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

TCR SPORTS BROADCASTING HOLDING, LLP,

Petitioner-Appellant,

-against-

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

Respondents-Respondents,

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

Respondents,

-and-

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

Nominal Respondents-Appellants.

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

New York County Clerk's Index No. 652044/2014

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

PLEASE TAKE NOTICE that, upon the annexed affirmation of Jonathan D. Schiller dated November 20, 2020 and its attached exhibits, the accompanying Memorandum of Law dated November 20, 2020, in support of this motion, and all

other papers, pleadings and proceedings in this action, Petitioner-Appellant TCR Sports Broadcasting Holding, LLP d/b/a Mid-Atlantic Sports Network ("MASN"), and Nominal Respondents-Appellants the Baltimore Orioles Baseball Club and Baltimore Orioles Limited Partnership (the "Orioles", and collectively with MASN, "Appellants"), by and through their undersigned attorneys, will move this Court at the Courthouse of the Appellate Division, First Department, 27 Madison Avenue, New York, NY 10010, on December 7, 2020, at 10:00am or as soon thereafter as counsel may be heard, for an Order:

(i) pursuant to CPLR § 2221 and 22 NYCRR § 1250.16(d)(2), granting Appellants leave to reargue this appeal and, upon reargument, modifying the judgment of the Supreme Court, New York County (Cohen, J.) entered December 9, 2019 ("December 9, 2019 Judgment"), by vacating the portions of the December 9, 2019 Judgment that calculate and award monetary damages of a sum total of $105,025,080.30 against MASN and in favor of the Nationals, and/or

(ii) pursuant to CPLR § 5602(a)(1), granting Appellants leave to appeal to the Court of Appeals and certifying that, in the opinion of this Court, questions of law are involved that ought to be reviewed by the Court of Appeals, and/or

(iii) granting any further and different relief as the Court deems proper.

PLEASE TAKE FURTHER NOTICE that, pursuant to CPLR § 2214 and 22 NYCRR § 1250.4(a), opposition papers and affidavits, if any, must be served at least seven (7) days before the return date of this motion.

Dated: New York, New York
November 20, 2020

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(via NYSCEF)

New York Supreme Court

Appellate Division—First Department

TCR SPORTS BROADCASTING HOLDING, LLP,

Petitioner-Appellant,

– against –

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

Respondents-Respondents,

– and –

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

Respondents,

– and –

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

Nominal Respondents-Appellants.

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

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO REARGUE AND/OR FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

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MASN and the Orioles[1] respectfully move: (1) pursuant to CPLR § 2221 and 22 NYCRR § 1250.16(d)(2), for leave to reargue this appeal, and/or (2) pursuant to CPLR § 5602(a)(1), for leave to appeal to the New York Court of Appeals.

PRELIMINARY STATEMENT

1. Reargument is Warranted. A court cannot modify an arbitration award in an order confirming it absent an express statutory ground for modification such as "miscalculation of figures." CPLR § 7511(c); *Weiss v. Metalsalts Corp.*, 15 A.D.2d 46, 47-48 (1st Dep't 1961). A court cannot *add* money damages or any other remedy that the arbitrators did not *expressly* award in the written award. The April 15, 2019 arbitration award at issue in this appeal ("April 15, 2019 Award") *did not* award money damages to the Nationals. A.785. The award is limited to a statement of the "fair market value" of the Orioles' and Nationals' telecast rights. A.754, 784-85. That statement of value is *not* an award of money *damages* to either the Orioles or the Nationals, as a review of the award demonstrates. The award gave an "estimate" of the total money the arbitrators estimated each team would receive for 2012-2016, which included hundreds of millions of dollars *already paid* by MASN. A.784. The award noted that each team had received hundreds of millions of dollars in rights

[1] The parties to this motion are Petitioner-Appellant TCR Sports Broadcasting Holding, LLP, d/b/a Mid-Atlantic Sports Network ("MASN"), Nominal Respondents-Appellants Baltimore Orioles Baseball Club and Baltimore Orioles Limited Partnership, in its capacity as managing partner of MASN (collectively the "Orioles" and together with MASN, "Appellants").

fees and profit distributions during 2012-2016 that would reduce any incremental amount due from MASN. A.745, 784-85. But the award did not purport to calculate or award any incremental sum to either team. A.785. This was precise and intentional. As the RSDC (represented Gregory Joseph) explained, the RSDC's mandate in the arbitration provision is narrow, and it is limited to issuing a statement of the fair market value of the telecast Rights in 2012-2016. A.753-54, 771.

Reargument is warranted under CPLR § 2221 and 22 NYCRR § 1250.16(d)(2). This Court's October 22, 2020 Order ("October 22, 2020 Order")[2] misapprehended the award and misapplied *Morgan Guaranty Trust Co. v. Solow*, 114 A.D.2d 818 (1st Dep't 1985), when affirming the $105,025,080.30 money judgment (A.90) that Supreme Court entered when confirming the award. Contrary to the Court's conclusion in the October 22, 2020 Order, the April 15, 2019 Award contains *no formula* for the calculation of any damages. A.785. The Court erred in relying on *Morgan Guaranty*, a case that held that when an award "fixed the formula upon which" the damages calculation was based, and that formula was "so clear and specific that the determination of the amounts owing is merely an accounting calculation," the court can *apply* that formula to calculate damages. 114 A.D.2d at

[2] The October 22, 2020 Order is attached as Exhibit 1 to the Affirmation of Jonathan D. Schiller in Support of Motion for Leave to Reargue and/or Leave to Appeal, dated November 20, 2020 ("Affirmation" or "Schiller Aff."). The December 9, 2019 Judgment is attached to the Affirmation as Exhibit 2, and the April 15, 2019 Award is attached to the Affirmation as Exhibit 3.

821-22. The April 15, 2019 Award shows that *Morgan Guaranty* is not applicable here. *There is no formula* anywhere in the award. This was deliberate because the arbitrators lacked the authority to award damages. The Court should grant leave to reargue this appeal and vacate the money judgment entered by Supreme Court.

