would be obligated to pay pursuant to the RSDC's informally-reported valuation. Thus, to encourage the Nationals' participation in settlement talks, MLB arranged a $25 million advance to the Nationals to make up the shortfall for 2012 and 2013. The advance was non-recourse to the Nationals, and the Nationals were not required to repay it. *See* Index No. 652044/2014, Dkt. 347. Rather, the contemporaneous documentation provided that as long as "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 [MLB] Commissioner's Office to cover" the advance. A.1135. Importantly, MASN and the Orioles knew the advance was going to be made. *See TCR Sports*, 2015 WL 6746689, at *4. The parties did not settle, and the RSDC issued its written award in 2014.

MASN then filed a petition in Supreme Court to vacate the RSDC's award. *See id*. Supreme Court (Marks, J.) granted MASN's petition, but *solely* on grounds related to the Nationals' arbitration counsel, Proskauer, having concurrently with the arbitration also represented MLB and certain interests of the RSDC members. *Id.* at *12. Justice Marks rejected each of the other arguments advanced by MASN and the Orioles (who were also a party to the Supreme Court proceedings), including the argument that MLB's $25 million advance to the Nationals purportedly created evident partiality, explaining that "MASN and the Orioles have not demonstrated

that the circumstances of the advance raise any serious questions about the fairness of the arbitration process." *Id*. at *9. Justice Marks further explained that "the Court cannot see how MASN or the Orioles were actually prejudiced by MLB's financial arrangement with the Nationals, even assuming there was insufficient disclosure of the precise nature of the arrangement." *Id*. at *8. Justice Marks noted that "the advance was not undertaken in secret," *id*. at *9, and that "MASN and the Orioles were aware that an advance would be made," *id*. at *4.

Justice Marks also held MLB and the RSDC did not engage in any prejudicial misconduct, rejecting MASN's and the Orioles' claims that MLB improperly influenced the outcome of the proceedings: "MLB provided the sort of support that the parties must necessarily have expected when they entered into the Agreement and there is no evidence that MASN and the Orioles had any expectation that the three Club representatives, when acting in their capacity as members of MLB's standing committee, would eschew assistance from MLB's support staff to the extent customary and appropriate." *Id*. at *7. Justice Marks held "Petitioners have not shown any denial of fundamental fairness based on MLB's support role or the informality of the procedures used." *Id*. Justice Marks also rejected the Orioles' arguments that (i) the RSDC's interpretation of the 2005 Agreement exceeded the scope of the arbitrators' authority or constituted manifest disregard of the law, *id.* at

*5-6, and (ii) MLB and the RSDC engaged in prejudicial misconduct by denying the Orioles' discovery requests, *id.* at *7.

In addition, Justice Marks denied MASN's and the Orioles' request to remand the matter for rehearing before an arbitral body other than the RSDC, explaining that if the Nationals retained new counsel who "do not concurrently represent MLB or the individual arbitrators and their clubs," the parties could "return to arbitration before the RSDC, however currently constituted, pursuant to the parties' Agreement." *Id*. at *13 n.21.

In 2017, this Court affirmed Supreme Court's vacatur decision solely on the basis of Proskauer's involvement in the arbitration. *TCR Sports Broad. Holding v. WN Partner, LLC*, 153 A.D.3d 140 (1st Dep't 2017). This Court also affirmed Supreme Court's denial of MASN's and the Orioles' request for an order remanding the parties for a rehearing in a different arbitral forum. *Id*. at 142-43 (per curiam). In so doing, this Court rejected MASN's and the Orioles' argument that MLB's outstanding $25 million advance to the Nationals rendered MLB and the RSDC biased against the Orioles. The plurality found that "[t]o allow the Orioles to now use the advance, which maintained the status quo, as a sword to disqualify the RSDC defies logic and mischaracterizes MLB's efforts to have the parties negotiate their differences without undue financial pressure on either side." *Id*. at 158 (plurality).

The plurality also rejected the dissent's factual conclusion that the RSDC – which now would be composed of entirely new members who had not participated in the original 2012 arbitration – "will remain puppets of MLB," characterizing the dissent's position as "pure conjecture." *Id*. at 157 (plurality).

The plurality also noted that "the Nationals have offered to post a bond to guarantee repayment of the advance to MLB regardless of the outcome of the arbitration." *Id*. (plurality). Justice Kahn joined the plurality in holding the new arbitration must be before the RSDC. *Id.* at 161 (concurrence).

The Orioles then filed a notice of appeal, from this Court's 2017 decision, to the Court of Appeals, which the Court of Appeals dismissed, *sua sponte*, for lack of jurisdiction. *See In re TCR Sports Broad. Holding, LLP v. WN Partner, LLC*, 30 N.Y.3d 1005 (2017). The Orioles then moved this Court for leave to appeal, which was unanimously denied by the same panel that rendered the underlying decision. *See In re TCR Sports Broad. Holding, LLP v. WN Partner, LLC*, 2018 WL 457101 (1st Dep't Jan. 18, 2018).

C. The 2018 Arbitration

In 2018, the parties had a new arbitration before the RSDC, which was now composed of entirely new members. A.1816. The Nationals were represented by new counsel that were not contemporaneously representing MLB, the RSDC members or their clubs. A.555.

1. The Orioles' Request For The RSDC's Recusal And For All Of Its Communications With MLB.

Given the Orioles' position that the outstanding $25 million advance purportedly compromised the impartiality of MLB and the RSDC, *see, e.g.*, A.563 ("It is intolerable for MLB to have skin in a game refereed by an MLB lawyer and an MLB committee."), the Nationals on February 9, 2018 agreed simply to repay MLB the $25 million advance, with interest, ten days prior to the scheduled start of the new RSDC arbitration (the "Prepayment Agreement"). A.559-60. The money would be returned to the Nationals if the hearing did not go forward when scheduled, but of course the Nationals would again need to repay the amount in advance of a new hearing date once scheduled. A.559. The Nationals informed the Orioles and MASN of the Prepayment Agreement on March 12, 2018. A.558.

The Orioles asked the RSDC to recuse itself from the new arbitration, for reasons including both the original $25 million advance and the Prepayment Agreement. A.563, 944. On May 10, 2018, the RSDC rejected that request in a comprehensive written decision, noting, among other things, that the $25 million advance "will be repaid before the hearing in this matter . . . , thereby mooting any concerns that the fact this loan remained outstanding would influence the outcome of this proceeding or give MLB an economic stake in the outcome of this proceeding." A.577-80. In that decision, the RSDC also affirmed, among other things, that: (1) "No RSDC member is aware of any fact or circumstance, past or

present, that would call into question his independence or give rise to reasonable doubts about his impartiality"; (2) "The RSDC members had no role in the previous RSDC hearing or subsequent judicial proceedings, and no RSDC member has prejudged the outcome of the present proceeding"; (3) "None of the RSDC members has any personal relationship with any of the parties beyond the normal interactions that occur in connection with MLB business," with two exceptions not relevant here; and (4) "The grounds articulated for recusal in [MASN's and the Orioles'] Letters were largely rejected by the First Department as grounds for disqualification of the RSDC. The First Department also granted the Nationals' motion to compel arbitration before the RSDC." A.577-78.