2. Leave to Appeal is Warranted. Pursuant to CPLR § 5602(a)(1), the Court should grant leave to appeal the October 22, 2020 Order to the Court of Appeals. The prior non-final order of this Court in this proceeding of July 13, 2017 ("July 13, 2017 Order"), which remanded proceedings to MLB's RSDC and resulted in the April 15, 2019 Award, is now before the Court of Appeals as of right under CPLR § 5601(d). Schiller Aff. Ex. 4. In the July 13, 2017 Order, this Court affirmed vacatur of the first arbitration award in this dispute ("June 30, 2014 Award"), but by a vote of 3-2 (with a two-Justice dissent) remanded the proceedings back to MLB's RSDC. July 13, 2017 Order, *TCR Sports Broadcasting Holding, LLP v. WN Partner, LLC*, 153 A.D.3d 140 (1st Dep't 2017), *appeal dismissed* 30 N.Y.3d 1005 (2017). The subsequent proceedings resulted in the April 15, 2019 Award. In the October 22, 2020 Order, this Court rejected MASN's and the Orioles' challenges to the April 15, 2019 Award, citing to the Court's July 13, 2017 Order in this proceeding.

As the Court of Appeals will *already* be reviewing whether the July 13, 2017 Order's remand decision was correct, the Court of Appeals should also hear Appellants' appeal regarding the arbitrators' evident partiality during the

proceedings after the remand—issues this Court held in the October 22, 2020 Order lacked merit while citing to the prior July 13, 2017 Order. That review will impose no significant additional burden on the Court of Appeals in this proceeding.

The events that occurred during the second arbitration, after the July 13, 2017 Order remanded proceedings back to MLB, raise fundamental issues of law under the Federal Arbitration Act and New York law. They are: (1) whether an arbitral appointing authority (here, MLB) may take a $25 million financial interest in holding the hearing in an agreement with one party, even though an arbitrator's financial interest is quintessential evident partiality warranting vacatur of the arbitration award; (2) whether arbitrators must disclose their communications with the head of, and officials of, the appointing authority, when these officials have litigated and publicly argued in favor of one party and against another on the issues to be arbitrated; and (3) if the Court does not grant reargument, whether a court can calculate money damages and enter a money judgment in a proceeding confirming an arbitration award when the award did not award damages or contain a formula.

These are novel issues of law of public importance in New York that warrant review, 22 NYCRR § 500.22(b)(4), because they go to the core of the fairness and impartiality obligations that arbitrators and arbitral appointing authorities must adhere to. Review of these issues by the Court of Appeals is particularly warranted in this case because this Court's prior July 13, 2017 Order remanding the arbitration

proceedings back to MLB is now before the Court of Appeals as of right.

QUESTIONS FOR REARGUMENT

1. Whether this Court's October 22, 2020 Order misapprehended the April 15, 2019 Award, which did not award money damages and did not specify a formula for calculating damages, and misapplied *Morgan Guaranty Trust Co. v. Solow*, 114 A.D.2d 818 (1st Dep't 1985), a case that only held that a court may calculate and award money damages when confirming an arbitral award when the award "fixed the formula upon which" to calculate damages that was "clear and specific"?

QUESTIONS FOR COURT OF APPEALS REVIEW

The following issues warrant Court of Appeals review:

1. Where a court has vacated an arbitral award because of the evident partiality of the arbitral forum, and remanded the proceedings back to the same arbitral forum, does the Federal Arbitration Act permit the arbitral forum to enter into an agreement with one party to the arbitration that gives the arbitral forum a direct $25 million financial interest in holding the arbitration hearing?

2. Where a court has vacated an arbitral award because of the evident partiality of the arbitral forum, and remanded the proceedings back to the same arbitral forum, and officials of the arbitral forum have previously publicly advocated and litigated, prior to remand, in favor of one party and against another party about

the issues to be arbitrated, are the new arbitrators required to disclose the communications they had with officials of the arbitral forum about the dispute?

3. If Appellants' motion for reargument on this question is denied, where the arbitrator's authority under an arbitration provision is limited to issuing a statement of value, and the arbitrators issue a statement of value that did not award any sum of money damages, and did not specify a formula by which to calculate damages, does the court have the power to perform its own calculation of damages the court deems are owed and then enter a money judgment on the award?

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The complete background relevant to this motion is set forth in MASN's and the Orioles' briefs on appeal, which are incorporated by reference here. Case No. 2019-05390 Dkt No. 8 (Principal Br.), No. 20 (Reply Br.). The basic facts relevant to this motion, including the relevant procedural history, are summarized below.

A. The Limited Mandate Granted to MLB's RSDC's Under the Arbitration Clause in Section 2.J.3 of the Settlement Agreement

This appeal arises from arbitration proceedings conducted before an MLB committee, the Revenue Sharing Definitions Committee, pursuant to a March 28, 2005 Settlement Agreement ("Settlement Agreement"). A.786. The arbitration proceedings were conducted pursuant to a narrow and specific arbitration provision in Section 2.J.3 of the Settlement Agreement. A.793. Section 2.J.3 provides that, if there is a dispute about the fair market value of the teams' telecast rights, "then the

fair market value of the Rights shall be determined by the Revenue Sharing Definitions Committee ('RSDC') using the RSDC's established methodology for evaluating all other related party telecast agreements in the industry." A.793. The RSDC has no authority outside this limited mandate. Other arbitral bodies have jurisdiction over other disputes arising under the Settlement Agreement. A.798-99.

MLB's RSDC is a standing committee appointed by the Commissioner of Baseball and comprised of three high-level MLB team representatives. The RSDC was created as part of MLB's Revenue Sharing Plan to ensure that the teams share all appropriate revenue. As part of this function, "[t]he RSDC typically reviews related-party transactions to see if the revenues that teams declare in the form of license fees are at market value or too low." A.740. The purpose of such RSDC reviews is to conduct valuations of teams' telecast rights in related party transactions—transactions between teams and team-owned networks—to ensure that team-owned networks are paying the teams fair market value rights fees (which are subject to revenue sharing) and not paying below fair market value rights fees to increase network profits (which are not subject to revenue sharing). A.740, 1754.

In the RSDC's typical reviews, the RSDC does not award any specific rights fee to any team and does not award any money damages to any team. Rather, the RSDC's role is to issue a declaration—a statement—about the fair market value of the team's telecast rights. *See, e.g.*, A.1736 (16th Report); A.1713 (18th Report);

A.1542 (38th Report). Consistent with the RSDC's traditional role, the parties in the Settlement Agreement gave the RSDC a very narrow and specific mandate: to "us[e] the RSDC's established methodology for evaluating all other related party telecast agreements in the industry" to "determin[e]" the "fair market value of the Rights." A.793. The text of section 2.J.3 shows that the parties did not give the RSDC any authority other than to apply the established methodology to issue a statement of fair market value. The Settlement Agreement did not grant the RSDC authority to award damages or any other legal *remedy* to the Nationals or Orioles.

B. The June 30, 2014 Award is Vacated due to Evident Partiality, but By a 3-2 Vote Proceedings are Remanded to the RSDC

The RSDC's first arbitration award in this dispute, the June 30, 2014 Award, was vacated by the Supreme Court (Marks, J.) due to MLB's and the RSDC's evident partiality. The Supreme Court's vacatur was unanimously affirmed by this Court in the July 13, 2017 Order. July 13, 2017 Order, 153 A.D.3d at 143. However, this Court sharply divided 2-1-2 on the proper forum for rehearing. The plurality (Andrias and Richter, JJ.) and concurrence (Kahn, J.) ordered rehearing before the RSDC but on different grounds. *Id.* at 143, 161. By contrast, the dissent (Acosta, J.P., and Gesmer, J.) concluded that "MLB's pervasive bias and unfair conduct has infected the RSDC so as to frustrate the parties' intent to submit their dispute to a fundamentally fair arbitration." *Id.* at 181. Presiding Justice Acosta's dissent

concluded that the Court should have ordered the arbitration to be reheard before a different and neutral panel outside of MLB's ambit and control. *Id.* at 180-81.

Due to the two-Justice dissent, Appellants have the right, under CPLR § 5601(d), to appeal to the Court of Appeals to review the issues that divided the dissent from the plurality and concurrence. Appellants served and filed a notice of appeal to the Court of Appeals on November 19, 2020. Schiller Aff. Ex. 4.[3]

The vacated June 30, 2014 award did not award any sum of damages to the Nationals or any other remedy. It issued a (vacated) statement of value. A.833.

C. Post-Remand, MLB and its RSDC Engage in Additional Conduct that is Inconsistent with an Impartial Arbitral Proceeding

The issue of whether the Court was authorized to remand the proceedings to the RSDC after vacatur is currently before the Court of Appeals. In addition to that question, MLB's RSDC's conduct *after* the remand, during the second arbitration, raised further issues about the MLB's RSDC's partiality and lack of transparency.

The Nationals and MLB won (by a 3-2 vote) remand to the RSDC based on the Nationals' representation to this Court that the Nationals would post a bond to guarantee repayment of MLB's $25 million loan to the Nationals. July 13, 2017 Order, 153 A.D.3d at 158, 176 n.6. But after winning remand, MLB and the

[3] Appellants previously sought review of the July 13, 2017 Order in a Notice of Appeal dated July 14, 2017 (Index No. 652044/14 Docket No. 775), and in a Notice of Appeal dated May 14, 2019 (Index No. 652044/14 Docket No. 805). However, the Court of Appeals determined in both instances that the July 13, 2017 Order was non-final. Now, the July 13, 2017 Order is final.

Nationals reneged on the Nationals' representation to this Court. Instead, the Nationals and MLB negotiated an agreement which they signed on February 9, 2018 without MASN's or the Orioles' knowledge. A.941. In the February 9, 2018 agreement, the Nationals *conditioned* their repayment of the $25 million to MLB on its RSDC holding an arbitration hearing. If, but only if, MLB's RSDC held the hearing, the Nationals were obligated to pay the $25 million to MLB. *Id.* If MLB's RSDC did not hold the hearing, the Nationals were not obligated to repay the $25 million back to MLB. MLB's RSDC rejected the Orioles' motion to recuse, agreed to hold the hearing pursuant to the $25 million agreement, and MLB collected the $25 million from the Nationals shortly before the hearing commenced. A.556.

The RSDC arbitrators also refused to disclose their communications with MLB officials regarding the arbitration. There is substantial evidence that the MLB Commissioner and his officials prejudged the issues to be arbitrated in favor of the Nationals and against MASN and the Orioles. A.1003, 1009-11, 1205. Indeed, in the first vacatur proceeding, the MLB Commissioner personally filed affidavits supporting the Nationals' litigation positions and attacked MASN's and the Orioles' litigation positions. A.989-1007. But in the second arbitration the RSDC refused to disclose what MLB officials told the RSDC about the issues in dispute before the RSDC, despite MLB's lawyers admitting to the parties that the RSDC arbitrators

and MLB officials were communicating about the dispute. A.948, 1051. [4]

D. The RSDC Issues the April 15, 2019 Award

The RSDC held a hearing on November 15-16, 2018. The parties submitted detailed written briefs to the RSDC prior to the hearing. During the second arbitration, the Nationals *never* sought money damages or other legal remedy, and never submitted any calculation of claimed damages. The Nationals' briefs to the RSDC set forth only the Nationals' position as to the fair market value of the rights. A.1865, 1924, 1963. The Nationals' submissions did not include a Prayer for Relief, an *ad damnum* statement, or any other statement seeking a damages remedy.

The RSDC issued an award on April 15, 2019. A.736. The April 15, 2019 Award reached *the same result* as the June 30, 2014 award as to fair market value, just as Justice Acosta had predicted in his dissent from the July 13, 2017 Order remanding proceedings to the RSDC. A.833, A.785. Yet, despite the fact that it applied two different methodologies in the two awards, the RSDC somehow claimed the methodology it used in both was "the RSDC's established methodology for

[4] MLB's RSDC committed additional misconduct including by denying MASN and the Orioles the right to a fair hearing by refusing to disclose documents about the RSDC's established methodology, and by failing to apply the RSDC's established methodology in favor of a novel methodology that it had never before used that included consideration of the RSDC arbitrators' subjective opinion about the amount of money the Orioles had received. *See* MASN-Orioles Principal Br. at 38-47. MASN and the Orioles are not seeking leave to appeal to the Court of Appeals on these issues, but are seeking leave to appeal on the issues identified in this motion because these issues go to the core of fairness and impartiality in all New York arbitrations.

evaluating all other related party telecast agreements in the industry." *Compare* A.822-34 (June 30, 2014 Award), *with* A.766-85 (April 15, 2019 Award).