During discovery, the RSDC permitted each party to submit requests for information to MLB. A.584. The RSDC granted many of MASN's and the Orioles' requests, *see* A.600-07, but denied a request for "all" communications between the RSDC and MLB, finding that the "stated reason" for discovery was "not to explore the merits of this dispute but rather to explore the impartiality of the RSDC," and that MASN and the Orioles had failed to make any "threshold showing of a lack of independence or impartiality on the part of any member of the RSDC." A.995.

2. The Nationals Repay The Advance Before The Hearing

The Nationals repaid the $25 million advance, plus interest, A. 556, ten days before the RSDC held a two-day evidentiary hearing on November 15-16, 2018, *see*

A.1767-1816. That hearing followed significant written pre-hearing submissions by the parties, as well as eleven procedural orders – many in favor of MASN and the Orioles – on matters raised by the parties in advance of the hearing. *See e.g.*, A.577, A.600, A.614, A.640, A.654, A.660, A.664, A.668.

3. The RSDC Award

The RSDC issued its 48-page written Award on April 15, 2019 (the "RSDC Award" or "Award"), finding that "the license fees to be paid by MASN to the Nationals for each of the years 2012-2016 are:

Year	**License Fee**
2012	$54,878,272.63
2013	$57,767,546.52
2014	$60,410,594.11
2015	$61,363,965.13
2016	$62,414,285.75
Average Annual Value	$59,366,932.83"

A.1769, 1816. The Award also expressly set forth that MASN previously paid the Nationals rights fees of $34.0 million for 2012, $36.6 million for 2013, $39.3 million for 2014, $42.0 million for 2015, and $45.7 million for 2016. A.1776.

The RSDC explained that it considered "all of the files, records and proceedings herein, including the testimony presented at the hearing, the parties' expert reports and witness statements, the voluminous exhibits offered into the record, and the parties' pre- and post-hearing briefs and other submissions," as well as "the experience of the Committee's members." A.1769. The Award included a

multi-page discussion of applicable Maryland law, and interpreted the 2005 Agreement's requirement that the RSDC apply its "established methodology." A.1786-1797. The RSDC found that term to be ambiguous, and, after considering extrinsic evidence presented by both sides, concluded that it "refers to a methodology that the RSDC uses for all other telecast agreements at the time that license fees are determined[.]" A.1795. The RSDC held the applicable methodology "requires that the Committee consider both a bottom-up, Bortz-style analysis [which had been proposed by the Orioles] and look at comparable teams' transactions" in telecast-rights deals. A.1797.

D. Supreme Court's Confirmation Order

In April 2019, the Nationals moved in Supreme Court to confirm the RSDC's 2019 award. On August 22, 2019, Supreme Court (Cohen, J.) confirmed the award. A.21-33.

Supreme Court also held that the RSDC Award was not "declaratory," but rather that it "constitutes a monetary 'sum awarded' upon which the court may grant interest." A.30. Supreme Court explained: "The RSDC made its determination, which clearly was a monetary award of what 'shall be paid' to the Nationals, down to the single dollar, subject only to deducting the amount previously paid by MASN to the Nationals in respect of the rights fees." A.31.

The court on November 14, 2019 directed the parties to submit a proposed judgment for "the amount of the television rights fees set forth on page 48 of the April 15, 2019 [RSDC] Award (NYCEF Doc. No. 813) minus the television rights fees already paid to the Nationals for the same relevant period, directing the Clerk to calculate statutory interest on the net amount from April 15, 2019 through the date of judgment." A.39. The parties and then the Clerk did so, and judgment was entered in favor of the Nationals on December 9, 2019 in the amount of $99,203,339.14, plus statutory interest running from April 15, 2019 through the date of the judgment, in the amount of $5,821,741.16. A.90. Supreme Court's judgment made clear that the $99,203,339.14 amount simply reflected "the amount of the television rights fees set forth on page 48 of the April 15, 2019 [RSDC] Award (NYCEF Doc. No. 813) minus the television rights fees already paid to the Nationals for the same relevant period." A.89. Supreme Court's judgment provided "that MASN and the Orioles and related parties are not foreclosed from seeking adjustments to or recalculations of past, current, or future MASN profit distributions in the ordinary course of business under the parties' 2005 Agreement, including the dispute resolution mechanisms set forth in that agreement if necessary." A.90. Supreme Court also noted that "[t]he RSDC arbitration panel did not award such adjustments or recalculations in the [RSDC] Award, and thus the Court's confirmation of the [RSDC Award] does not address or adjudicate those issues." *Id.*

E. This Court's Unanimous Affirmance

This Court on October 22, 2020 unanimously affirmed Supreme Court's confirmation of the RSDC's April 2019 award and the entry of judgment, ruling "Petitioner failed to establish evident partiality in the RSDC in the second arbitration. Moreover, we reject petitioner's arguments that the RSDC otherwise violated its obligations, exceeded its powers or denied petitioner a fair hearing. To the extent petitioner makes arguments about the RSDC's ability to be impartial that it did not advance in the prior appeal, we reject them." Dkt. 28 at 2. This Court also rejected MASN's and the Orioles' argument that Supreme Court "unlawfully modified the award in its confirmation order by performing a calculation of the Nationals' damages." *Id.* (citing *Morgan Guar. Trust Co. of N.Y. v. Solow*, 114 A.D.2d 818, 821-822 (1st Dep't 1985), *aff'd* 68 N.Y.2d 779 (1986)).

ARGUMENT

I. REARGUMENT IS NOT WARRANTED

"A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted ***only*** upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision.'" *William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 27 (1st Dep't 1992) (emphasis added).

MASN's and the Orioles' request for reargument focuses on the final sentence of this Court's unanimous October 22, 2020 decision, and this Court's citation there

to *Morgan Guaranty Trust Company of N.Y. v. Solow*, 114 A.D.2d 818 (1st Dep't 1985). But MASN and the Orioles merely repeat the same arguments MASN and the Orioles already advanced to this Court in their underlying appeal, including their attempt to distinguish *Morgan Guaranty*. Dkt. 20 at 7, 27-28. MASN and the Orioles suggest that because this Court disagreed with those previously advanced arguments, this Court somehow misapprehended *Morgan Guaranty*. That is false, and MASN and the Orioles cite ***no*** authority whatsoever for the formalistic rule they claim *Morgan Guaranty* established.