The April 15, 2019 Award decided a singular issue: the purported fair market value of the rights licensed to MASN. The April 15, 2019 Award did not calculate any amount of money damages owed by MASN. A.785 (reaching only a conclusion as to "the fair market value of MASN's rights to telecast each of the Orioles and Nationals"). The RSDC acknowledged that the damages owed to the Nationals *would be far less than the fair market value statement in the award* because MASN *had already paid* $197.2 million in rights fees to the Nationals, as well as $41.2 million in profit distributions—profit distributions that MASN would not have been able to pay if it had paid the higher telecast rights fees—during the 2012-2016 period. A.745, 784. The RSDC went on to calculate the total amount that it believed the Nationals should have received for the 2012-2016 period: $308.8 million. *Id*. The award did not calculate *the amount remaining unpaid*, i.e., any damages owed the Nationals based on the higher rights fee value, which would require subtracting the amounts already paid by MASN from that ultimate total amount. A.784-85.

E. Supreme Court Confirms the Award, Awards Money Damages Not Set Forth in the Award, and Enters a Money Judgment

In the Nationals' motion to confirm the April 15, 2019 Award, the Nationals sought a judgment confirming the award, but the Nationals *did not seek*, in *either* their motion to confirm the award *or* their reply in support of the motion, *any amount*

of money damages. A. 508, 1289. Nor did the Nationals submit to the Court any proposed formula to calculate monetary damages in *either* their motion to confirm the award or reply in support of their motion to confirm the award. *Id.*

The Supreme Court confirmed the award on August 22, 2019. The Supreme Court initially referred the proceeding to a Judicial Hearing Officer or Special Referee for an "inquest" to calculate what the Supreme Court stated was a "sum awarded" under the April 15, 2019 Award. A.32. MASN and the Orioles moved for reargument on the ground that Supreme Court's order was an unauthorized modification of an award that did not award damages. A.39. At the oral argument on that motion, Supreme Court stated multiple times that the issue of whether the April 15, 2019 award was an award of damages or only a declaratory award was a close question. A.41-75. However, Supreme Court denied reargument and reaffirmed its August 22, 2019 decision and order, although it removed the referral to the Special Referee. The Supreme Court directed the parties to calculate the Nationals' damages submit a proposed judgment to the court for review. A.39-41.

The Supreme Court entered a judgment against MASN and in favor of the Nationals on December 9, 2019 in the amount of $105,025,080.30. A.90.

F. This Court Affirms the Judgment

In the October 22, 2020 Order, this Court affirmed the judgment. Schiller Aff. Ex. 1. Appellants seek reargument and leave to appeal the October 22, 2020 order.

LEGAL STANDARD

A. Reargument

Under CPLR § 2221, and 22 NYCRR § 1250.16(d), the Court may grant leave to reargue if there are one or more matters of fact or law that were "overlooked or misapprehended by the court." This Court has granted reargument, or affirmed a grant of reargument by Supreme Court, in various circumstances, including, among other reasons, where the court misinterpreted a deposition transcript, *Mendez v. Queens Plumbing Supply, Inc.*, 39 A.D.3d 260 (1st Dep't 2007), misinterpreted medical documents submitted in opposition to a motion for summary judgment, *Jones v. Budhwa*, 23 A.D.3d 154 (1st Dep't 2005), misinterpreted a party's discovery request, *Hargrove v. Riverbay Corp.*, 128 A.D.3d 464 (1st Dep't 2015), and misinterpreted a prior order, *Post v. Post*, 156 A.D.2d 192 (1st Dep't 1989).

B. Leave to Appeal

The Appellate Division and Court of Appeals grant leave to appeal to the New York Court of Appeals in actions presenting questions that are unsettled, "novel", or of public importance. *See* 22 N.Y.C.R.R. § 500.22(b)(4) (issues that "are novel or of public importance" or that "conflict with prior decisions" merit review); *Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder*, 72 N.Y.2d 174, 183 (1988) (granting leave to appeal the "novel and significant issues tendered for review"); *In*

re Shannon B., 70 N.Y.2d 458, 462 (1987) (granting leave to appeal so the Court of Appeals could consider "the important issue" presented).

New York courts also grant leave to appeal when a case presents issues of federal law having significance and impact not only statewide, but also nationally. *See, e.g.*, *Guice v. Charles Schwab & Co.*, 89 N.Y.2d 31, 38 (1996) (leave to appeal granted to consider whether federal law preempted state-law claims). This case—governed by the Federal Arbitration Act Chapter 1—is just such a case. The FAA governs any arbitration arising out of a "contract evidencing a transaction involving commerce," 9 U.S.C. § 2, and therefore controls judicial review of a vast sweep of arbitration agreements and awards. However, even though it creates substantive federal arbitration law, the FAA Chapter 1 "does not create any independent federal-question jurisdiction." *Southland Corp. v. Keating*, 465 U.S. 1, 15 n.9 (1984). As a result, federal courts do not have jurisdiction to hear disputes governed by the FAA where, as here, diversity of citizenship is lacking, and state courts are regularly called upon to decide cases governed by the FAA and develop the jurisprudence. *See Flanagan v. Prudential-Bache Securities, Inc.*, 67 N.Y.2d 500, 506 (1986) (New York state courts interpreting the FAA in light of novel or unsettled issues have "the same responsibility as the lower Federal courts").

Decisions of New York courts are particularly important here because "the FAA was modeled after New York's arbitration law . . . and no significant distinction

can be drawn between the policies supporting the FAA and arbitration provisions of the CPLR." July 13, 2017 Order, 153 A.D.3d at 173 (Acosta, P.J., dissenting) (quoting *Matter of Smith Barney, Harris Upham* & Co. *v Luckie,* 85 N.Y.2d 193, 205-06 (1995)); *see Hall St. Assocs., LLC v. Mattel, Inc*., 552 U.S. 576, 589 n.7 (2008) ("The text of the FAA was based upon that of New York's arbitration statute."). Federal courts applying the FAA look to "[c]ases applying New York arbitration law analogous to the FAA" both in general and on the specific issues presented by this appeal. *In re Arbitration Between Tempo Shain Corp. v. Bertek, Inc.*, No. 96-3354, 1997 WL 580775, at *2 (S.D.N.Y. Sept. 17, 1997).