A. Reargument Is Not Warranted Based on Repetition of Arguments This Court Has Already Rejected.

The First Department has "repeatedly held" that a reargument motion is "designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principal of law," and that "***[i]ts purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided***." *Pro Brokerage*, 99 A.D.2d at 971 (emphasis added; quoting *Foley*, 68 A.D.2d at 567); *accord Setters v. AI Properties & Developments (USA) Corp.*, 139 A.D.3d 492, 492 (1st Dep't 2016); *Mangine v. Keller*, 182 A.D.2d 476, 477 (1st Dep't 1992); *Application of Licato*, 104 A.D.2d 20, 22 (1st Dep't 1984); *New York Cent. R. Co. v. Banton Corp.*, 110 N.Y.S.2d 64, 66 (1st Dep't 1952).

Despite this clear rule, MASN and the Orioles on this motion repeat the ***exact same arguments*** they previously made to this Court – claiming, yet again, that the monetary judgment entered by Supreme Court unlawfully modified the RSDC's Award. Dkt. 8 at 52-56; Dkt. 20 at 26-28; *cf*. Mot. 16-24. MASN and the Orioles previously argued – just as they do here (*e.g.* Mot. 2-3, 21) – that the RSDC Award did not "set forth a formula to calculate damages." In fact, the following paragraph from the MASN/Orioles Reply Brief on appeal is copied in their present motion brief almost verbatim:

> 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). 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.

Dkt. 20 at 28 (footnote omitted); *compare* Mot. 23.

In addition, in response to the Nationals' argument on appeal that Supreme Court's entry of judgment was proper under *Morgan Guaranty* (Dkt. 18 at 55, 57), MASN and the Orioles specifically previously argued (just as they do here) that *Morgan Guaranty* does not apply and that the facts in that case are somehow

"distinguishable." Dkt. 20 at 7, 27-28. This Court rejected MASN's and the Orioles' arguments.

Thus, at most, MASN and the Orioles simply "disagree as to the law" applied by this Court. *Dunham v. Hastings Pavement Co.*, 57 A.D. 426, 430 (1st Dep't 1901) (denying reargument). This Court ***rejected*** MASN's and the Orioles' argument as "unavailing." Dkt. 28 at 2. This does not mean, of course, that this Court "overlooked or misapprehended relevant facts, or misapplied controlling principles of law," the standard for reargument. *300 W. Realty Co. v. City of New York,* 99 A.D.2d 708, 709 (1st Dep't 1984); *see also Banton Corp.*, 110 N.Y.S.2d at 66 ("A motion for reargument is not just a repetitious application by a disappointed lawyer, who feels he ought to have as much further reconsideration as he chooses"; "If this practice is tolerated such applications will go on ad infinitum."). Where, as here, there is "nothing but repetition on the so-called 'reargument' motion," the motion must be denied. *Id.*; *see also People v. Merly*, 31 N.Y.S.3d 751, 755-56 (Sup. Ct. Bronx Cnty. 2016).

B. The Court Did Not Misapprehend Any Fact or Law

1. This Court Properly Applied *Morgan Guaranty*.

MASN and the Orioles assert that under *Morgan Guaranty*, a court cannot issue a monetary judgment on the basis of an arbitration award unless the award "***expressly set[s] forth***" the full numerical amount owed, or a specific formula by

which the amount can be calculated. Mot. 22-23 (emphasis added). MASN and the Orioles insist Supreme Court's monetary judgment unlawfully modified the RSDC Award because "there is no formula *in the award*." Mot. 23 (emphasis in original).[3] But *Morgan Guaranty* does not include any formalistic requirement that the actual formula be set out in the arbitration award: *Morgan Guaranty* holds instead that "[w]here the formulae for the computations are so clear and specific that the determination of the amounts owing is merely an accounting calculation, the award is final and definite and is required to be confirmed." 114 A.D.2d at 822 (alterations omitted; quoting *Hunter v. Proser*, 274 A.D. 311, 312 (1st Dep't 1948)). That is, what matters under *Morgan Gurararanty* is not whether, as MASN and the Orioles assert, the award "expressly set forth" (Mot. 22) a formula as a mathematical equation, but whether, as *Morgan Guaranty* actually states, "[a]ll that remained was a calculation of the amount due" as a "mere ministerial act." 114 A.D.2d at 822.

Indeed, *Morgan Guaranty* has been cited by numerous cases to support the same approach applied by Supreme Court and this Court here. *See, e.g.*, *Civil Serv. Employees Ass'n. v. Cty. of Nassau*, 305 A.D.2d 498, 498 (2d Dep't 2003) ("An award is final and definite if the computation of the award is so clear and specific

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[3] *See also* Mot. 22 ("The narrow exception in *Morgan Guaranty* for a clear and specific formula *set forth in the award* is not applicable here . . . ." (emphasis in original)); *id.* at 35 ("The text of the [RSDC] Award clearly does not contain any formula.").

that the determination of the amounts owing is merely an accounting calculation." (quotation marks, ellipses, and citation omitted)); *Matter of Civil Serv. Employees Ass'n, Inc., Local 1000, AGSCMS, AFL-CIO on Behalf of Hinton (State)*, 223 A.D.2d 890, 892 (3d Dep't 1996) ("All that needs to be done are ministerial acts or arithmetic calculations and, therefore, the absence of a dollar figure does not affect the finality of the award." (citation omitted)); *Snyder-Plax v. Am. Arbitration Ass'n*, 196 A.D.2d 872, 874 (2d Dep't 1993) ("All that remained to be done was, in effect, merely an accounting calculation to determine the interest due on the awards—a ministerial act which did not detract from the finality of the awards." (citations omitted)); *Matter of Vermilya (Distin)*, 157 A.D.2d 1030, 1031 (3d Dep't 1990) ("The remaining issue based upon lack of a specific dollar figure is not valid where, as here, computation of the amount due is but a ministerial act." (citations omitted)).

MASN and the Orioles fail to cite a single case that supports their formalistic focus on the award's "express[]" language. (Mot. 20). The three cases they do cite are inapposite:

- *Weiss v. Metalsalts Corp*., 15 A.D.2d 46 (1st Dep't 1961), involved an arbitration award that "direct[ed] . . . specific performance" on a contract with an option to purchase certain stock "at 20 cents a share," but also "directed" that the claimant was entitled to purchase 22,500 shares for $2,250, which would be a price of only 10 cents a share. 15 A.D.2d at 47. Respondent argued that the lowered price was an "obvious error or miscalculation," while claimant argued it should be construed as "damages for [the respondent's] delay in making the stock available." *Id*. The Court rejected claimants' strained "damages" argument and remanded to the arbitrators on the ground that the award was "uncertain or the result of a

miscalculation." *Id.* at 47-48. Thus the issue in *Weiss* was not that "the damages sought by the claimant were not expressly contained in the award," as MASN and the Orioles suggest (Mot. 20), but rather that there was an apparent miscalculation in the content of the award.

- In *Canada Dry Delaware Valley Bottling Co. v. Hornell Brewing Co.*, 2013 WL 5434623 (S.D.N.Y. Sept. 30, 2013), the Court did not reject claimant's pursuit of money damages in a confirmation proceeding simply because "the [arbitration] award was limited to 'a declaratory award issued by the panel'" as MASN and the Orioles suggest (Mot. 20), but because claimant's "request" for damages and the "theory" on which it was based had been "***explicitly rejected by the arbitration panel***." 2013 WL 5434623 at *11 (emphasis added).

- Finally, MASN's and the Orioles' assertion that in *W. Massachusetts Elec. Co.v. Int'l Bhd. of Elec. Workers, Local 455*, 2012 WL 4482343 (D. Mass. Sept. 27, 2012), "the court rejected a claimant's attempt to seek monetary damages" (Mot. 20) is flatly false. In fact, claimant in that case ***never*** requested monetary damages, as its dispute with the respondent concerned the respondent's harmless "announce[ment]" of a harmful action it might take, but then never took. 2012 WL 4482343 at *2, *7. The Orioles' quotations and citations from *W. Massachusetts Elec. Co.* are highly misleading, and nothing in that decision is inconsistent with *Morgan Guaranty* or this Court's unanimous ruling here.

Tellingly, MASN and the Orioles ***already*** cited each of these cases below. *See* Dkt. 8 at 53; Dkt. 20 at 27.

Contrary to MASN's and the Orioles' assertions, it is well established that where, as here, "[a]ll that needs to be done are ministerial acts or arithmetic calculations," it is legal error for a court to enter judgment without performing the calculations. *Matter of Civil Serv. Employees Ass'n, Inc.*, 223 A.D.2d at 890-93 (reversing Supreme Court's remand to arbitrators to perform calculations themselves); *Matter of Vermilya (Distin)*, 157 A.D.2d at 1030-31 (argument for

vacatur "based upon lack of a specific dollar figure is not valid where, as here, computation of the amount due is but a ministerial act," and Supreme Court could perform remaining calculations when arbitrators ordered that employee be "made whole for any back pay lost without interest and less any earnings from outside employment").[4]

This Court's application of this longstanding principle was not a misapprehension of law or fact warranting reargument.

2. The Formula For Calculating The Amount Owed To The Nationals Is Clear and Specific.

A clear and specific formula for calculating the monies owed to the Nationals obviously exists in the RSDC Award: that amount is simply the fair market value of the Nationals' telecast rights, as determined in the RSDC award, A.1769, minus the amount MASN already paid the Nationals, as set forth in the RSDC award, A.1776. That is precisely the calculation Supreme Court performed, yielding $99,203,339.14. *See* A.89-90 (describing the amount as "the amount of the

[4] *See also Matter of Trudeau (S. Colonie Cent. Sch. Dist.)*, 135 A.D.2d 150, 156 (3d Dep't 1988), *aff'd sub nom*. *Trudeau v. S. Colonie Cent. Sch. Dist*., 73 N.Y.2d 736 (1988) (Supreme Court should have confirmed award directing that party be paid "daily rate of pay for each hour so worked," even though award did not itself perform that calculation); *States Marine Lines, Inc. v. Crooks*, 19 A.D.2d 1, 3 (1st Dep't 1963), *aff'd*, 13 N.Y.2d 206 (1963) ("It is not a valid objection to an award to say that the amount payable may depend on a computation[.]"); *Hunter v. Proser*, 298 N.Y. 828, 829 (1949) (similar); 21 Williston on Contracts § 57:114 (4th ed. July 2019) ("An award is still complete if arithmetic calculations or similar ministerial acts remain to be completed").

television rights fees set forth on page 48 of the April 15, 2019 [RSDC] Award (NYCEF Doc. No. 813) minus the television rights fees already paid to the Nationals for the same relevant period.").

MASN and the Orioles do not challenge that formula nor the arithmetic – nor could they legitimately do so. MASN and the Orioles instead attempt to muddy the waters by suggesting Supreme Court somehow should have, but did not, account for the supposed impact higher rights fees from 2012 through 2016 might have had on separate profit distributions MASN made during those years. *See* Mot. 23. Putting aside that MASN and the Orioles already made this exact same argument to this Court in the underlying appeal (Dkt. 8 at 55-56; Dkt. 20 at 28), Supreme Court in fact accounted for the Orioles' arguments, and expressly stated in its judgment that "MASN and the Orioles and related parties are not foreclosed from seeking adjustments to or recalculations of past, current or future MASN profit distributions in the ordinary course of business" if they believe such adjustments or recalculations were warranted. A.90. Supreme Court correctly acknowledged that "[t]he RSDC arbitration panel did not award such adjustments or recalculations [of profit distributions] in the [RSDC] Award, and thus the Court's confirmation of the [RSDC] Award does not address or adjudicate those issues." *Id*.

There can be no serious dispute that Supreme Court's subtraction of amounts paid from amounts owed was a matter of straightforward arithmetic, performed on

uncontested numerical values supplied by the RSDC in its Award – a ministerial act of subtraction clearly authorized under *Morgan Guaranty*. *See* 114 A.D.2d at 822.

II. LEAVE TO APPEAL SHOULD BE DENIED BECAUSE THE QUESTIONS PRESENTED DO NOT MERIT FURTHER REVIEW

This Court's unanimous October 22, 2020 decision involves the application of well-settled law to unique facts. The Court should therefore deny MASN and the Orioles leave to appeal to the Court of Appeals, just as this Court unanimously denied MASN leave to appeal from the Court's earlier 2017 decision. *See In re TCR Sports Broad. Holding, LLP v. WN Partner, LLC*, 2018 WL 457101 (1st Dep't Jan. 18, 2018).

As in 2017, MASN and the Orioles have failed to identify any "question of law important enough to warrant the immediate attention of the Court of Appeals." C.P.L.R. § 5602, Practice Commentary C5602:1. MASN and the Orioles seek review of questions that are "lacking general significance," which "concern only these parties," and which "can be expected to arise only rarely or only in exceptional cases." *Id.* There is no "conflict of decision between different appellate divisions," and the proposed questions are neither "likely to arise frequently" nor "important to others than the parties litigant." 11 Carmody-Wait New York Practice 2d § 71:69 (collecting examples of cases where further review may be warranted). Instead, each of MASN's and the Orioles' "questions presented" concern questions of fact – as opposed to "questions of law" – that are outside the jurisdiction of the Court of

Appeals. C.P.L.R. § 5602; *see also* C.P.L.R. § 5601(a) (appeal may be taken as of right "where there is a dissent by at least two justices on ***a question of law***") (emphasis added). Leave for appeal therefore should be denied.