ARGUMENT

I. THE COURT SHOULD GRANT LEAVE TO REARGUE THE ISSUE OF WHETHER SUPREME COURT IMPROPERLY MODIFIED THE APRIL 15, 2019 AWARD BY ENTERING A MONEY JUDGMENT

A. The April 15, 2019 Award Demonstrates that the Arbitrators Did Not Award Damages or a Formula to Calculate Damages

The face of the April 15, 2019 Award demonstrates that the RSDC did not award a sum of monetary damages, or any other legal remedy, to either the Nationals or the Orioles. The RSDC's award was limited only to a *statement*—a *declaration* of "the fair market value of MASN's rights to the telecast of each of the Orioles and Nationals," not any *sum awarded* to the Nationals or Orioles. A.783-85.

Indeed, the RSDC's mandate in section 2.J.3 of the Settlement Agreement does not authorize the RSDC to award damages. As the award states, the RSDC's

"authority runs no further than determining the fair market value of the rights at issue." A.754. This statement in the April 15, 2019 Award follows directly from the RSDC's limited mandate in section 2.J.3 of the Settlement Agreement. Section 2.J.3 gives the RSDC a single narrow and specific mandate: to determine "the fair market value of the Rights" using "the RSDC's established methodology for evaluating all other related party telecast agreements in the industry." A.793. Consistent with that narrow mandate, which does *not* grant the RSDC the authority to award damages or any other remedy, the RSDC issued a statement concerning fair market value, not a damages award or a formula to calculate damages. A.754, 785.

As the award itself stated, the incremental sum due to the Nationals (which the award did not calculate or specify a formula for calculation) will be substantially less than the award's declaration of fair market value. A.784. As the award shows, a determination (which the award did not make) 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 necessarily reduced profits for 2012-2016. A.745, 754, 784. The RSDC did perform an "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[ ]" is not a damages calculation or formula. The RSDC did not purport to award this amount (or any other sum) to the Nationals. The RSDC

determined only the supposed "fair market value of the rights." A.754, 793. The RSDC's inclusion of this estimate, which it clearly did not *award* to either team, further shows that its actual award was limited to a declaration, not damages.

The RSDC's typical role further supports MASN's and the Orioles' position regarding the April 15, 2019 Award and the RSDC's mandate in the Settlement Agreement. As the award noted, "[t]he RSDC typically reviews related-party transactions to see if the revenues that teams declare in the form of license fees are at market value or too low." A.740. The RSDC's typical role is limited to a statement—a declaration of fair market value of telecast rights—that is in turn factored into other calculations that affect MLB teams. The record in this proceeding contains several RSDC decisions both before and after the Settlement Agreement was signed, including the vacated June 30, 2014 Award in this dispute. *None* of those RSDC decisions awarded *money damages*. A. 833, 1376, 1713, 1542.

The Nationals' past conduct is inconsistent with their current position that the April 15, 2019 Award awarded them a sum of money damages. In the lengthy arbitration proceeding, the Nationals *never* submitted to the RSDC any prayer for relief or calculation of damages. The Nationals' briefs to the RSDC, like the briefs of MASN and the Orioles, only set forth the Nationals' position as to the fair market value of the rights. A.1865, 1924, 1963. Indeed, the Nationals' pre-hearing submission to the RSDC asked for *reallocation* of prior payments, not damages:

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

Nor did the Nationals submit any proposed calculation of any amount they claimed the RSDC awarded in *either* the Nationals' motion to the Supreme Court to confirm the second award, or in their reply brief in support of their motion to confirm. A. 508, 1289. It was only *at oral argument* on July 12, 2019, that the Nationals produced, for the first time, a *demonstrative* containing what the Nationals claimed was the amount of damages that the RSDC awarded them. A.1410-11.

The Nationals' own conduct is flatly inconsistent with a party that is seeking damages. Parties who seek damages ask the arbitrators to award them. They submit a calculation of the amount of their claimed damages; and include that calculation of damages in a Prayer for Relief or a similar statement in their briefs. The Nationals did none of this. Instead, they have tried to use the courts for the improper purpose of extracting damages in a judgment that the arbitrators did not actually award.

B. The Court Should Grant Leave to Reargue Because the Court Misapprehended the Award and Misapplied *Morgan Guaranty*

Under New York law, the Supreme Court had no power to award damages the arbitrators did not award, calculate damages the award did not calculate, or enter a money judgment on the award. Under CPLR 7510, the Supreme Court's authority

is limited to "confirm[ing]" the award, "unless the award is vacated or modified upon a ground specified in" CPLR 7511. Absent an express ground for modification contained in CPLR 7511(c), which includes a "miscalculation of figures," the Supreme Court has *no power* to modify an arbitration award. CPLR 7511(c).

Courts have *rejected* attempts by parties to obtain monetary damages or other remedies in judicial confirmation proceedings when the arbitrators did not expressly award those remedies in the award. In *Weiss v. Metalsalts Corp.*, 15 A.D.2d 46 (1st Dep't 1961), the court rejected a claimant's argument that an arbitration award awarded damages when the damages sought by the claimant were not expressly contained in the award. The court remanded proceedings to the arbitrators for further consideration. *Id.* at 46-47. In *Canada Dry Delaware Valley Bottling Co. v. Hornell Brewing Co*., No. 11 CIV. 4308 PGG, 2013 WL 5434623 (S.D.N.Y. Sept. 30, 2013), the court rejected a claimant's attempt to seek monetary damages from the court in confirmation proceedings, when the award was limited to "a declaratory award issued by an arbitration panel." *Id.* at *10-11. And in *W. Massachusetts Elec. Co. v. Int'l Bhd. of Elec. Workers, Local 455*, No. Civ.A. 11-30106-DPW, 2012 WL 4482343, (D. Mass. Sept. 27, 2012), the court rejected a claimant's attempt to seek monetary damages and injunctive relief in confirmation proceedings because the arbitration award did not award those remedies. *Id.* at *8. Instead, as the court explained: "The arbitrator's decision was in the nature of a declaratory judgment.

The effect of confirmation is that it will govern interpretation of the parties' contractual relationship and it may estop the same parties from relitigating the issue by analogy to principles of res judicata and collateral estoppel." *Id.* "Future disputes between the parties, if any, will determine the precise impact of the arbitrator's interpretive declaration, which [the court] confirm[ed] in this proceeding." *Id.*

The sole case cited by this Court in its October 22, 2020 Order affirming the money judgment, *Morgan Guaranty Trust Co. v. Solow*, 114 A.D.2d 818 (1st Dep't 1985), does not support the Court's conclusion here. In *Morgan Guaranty*, the award itself actually contained the formula to be applied to compute the damages due to the claimant. The award "fixed the formula upon which the escalate rent was based, the real issue they were called upon to decide. All that remained was a calculation of the amount due based upon that formula. That was a mere ministerial act and did not detract from the finality of the award." *Id.* at 821-22. The court explained that "where the formula for the computations are so clear and specific that the determination of the amounts owed is merely an accounting calculation, the award is final and definite and is required to be confirmed." *Id.* at 822.

There is no formula in the April 15, 2019 Award at issue in this appeal from which to calculate damages—much less a formula that is "so clear and specific" so as to eliminate all doubt. Indeed, in the April 15, 2019 Award, the RSDC specifically stated that its authority "runs no further" than issuing a statement about the fair

market value of the rights. A.754. The narrow exception in *Morgan Guaranty* for a clear and specific formula *set forth in the award* is not applicable here, and the Court misapprehended the award and *Morgan Guaranty* in so concluding.

If adhered to by this Court, its decision in this case will greatly expand the narrow exception in *Morgan Guaranty* for awards setting forth a formula that is "so clear and specific that the determination of the amounts owed is merely an accounting calculation." Its decision will also fly in the face of the Court's narrow authority in CPLR § 7510 to "confirm the award" "unless the award is vacated or modified upon a ground specified in" CPLR § 7511. CPLR §§ 7510 and 7511 *do not* give the Court the authority to *add* a damages calculation formula *into* the award that is not expressly set forth in the award. The Court's decision doing so far exceeds the Court's limited authority under CPLR § 7511 to modify an award to correct "a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award" or address something that makes the award "imperfect in a matter of form, not affecting the merits of the controversy."

The Nationals have argued that the April 15, 2019 Award contains a formula for the calculation of monetary damages. Case No. 2019-05390, Dkt. No. 18 (Nationals' Response Brief) at 55-57. But a plain reading of the April 15, 2019 award shows that the award does not contain any formula. Nowhere in the Nationals' brief do the Nationals identify any formula in the award, because there is

no formula *in the award*—much less a formula that is "so clear and specific" as to remove all doubt from its application, as is required under *Morgan Guaranty*.

Indeed, the "formula" the Nationals have argued the April 15, 2019 Award contains (which it does not) is *inconsistent* with the award. Under the "formula" the Nationals argue is in the award, 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 (Nats. 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, pursuant to a "formula" not actually in the award.

In sum, the face of the April 15, 2019 award demonstrates that the arbitrators did not award monetary damages to either the Nationals or Orioles, and did not set forth *any* formula for the calculation of damages—much less a formula "so clear and specific that the determination of the amounts owed is merely an accounting calculation." *Morgan Guaranty*, 114 A.D.2d at 822. This Court's October 22, 2020 Order misapprehended the April 15, 2019 Award, and misapplied *Morgan Guaranty*, when it affirmed the money judgment entered by Supreme Court. The

Court should grant leave to reargue on this issue, and should vacate the money judgment entered by Supreme Court as in excess of Supreme Court's authority.

II. LEAVE TO APPEAL SHOULD BE GRANTED

A. The Court of Appeals is Already Reviewing the Court's July 13, Remand Order. The Court of Appeals Should Also Review the Additional Issues that Arose After the Remand Order

The procedural posture of this appeal gives rise to a particularly compelling justification for the Court to grant leave to appeal the October 22, 2020 Order to the Court of Appeals. Specifically, the Court's prior July 13, 2017 Order, which by a vote of 3-2 (with a two-Justice dissent) remanded proceedings to MLB's RSDC, is now before the Court of Appeals as of right under CPLR 5601(d). Schiller Aff. Ex. 4, Supreme Court Dkt. No. 965 (5601(d) Notice of Appeal to the Court of Appeals). Thus, the Court of Appeals will already be hearing and deciding whether the Court's 2017 decision to remand the proceedings to the RSDC was correct or incorrect.

In the course of hearing and deciding Appellants' as-of-right appeal seeking review of the July 13, 2017 Order, the Court of Appeals will need to become familiar with the core agreements and facts of this case, including the Settlement Agreement, the role and the conduct of MLB's RSDC, and MLB's agreement with the Nationals advancing the Nationals $25 million. *Compare* July 13, 2017 Order, 153 A.D.3d at 143-61 (Andrias, J., Plurality), *with id.* at 162-81 (Acosta, J., Dissenting). The Court of Appeals will then need to decide whether the Court's July 13, 2017 decision to

remand proceedings to the RSDC was proper. If the Court of Appeals concludes that this Court erred in ordering remand to the RSDC, then the Court of Appeals would not need to address whether the additional issues that occurred during the second arbitration require vacatur of the April 15, 2019 award. However, if the Court of Appeals concludes that this Court was correct to remand proceedings to the RSDC, the Court of Appeals should also review the conduct of MLB after the remand decision and during the second arbitration. As explained below, the events during the second arbitration present fundamental issues going to the core of the impartiality and disclosure required in arbitrations conducted in New York.

B. Certification Is Warranted to Settle a Fundamental Question Regarding When, if Ever, an Arbitrator or Arbitral Forum May Take a Direct Financial Stake in an Issue Before the Arbitrator

As the Court's July 13, 2017 Order demonstrates, on March 31, 2017, at oral argument before this Court, the Nationals' lawyer represented to the Court that the Nationals would "post a bond to guarantee repayment of" MLB's $25 million advance to the Nationals "regardless of the outcome of the arbitration." July 13, 2017 Order, 153 A.D.3d at 158 (Andrias, J., plurality); *id.* at 176 n.6 (Acosta, P.J., dissenting). The July 13, 2017 Order also demonstrates that the two-Justice plurality opinion cited and relied on the Nationals' lawyer's promise to post a bond when ruling that arbitration proceedings should be remanded to MLB's RSDC. *Id.*

The record in the second arbitration (after remand), the subject of the present

appeal, demonstrates that the Nationals did not post a bond. The record demonstrates that, instead, the Nationals and MLB negotiated an agreement which they signed on February 9, 2018, and which conditioned the Nationals' repayment of $25 million to MLB on MLB's RSDC actually holding the arbitration hearing. A.941. This evidence demonstrates that MLB, the arbitral appointing authority, had a direct financial interest in the decision of its arbitrators of whether to hold the hearing.