A. This Case Does Not Raise An Important Question Regarding An Arbitral Forum's "Direct Financial Stake" In An Arbitration

MASN's and the Orioles' first "Question Presented" – concerning whether the FAA allows "an arbitral forum to enter into an agreement with one party to an arbitration that gives the arbitral forum a direct $25 million financial interest in holding the arbitration hearing" (Mot. 5, 25-31) – is, on its face, "lacking general significance," "concern[s] only these parties," and "can be expected to arise only rarely or only in exceptional cases." C.P.L.R. § 5602, Practice Commentary C5602:1. The question is irrelevant to the vast majority of arbitrations and, in the context of the actual facts of this particular case, puts no pressure whatsoever on settled law. MASN's and the Orioles' request for leave to appeal on this fact-specific question should therefore be denied.

To conjure up controversy where none exists, MASN and the Orioles falsely assert that this Court's October 22, 2020 decision "adopted" a "rule" that "an arbitral appointing authority may, *in an agreement with one party, take a direct financial stake in an issue before the arbitrator*." Mot. 31 (emphasis in original). But this Court's decision adopted no such rule. Instead, the Court concluded that MASN "failed to establish evident partiality in the RSDC in the second arbitration." Dkt.

28 at 2. That holding flows from well-established authority. The "reasonable person standard" for determining evident partiality under the applicable Federal Arbitration Act is "***settled law***." *U.S. Elecs., Inc. v. Sirius Satellite Radio, Inc.*, 17 N.Y.3d 912, 914 (2011) (emphasis added) (collecting cases). Under this standard, "evident partiality will be found where a reasonable person would ***have to*** conclude that an arbitrator was partial to one party to the arbitration." *Id.* (emphasis added; quotation marks omitted). "A party moving to vacate an arbitration award has the burden of proof, and the showing required to avoid confirmation is very high." *Id.* at 915. The Court of Appeals quoted *Transportes Coal Sea de Venezuela C.A. v. SMT Shipmanagement & Transp. Ltd.*, 2007 WL 62715, *3 (S.D.N.Y. Jan. 9, 2007) for the well-established proposition that to constitute evident partiality, "[t]he interest or bias must be direct, definite and capable of demonstration rather than remote, uncertain, or speculative." *Id.*

MASN's and the Orioles' suggestion that there could be a "bright line rule" against "an arbitrator or appointing authority [having] a direct financial interest in any matter before it" (Mot. 27) is pulled from thin air. The two cases MASN and the Orioles assert "indicate[]" this imaginary bright line rule – *Pitta v. Hotel Ass'n of New York City, Inc.*, 806 F.2d 419 (2d Cir. 1986) and *Coty Inc. v. Anchor Const., Inc.*, 7 A.D.3d 438 (1st Dep't 2004) – indicate no such thing. In *Pitta*, the Second Circuit held that evident partiality clearly existed where "the arbitrator, acting alone,

determine[d] the validity of his own dismissal from a lucrative position." 806 F.2d at 424. In doing so, the Court explicitly stated it did ***not*** intend to announce a bright line rule: "***We do not suggest that an arbitrator must recuse himself from every decision that might have any bearing on his compensation***." *Id.* (emphasis added). In *Coty*, this Court issued a two-sentence decision affirming the vacatur of an award "in light of the appearance of impropriety created by the involvement of the arbitrators in the parties' dispute over prepayment of arbitration fees, a matter in which the arbitrators had a direct financial interest." 7 A.D.3d at 439. But that case was not governed by the FAA; Supreme Court in the decision below noted that the applicable "appearance of impropriety" standard was different from the evident partiality standard under the FAA, and, in any event, neither this Court nor Supreme Court hinted at any bright line rule. *Id.*; *Coty Inc. v. Anchor Const. Inc.*, 2003 WL 139551, at *8 & n.7 (Sup. Ct. N.Y. Cnty. Jan. 8, 2003).

In fact, there are no "bright lines" in the standard for evident partiality. Instead, the question is whether a reasonable person "***considering all of the circumstances***" would "*have* to conclude" the arbitrator was biased. *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 137 (2d Cir. 2007) (latter emphasis in original); *accord Ometto v. ASA Bioenergy Holding A.G.*, 2013 WL 174259, at *3 (S.D.N.Y. Jan. 9, 2013); *797 Broadway Grp., LLC v. BCI Const., Inc.*, 59 N.Y.S.3d 657, 662 (Sup. Ct. Albany Cnty. 2017).

The facts of this case are unique, but their analysis under the settled standard for evident partiality is straightforward. *First*, it is undisputed that the MLB's incentive to recover its $25 million advance could not have biased the RSDC's decision on the merits of the parties' dispute, because pursuant to the Nationals' Prepayment Agreement, the advance was repaid (with interest) ten days before the second hearing. *See* Mot. 10. MASN's only argument – that the agreement gave MLB a "direct financial stake" in whether the RSDC recused itself – does not hold water. As Supreme Court found, the Prepayment Agreement did not make MLB's recovery of its advance to the Nationals contingent upon whether the RSDC recused itself; MLB would have recovered the money under the terms of the advance, which remained in full force. A.1134-35. *Second*, the purpose and effect of the Prepayment Agreement was to ***alleviate*** any asserted concern by MASN and the Orioles about the MLB's financial interests by ensuring that the Nationals would return the full amount of the MLB's advance before the RSDC held a hearing and ruled on the merits. *See* A.22. *Third*, there is nothing anomalous about the RSDC's decision not to recuse itself: the RSDC's written decision reflected consideration of MASN's and the Orioles' arguments; and, as noted by the RSDC, its decision was consistent with this Court's 2017 decision. *See* A.577-78 (citing *TCR Sports*, 153 A.D.3d at 143 ("there is no basis, in law or in fact, to direct that the second arbitration be heard in a forum other than the industry-insider committee that the parties selected

in their agreement to resolve this particular dispute, fully aware of the role MLB would play in the arbitration process")). And the members of the RSDC affirmed that they had no conflicts that would render them biased in favor of the Nationals. A.577-78.

This Court's unanimous decision that MASN and the Orioles failed to establish evident partiality thus does not remotely undermine the public policy behind the arbitration regime, nor does it threaten "New York's global reputation as one of the leading centers of business arbitration" (Mot. 31). To the contrary, this Court's decision reflects the straightforward application of well-settled precedent. As such, this ruling provides stability and clear guidelines to litigants. As the Orioles and MASN acknowledge (Mot. 28), arbitration is intended to "conserv[e] the time and resources of the courts and the contracting parties." *Marracino v. Alexander*, 73 A.D.3d 22, 26 (4th Dep't 2010). That purpose would be undermined by granting MASN and the Orioles leave to appeal here.