Certification to the Court of Appeals is warranted so the Court of Appeals can address when, if ever, an arbitral appointing authority or arbitrator may take a direct financial stake in a decision before the arbitrator—here, the decision of whether to recuse or to deny recusal and hold the arbitration hearing. Review of this question is particularly warranted because multiple analogous precedents all point in the opposite direction of the October 22, 2020 Order. For example, in *Coty Inc. v. Anchor Const., Inc.*, 7 A.D.3d 438 (1st Dep't 2004), this Court affirmed vacatur of an award because the arbitrators involved themselves "in the parties' dispute over prepayment of arbitration fees, a matter in which the arbitrators had a direct financial interest." *Id.* at 439. And in *Pitta v. Hotel Ass'n of N.Y.C., Inc.*, 806 F.2d 419 (2d Cir. 1986), the Second Circuit held that the FAA prohibited an arbitrator from arbitrating a dispute over whether he had been validly dismissed as arbitrator, because he had a financial incentive (beyond his hourly charges) to conclude that he had not been validly dismissed. The Second Circuit vacated the award and remanded

the issue to be heard before a different, independent arbitrator. *Id.* at 423-24.

MASN and the Orioles submit that *Coty* and *Pitta*, the two most directly analogous precedents from New York State and Federal Court on the issue of an arbitrator's financial interest, hold that an arbitrator cannot have a direct financial interest in a decision before the arbitrator, including on whether to recuse. There is no case MASN and the Orioles are aware of permitting an arbitrator or an arbitral appointing authority to have a direct financial interest in a decision before it.

There is no sound reason to allow the tension between the October 20, 2020 Order and the above-cited authorities to persist. The Court of Appeals should instead have the opportunity to consider the scope of when, if ever, an arbitrator or arbitral appointing authority is permitted under the Federal Arbitration Act to have a direct financial interest in a decision before the arbitrator, including a recusal decision. Leave to appeal should be granted to facilitate this critically-needed review.

Indeed, the bright line rule indicated in *Coty* and *Pitta*—that an arbitrator or appointing authority *may not* have a direct financial interest in any matter before it—is sound and justified. In enacting the FAA, Congress struck a careful balance between promoting private agreements to arbitrate on the one hand, and ensuring that arbitration, including all of the accompanying decisions by arbitrators prior to a hearing on the merits, meets a basic level of due process. The question of whether any direct financial interest is permitted in any circumstance (beyond a nominal

financial interest in collecting arbitrator fees) is a central question that the Court of Appeals should answer because it goes to basic arbitral process integrity.

At its "essence," arbitration is "a tool for administering justice outside of the courts," Order at 73 (Acosta, P.J., dissenting), which is intended to "conserve the time and resources of the courts and the contracting parties," *Marracino v. Alexander*, 73 A.D.3d 22, 26 (4th Dep't 2010). Because arbitration is intended to give the parties the flexibility to design their own adjudicatory processes, an arbitration "is not required to comport with strictures of formal court proceedings." *Kaplan v. Alfred Dunhill of London*, No. 96-0256, 1996 WL 640901, *5 (S.D.N.Y. Nov. 4, 1996) (citations omitted). But this does not mean that arbitrations are permitted to abandon basic notions of fairness, impartiality and integrity.

To the contrary, courts recognize that for arbitration to serve its intended purpose, "it is *imperative* that the integrity of the process … be z*ealously safeguarded*." *Matter of Goldfinger v. Lisker*, 68 N.Y.2d 225, 231 (1986) (emphasis added). Arbitral proceedings must be fair and impartial, and meet the minimum standards for due process. *Kaplan*, 1996 WL 640901, *6 ("Before a district court may confirm an arbitration award, it must be satisfied that the parties were provided a fundamentally fair hearing."); *Bell Aerospace Co.*, 500 F.2d at 923 (arbitrator must "grant parties a fundamentally fair hearing"); *accord Bowles Fin. Grp., Inc. v. Stifel, Nicolaus & Co.*, 22 F.3d 1010, 1012-13 (10th Cir. 1994) ("Courts have created a

basic requirement that an arbitrator must grant the parties a fundamentally fair hearing"). A direct financial interest by an arbitrator or arbitral appointing authority in an arbitrator's decision —especially one, as here, that arises from an agreement between the appointing authority and *a party*—is inconsistent with basic fairness.

These principles are reflected in Section 10 of the FAA and the "confirmation and vacatur safety net" that it creates. *See Hoeft v. MVL Group, Inc.,* 343 F.3d 57, 63 (2d Cir 2003), *overruled on other grounds by Hall St. Assocs.*, 552 U.S. 576. Through Section 10, Congress "impressed limited, but critical, safeguards onto this process, ones that respected the importance and flexibility of private dispute resolution mechanisms, but at the same time barred federal courts from confirming awards tainted by partiality, a lack of elementary procedural fairness, corruption, or similar misconduct." *Id.* at 64; *In re Wal-Mart Wage & Hour Emp't Practices Litig.*, 737 F.3d 1262, 1268 (9th Cir. 2013) (parties cannot waive FAA's statutory grounds for vacatur because that would "frustrate Congress's attempt to ensure a minimum level of due process for parties to an arbitration" and leave parties "without any safeguards against arbitral abuse"). These safeguards undergird the policy favoring arbitration. Indeed, it is only *because* these safeguards exist that courts can defer to private agreements to arbitrate in the first place. *Hoeft*, 343 F.3d at 63 ("Thus, while we have spoken in broad terms of deference to private agreements to arbitrate, we have always done so with an awareness of the confirmation-and-vacatur safety net

that hangs below."); *see also Goldfinger*, 68 N.Y.2d at 231 (explaining that it is imperative to "zealously" safeguard the integrity of the arbitral process "[p]recisely *because* arbitration awards are subject to such judicial deference").