B. This Case Does Not Raise An Important Question Regarding Arbitrators' Obligations To Disclose Their Communications.

MASN's and the Orioles' second "Question Presented" – regarding when arbitrators may be required to disclose their communications with the arbitral forum – seeks further judicial review of the RSDC's denial of MASN's and the Orioles' discovery request during arbitration for "all" communications between MLB and the RSDC concerning the rights fee dispute. *See* Mot. 5-6, 31-34. This is not a question

of law but a question of fact, and one clearly "lacking general significance." C.P.L.R. § 5602, Practice Commentary C5602:1. Indeed, MASN and the Orioles are essentially seeking review of the RSDC's well-reasoned written decision (A.578-79) denying their discovery request – and a request based on pure speculation that MLB had secret "behind-the-scenes involvement" in the second RSDC arbitration (Dkt. 8 at 37). In that decision, the RSDC affirmed that "[n]o RSDC member is aware of any fact or circumstance, past or present, that would call into question his independence or give rise to reasonable doubts about his impartiality" and that, with two exceptions that would only create a risk of bias *against the Nationals*, "[n]one of the RSDC members has any personal relationship with any of the parties beyond the normal interactions that occur in connection with MLB business." A.577-78.

Here, again, the applicable FAA jurisprudence is well-settled: arbitrators have "wide discretion" in procedural matters, including discovery. *Glen Rauch Sec., Inc. v. Weinraub*, 2 A.D.3d 301, 302 (1st Dep't 2003); *Supreme Oil Co. v. Abondolo*, 568 F. Supp. 2d 401, 408 (S.D.N.Y. 2008) (arbitrators have "great latitude to determine the procedures governing their proceedings and to restrict or control evidentiary submissions, without the need to follow all the niceties observed by the federal courts") (quotation marks and citation omitted); *Matter of Merrill Lynch, Pierce Fenner & Smith, Inc.*, 198 A.D.2d 181, 181 (1st Dep't 1993); *Hyatt Franchising, L.L.C. v. Shen Zhen New World I, LLC*, 876 F.3d 900, 901-02 (7th Cir.

2017) ("Indeed, nothing in the Federal Arbitration Act requires an arbitrator to allow *any* discovery.") (emphasis in original); *Abu Dhabi Inv. Auth*., 2013 WL 789642, at *9 (S.D.N.Y. Mar. 4, 2013) ("ADIA cites no federal case—and this Court could find none—where a court vacated an arbitral award because the panel denied one party a document request.").

MASN and the Orioles sidestep this authority, claiming that this case is really about "disclosures," citing *Sanko S.S. Co. v. Cook Industries, Inc.*, 495 F.2d 1260 (2d Cir. 1973). Mot. 33. In *Sanko*, however, the Second Circuit ordered an evidentiary hearing to ascertain the "extent and nature of the ***relationships***" an arbitrator had failed to disclose—the arbitrator's "***business connections***" that could have created an impression that he was biased. 495 F.2d at 1262-63 (emphases added). The court found that "the record . . . does not justify a holding that [the complaining party] knew or should reasonably have known[] of [the arbitrator's] undisclosed dealings." *Id.* at 1265. On that basis, the Second Circuit distinguished two prior cases in which it had ***rejected*** challenges to arbitration awards, because the complaining party "***should have known***" or "***must have known***" about the relationships the arbitrators had not disclosed. *Id.* at 1264-65 (citing *Garfield & Co. v. Wiest*, 432 F.2d 849 (2d Cir. 1970) and *Cook Industries v. C. Itoh & Co.*, 449 F.2d 106 (2d Cir. 1971)). In light of those two cases, *Sanko* directed the district court on remand to "give full consideration to any further evidence" that the complaining

party did "in fact know or have reason to know of [the arbitrator's] undisclosed business relationships." *Id.* at 1265.

Sanko does not apply here because MASN and the Orioles have always been ***well aware*** of the relationship between the RSDC and MLB. MASN and the Orioles expressly agreed to insider arbitration before the RSDC, an MLB committee composed of "industry insiders, with specialized expertise." *TCR Sports*, 153 A.D.3d at 161 (plurality). MASN and the Orioles made this agreement ***with*** MLB, a party to the March 2005 Agreement. A.535. The Orioles have acknowledged that they "bought into whatever the structure was, whatever [MLB]'s role was; we agreed to that, we had to live with that.'" *TCR Sports*, 153 A.D.3d at 156 (plurality). As Supreme Court correctly found, "MLB's role should not have been a surprise in the first arbitration and certainly was not in the second one." A.25.

This case is akin to those cited in *Sanko*, where arbitrators were ***not*** required to make disclosures about their relationships of which the parties ***were aware***. *See Garfield*, 432 F.2d at 853-54 (addressing "when parties have agreed to arbitration with full awareness that there will have been certain, almost necessary, dealings between a potential arbitrator and one of the opposing parties"; finding the "exact extent of th[ose] dealings" need not be disclosed); *Cook*, 449 F.2d at 108 ("the

obligation to which arbitrators are subject [is] to disclose dealings of which the parties cannot reasonably be expected to be aware").[5]

Contrary to MASN's and the Orioles' argument (Mot. 31-32), the vacatur of the RSDC's first award did nothing to justify suspicion of foul play in the RSDC's *second* proceeding. The sole ground upon which the first award was vacated was that the law firm representing the Nationals had been concurrently representing MLB and certain interests of the RSDC members, *TCR Sports*, 153 A.D.3d at 151-53, and that problem was cured in the second proceeding, in which the Nationals were represented by new counsel from a different law firm with no such concurrent representations, A.555.

Nor were MASN's and the Orioles' demands for RSDC's communications with MLB justified by the MLB Commissioner's public comments, *see* Mot. 32. That argument was rejected by this Court in its 2017 decision, *TCR Sports*, 153 A.D.3d at 158 (plurality), then again by Supreme Court (A.26-27), and yet a third time by this Court's unanimous October 22, 2020 decision (Dkt. 28 at 2). Any suspicion that MLB was secretly pulling the RSDC's strings based on the public

[5] Even as to the first arbitration, Supreme Court found no denial of fundamental fairness based on MLB's "support role," *TCR Sports*, 2015 WL 6746689 at *7, and this Court affirmed, observing that the role MLB had played could not have been any surprise to the parties, *see TCR Sports*, 153 A.D.3d at 156 (plurality). And MLB played an even lesser role in the second arbitration. *See* A.26. The RSDC retained a new legal advisor in that second arbitration (*id.*), and neither the Commissioner nor any other MLB employees participated in the hearing.

comments of its Commissioner would be entirely speculative, and speculation cannot establish evident partiality. *See* A.26 (citing *U.S. Elecs.*, 17 N.Y.3d at 914-15; *797 Broadway Grp.*, 59 N.Y.S.3d at 665; *Siemens Transp. Partnership Puerto Rico, S.E. v. Redondo Perini Joint Venture*, 824 N.Y.S.2d 758 (Sup. Ct. N.Y. Cnty. Sept. 15, 2006); *Areca, Inc. v. Oppenheimer & Co.*, 960 F. Supp. 52, 57 (S.D.N.Y. 1997)).

C. This Case Does Not Raise An Important Question As To Whether A Formula For Calculating Damages Must Be Expressly Stated In An Arbitration Award.

MASN's and the Orioles' final "Question Presented" – whether a court may enter a money judgment on an arbitral award when the award does not ***expressly*** calculate the award or ***expressly*** specify a formula – does not raise any question at all, much less a "question of law important enough to warrant the immediate attention of the Court of Appeals." C.P.L.R. § 5602, Practice Commentary C5602:1. Rather, this "question" already has a well-settled answer: as discussed above in Section I.B.1, *supra*, the answer is YES. MASN's and the Orioles' proposed alternative is that, even if the formula for computing money owed to a claimant pursuant to an arbitration award is clear, specific and not legitimately disputable, a court may not apply that formula and award the claimant money owed unless that formula is *"expressly contain[ed]*" in the arbitration award's "text." Mot. 35 (emphasis in original). Such a formalistic rule would directly contradict settled law.

MASN and the Orioles insist that this Court's decision in *Morgan Guaranty*, 114 A.D.2d 818, supports its proposed rule (Mot. 21-23, 34-35), but that decision clearly does not. As discussed in Section I.B.1, *supra*, it is settled law that, upon confirming an arbitration award, a court must calculate the monetary award if the formula for its calculation is "so clear and specific that the determination of the amounts owing is merely an accounting calculation." *Morgan Guaranty*, 114 A.D.2d at 822 (ellipsis omitted; citing *Crooks*, 13 N.Y.2d at 215; *Overseas Distributors Exch., Inc. v. Benedict Bros. & Co.*, 5 A.D.2d 498, 499 (1st Dep't 1958); *Hunter*, 274 A.D. 311, 312 *aff'd*, 298 N.Y. 828 (1949)); *accord Cty. of Nassau*, 305 A.D.2d at 498; *Matter of Civil Serv. Employees Ass'n, Inc.*, 223 A.D.2d at 892; *Snyder-Plax*, 196 A.D.2d at 874; *Matter of Vermilya (Distin)*, 157 A.D.2d at 1031.

Here, MASN and the Orioles cannot legitimately dispute that the formula for computing the money awarded to the Nationals under the RSDC's 2019 award is clear and specific. The RSDC award sets forth the specific dollar amount that MASN ***was obligated to*** pay the Nationals in telecast rights fees from for each year from 2012 through 2016. A.1769. The RSDC award also sets forth the specific dollar amounts that MASN previously paid the Nationals in telecast rights fees for each year from 2012 through 2016. A.1776. Thus to calculate the money owed to the Nationals, all that was left to do was to subtract the amount that MASN previously paid from the amount that MASN is now obligated to pay. A.89. That

is precisely the calculation that Supreme Court ordered the parties to make, *id.*, and that is exactly how the judgment amount of $99,203,339.14 was calculated. *See* A.39 (directing the parties to submit a proposed judgment for "the amount of the television rights fees set forth on page 48 of the April 15, 2019 [RSDC] Award (NYCEF Doc. No. 813) minus the television rights fees already paid to the Nationals for the same relevant period, directing the Clerk to calculate statutory interest on the net amount from April 15, 2019 through the date of judgment"); A.90 (entering judgment in the amount of $99,203,339.14, plus statutory interest running from April 15, 2019 through the date of the judgment, in the amount of $5,821,741.16); A.89 (the $99,203,339.14 amount in the judgment reflected "the amount of the television rights fees set forth on page 48 of the April 15, 2019 [RSDC] Award (NYCEF Doc. No. 813) minus the television rights fees already paid to the Nationals for the same relevant period.").

Against that backdrop, it is not credible for MASN and the Orioles to suggest that this Court has "made new law" by affirming Supreme Court's monetary judgment (*see* Mot. 35). Rather, this Court's affirmance of Supreme Court's simple, ministerial arithmetic required only the equally simple application of well-settled law.

D. MASN's and the Orioles' Claim That The Court Of Appeals "Is Already Reviewing" This Court's 2017 Decision Is Both False And Irrelevant.

MASN and the Orioles argue that leave to appeal from this Court's unanimous October 22, 2020 decision is justified because the Court of Appeals purportedly already "will already be hearing" an appeal of this Court's 2017 decision in this case, and the Court of Appeals thus will "need to become familiar" with this case anyway. Mot. 24-25.

But this is not true: the Court of Appeals is not "already" reviewing this Court's 2017 decision. MASN and the Orioles have merely ***noticed*** (on November 19, 2020) an appeal to the Court of Appeals, purportedly pursuant to C.P.L.R. § 5601(d), and submitted (on November 25, 2020) a preliminary appeal statement to the Court of Appeals. The Court of Appeals has neither taken jurisdiction over the appeal nor determined that the statutory requirements for appeal under C.P.L.R. § 5601(d) are satisfied here. And there is no basis to assume that the Court of Appeals will do so.

Rather, in seeking to appeal yet again, MASN and the Orioles again disregard that the Court of Appeals is a court of limited jurisdiction under the New York Constitution and the C.P.L.R. Indeed, the Court of Appeals previously has ***twice dismissed*** on jurisdictional grounds MASN's and the Orioles' attempts to appeal to the Court of Appeals from this Court's 2017 decision: first, in 2017, when

Appellants sought to appeal directly after the 2017 decision, the Court of Appeals dismissed the appeal "sua sponte, upon the ground that the order appealed from does not finally determine the proceeding within the meaning of the Constitution," *TCR Sports*, 30 N.Y.3d 1005; and, second, in 2019, when Appellants sought a direct appeal to the Court of Appeals, pursuant to C.P.L.R. § 5601(d), from this RSDC's 2019 award, the Court of Appeals again dismissed the appeal, on the ground that the RSDC's award did "not finally determine an action within the meaning of the Constitution." *TCR Sports*, 34 N.Y.3d 1011.

This time around, the Court of Appeals still lacks jurisdiction to review MASN's and the Orioles' complaints regarding this Court's 2017 decision to remand the parties to a new arbitration before the RSDC, because C.P.L.R. § 5601(d) does not authorize jurisdiction under these circumstances.

First, C.P.L.R. § 5601(d) requires that the appealed-from Appellate Division decision "necessarily affects" a subsequent final decision. This requirement is not satisfied where, as here, the Appellate Division decision remands a case for a new plenary hearing. In a long line of cases, the Court of Appeals has consistently held that an order requiring a new plenary trial does not "necessarily affect" the judgment that ensues from that new trial, because any issues raised by the new trial order can be re-raised at the new trial (and then brought up for review in an appeal from the

new judgment).[6] The same principle applies to this Court's order here remanding the parties here to conduct a new RSDC arbitration. And, in fact, many of MASN's and the Orioles' arguments made on this appeal were considered (and rejected) by the RSDC on remand, and then considered (and rejected) by Supreme Court in 2019 and this Court in its October 22, 2020 decision.

Second, C.P.L.R. § 5601(d) also requires that C.P.L.R. § 5601(a) be satisfied, and that requirement is not met here, because this Court's 2017 decision did not include a two-justice dissent "on a question of law," as required under C.P.L.R. § 5601(a). The dissent in the 2017 decision was premised on a dispute of fact, not a dispute of law. Indeed, the plurality and the dissent *agreed* on the well-established *legal* principle that in extraordinary circumstances, a court may exercise its equitable authority to reform an arbitration agreement and direct that a dispute be arbitrated in a forum other than the one agreed by the parties in the contract. The plurality and dissent divided only on the *factual* question of whether the circumstances here justified directing the parties to arbitrate in a forum different from the one agreed by the parties in their contract.

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[6] *See, e.g., Daus v. Gunderman & Sons*, 283 N.Y. 459, 464 (1940); *Barker v. Tennis 59th Inc.*, 65 N.Y.2d 740, 740-41 (1985); *Miocic v. Winters*, 52 N.Y.2d 896 (1981); *Town of Peru v. State*, 30 N.Y.2d 859, 860 (1972); *Wintermute v. Vandemark Chem., Inc.*, 30 N.Y.3d 1041 (2017) (applying identical limitation in C.P.L.R. § 5602(a)(1)(ii)); Karger, Powers of the New York Court of Appeals, § 9:5 (rev. 3d ed.) (collecting cases).

Specifically, the plurality and the dissent here expressly ***agreed*** on the relevant legal principle:

- The plurality assumed that courts have "inherent power to disqualify an arbitration forum in an exceptional case," *TCR Sports*, 153 A.D.3d at 143 (plurality), and agreed that an arbitration agreement may be reformed "in certain limited circumstances" where it "'is subject to attack under general contract principles,'" *id.* at 159 (quoting *Aviall, Inc. v. Ryder Sys., Inc.*, 110 F.3d 892, 895 (2d Cir. 1997)).[7]
- The dissent noted that "[e]ven the plurality, while arguing that there is no legal basis for referring the matter to a new arbitral forum, agrees that the agreement could be reformed if only MASN and the Orioles had 'made the extraordinary showing of grounds needed to reform the agreement or disqualify the RSDC.'" *Id.* at 178 (quoting *id.* at 160 (plurality)); *see id.* at 163 (dissent noting "Justice Andrias's concurring opinion (the plurality) appears to acknowledge that this Court may have the power to refer the

[7] The concurrence agreed that a court may determine not to enforce an arbitration clause (*e.g.*, by reforming it) where there is an "established ground" for doing so, "such as fraud, duress, coercion or unconscionability." *Id.* at 161 (concurrence).

matter to a neutral arbitral forum other than that chosen by the parties under the appropriate circumstances").[8]

The dissent thus focused on the ***factual*** question of whether MASN and the Orioles had made the "extraordinary showing" that is necessary to invoke the courts' power to reform the parties' agreement and remand the parties to a different arbitral body. *Id.* at 178; *see also id.* at 163, 172, 174, 177, 181. Even to the extent the plurality and dissent could be said to have disagreed on applying the facts to the law – thereby addressing a mixed question of law and facts – it is well established that this does not constitute a disagreement on a "question of law," which is the necessary requirement for the Court of Appeals to take jurisdiction. *In re Daniel H.*, 15 N.Y.3d 883, 884 (2010) (collecting authorities); *see also Matter of Robert S.*, 76 N.Y.2d 770 (1990) (dissent on whether facts established probable cause raised unreviewable mixed question of fact and law); Karger, *supra*, § 6:5 ("mixed question of fact and law … would not be reviewable by the Court of Appeals"). Moreover, "[w]here it is equivocal whether a dissent rests upon disagreement in fact or law, the dissent is

[8] The underlying legal proposition applied by both the plurality and dissent – that § 2 of the applicable Federal Arbitration Act preserves courts' authority to invoke "generally applicable contract defenses," *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017) (citation omitted), and that the doctrine of reformation is one such "generally applicable" defense, *see, e.g.*, *Md. Port Admin. v. John W. Brawner Contracting Co.*, 492 A.2d 281, 288 (Md. 1985); *Chimart Assocs. v. Paul*, 66 N.Y.2d 570, 574 (1986) – is well established.

not on a question of law within the meaning of CPLR 5601(a)." *Gillies Agency, Inc. v. Filor*, 32 N.Y.2d 759, 760 (1973); Karger, *supra*, § 6:5 (same).

At bottom, this matter involves application of settled law to unique facts – precisely the type of case that is *outside* the Court of Appeals' jurisdiction.

In any event, the entire premise of MASN's and the Orioles' position is wrong. Even assuming *arguendo* that the Court of Appeals could take jurisdiction over MASN and the Orioles' appeal, under C.P.L.R. § 5601(d), to bring up for review this Court's 2017 order in this case, ***only*** the 2017 order would be reviewable; indeed, MASN and the Orioles then would have ***waived*** their right to seek any further review of issues arising from the RSDC's 2019 arbitration award, including any issues raised in this Court's October 22, 2020 decision. *See Parker v. Rogerson*, 35 N.Y.2d 751, 753 (1974); *Hirsch v. Lindor Realty Corp.*, 63 N.Y.2d 878, 881 (1984) ("By choosing to appeal directly to this court from the Supreme Court judgment [under C.P.L.R. 5601(d)], plaintiff has waived review of the new matter." (citations omitted)); Karger, *supra*, § 9:4 ("[T]he general rule is that by taking a direct appeal, the appellant waives the right to seek review, either in the Appellate Division or the Court of Appeals, of the merits of the final determination.").

III. THE MOTION SHOULD BE DENIED AS PROCEDURALLY DEFECTIVE

MASN's and the Orioles' motion to reargue and for leave to appeal should be denied on the independent grounds that it fails to comply with the requirements of the C.P.L.R. Because the motion seeks leave to appeal, it needed to be "noticed to be heard at a motion day . . . not more than fifteen days after notice of the motion [was] served." C.P.L.R. § 5516. Yet MASN and the Orioles noticed their motion to be heard on December 7, 2020, more than fifteen days after they served it on November 20, 2020. Dkt. 29 at 1-2. This provides an additional, independent reason to deny the motion as procedurally improper. *See, e.g.*, *Bd. of Educ., Shoreham-Wading Cent. Sch. Dist. v. State*, 66 N.Y.2d 854, 854 (1985).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny MASN's and the Orioles' motion for reargument and for leave to appeal to the Court of Appeals.

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Respectfully submitted,

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