MASN and the Orioles submit that, at a minimum, the FAA's mandate that arbitrators act impartially forbids arbitrators or arbitral appointing authorities from taking *a direct financial stake* in an issue before the arbitrator—including the issue of whether to recuse. *See Commonwealth Coatings Corp. v. Cont'l Cas. Co.,* 393 U.S. 145, 147 (1968) (in enacting the FAA, Congress intended "to provide not merely for an arbitration *but for an impartial one*") (emphasis added); A.863 (Marks, J.) ("neutrality of the adjudicative process is the very bedrock of the FAA ... [and] [i]t is upon that foundation, and in great reliance upon it, that courts can defer to processes decided upon and designed by private contract"); *Bowles*, 22 F.3d at 1013 (a fundamentally fair hearing requires proceedings before "*decisionmakers [that] are not infected with bias*.") (emphasis added); THOMAS H. OEHMKE, COMMERCIAL ARBITRATION § 36:01 (Revised Ed., Cumulative Supp. 2001) ("The notion of decision-making by *neutrals who are independent* is central" to arbitration; parties "have a right to be judged *impartially and independently*") (emphasis added).

The question of whether any direct financial interest is allowed, including after an order vacating an award but remanding proceedings to the same appointing authority, is fundamental. It bears directly on the integrity of the arbitral process

and public confidence in arbitration as an alternative forum of dispute resolution. The rule this Court adopted in the October 22, 2020 Order, that an arbitral appointing authority may, *in an agreement with one party, take a direct financial stake in an issue before the arbitrator*, would disserve the policy interest in ensuring that arbitration is consistent with fundamental fairness, and is viewed in those terms by the public—an interest that is particularly crucial given the ubiquity of arbitration agreements in modern life. It would equally disserve New York's global reputation as one of the leading centers for business arbitration. New York has a unique and compelling interest in resolving this critical questions regarding when, if ever, it is appropriate for an appointing authority to take a financial interest in a decision.

C. Certification is Warranted to Clarify Arbitrators' Disclosure Obligations when Officials of the Appointing Authority Have Publicly Argued in Favor of One Party and Against Another

The RSDC's post-remand refusals to disclose communications with MLB officials, and the Supreme Court's sanctioning of those refusals to disclose when confirming the April 15, 2019 Award, raise a fundamental question regarding replacement arbitrators' disclosure obligations after a remand following vacatur.

As explained above, in the July 13, 2017 Order, this Court *unanimously* affirmed vacatur of the June 30, 2014 Award due to MLB's and its RSDC's evident partiality under the Federal Arbitration Act, but divided 3-2 on the issue of the proper arbitral forum for the rehearing. The record in the first arbitration and subsequent

court proceedings, which resulted in the July 13, 2017 Order, demonstrates that MLB and its officials, including the Commissioner of Baseball, have prejudged the issues arbitrated in this dispute. Indeed, the Commissioner himself has demonstrated evident bias and, in some instances, outright hostility to MASN and the Orioles. The Commissioner has argued in favor of the Nationals' interpretation of what "the RSDC's established methodology" means in the Settlement Agreement, the key issue before the RSDC, strenuously (and wrongly) arguing that MASN's and the Orioles' interpretation of the provision "does not conform to its text." A.1003.

The Commissioner has also publicly 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 actively litigated against MASN and the Orioles in this dispute, personally filing three affidavits with Supreme Court arguing directly in favor of 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. Senior MLB officials who report to the Commissioner also personally filed affidavits in the Supreme Court proceedings in support of the Nationals. After the Supreme Court found Appellants were likely to *succeed* on the merits of their vacatur challenge to the award, the Commissioner declared that MASN "will be required to pay" the rights fees set in the vacated first award "sooner or later." A.1009-11.

In sum, the record in this case demonstrates that the *appointing authority*—MLB including the Commissioner himself—is not neutral in this dispute, and has publicly prejudged the issues to be arbitrated in this dispute. Thus, the proceedings on remand raised a question that the Court's July 13, 2017 Order did not address: the replacement RSDC arbitrators' disclosure obligations. There can be no serious dispute that statements or instructions by the MLB Commissioner or his staff to these arbitrators about the issues to be arbitrated could create an impression that the Commissioner or his staff are attempting to influence the proceedings. The MLB Commissioner appoints and removes the RSDC arbitrators at will and exercises broad powers over all MLB teams. A.165, 194. The Commissioner's statements to the RSDC arbitrators could plainly influence the arbitrators' deliberations.

This appeal presents the question of whether the arbitrators were required to disclose any communications they had with the MLB Commissioner or his staff about this dispute. MASN and the Orioles submit that the authority most analogous, *Sanko S.S. Co. v. Cook Indus, Inc.*, 495 F.2d 1260 (2d Cir. 1973), supports a requirement that the RSDC arbitrators disclose the requested communications. In *Sanko*, the Second Circuit held that a party to an arbitration was entitled to an evidentiary hearing to ascertain the full extent and nature of the relationships, both direct and indirect, between the arbitrator and the other party. *Id.* at 1264-65. The arbitrators were required to make this disclosure because the information about

which disclosure was sought "could create an impression of possible bias." *Id.*

Here, the evidence demonstrates that the appointing authority, MLB, *is biased* in this dispute in favor of the Nationals, and against MASN and the Orioles. Indeed it has publicly advocated for and litigated in favor of the Nationals, and against MASN and the Orioles. To the extent the MLB Commissioner or his staff, which control the league and exercise plenary power of the RSDC and its members' teams, communicated with the arbitrators about this dispute, such a communication would, Appellants submit, "create an impression of possible bias" under *Sanko*.

The Court of Appeals should have the opportunity to consider the scope of when, in light of clear evidence of bias of the appointing authority, the arbitrators must disclose their communications with officials of the appointing authority.

D. Certification is Warranted to Clarify Whether a Court May Enter a Money Judgment on an Arbitral Award when the Award Does Not Expressly Award Damages or Specify a Formula

For the reasons stated in section I, *supra*, the Court should grant leave to reargue on the issue of whether Supreme Court's entry of a money judgment on the April 15, 2019 Award was proper, and should vacate the money judgment because the April 15, 2019 Award did not award either party monetary damages. At the very least, if this Court denies reargument, the Court should then grant leave to appeal to the Court of Appeals on this issue. The April 15, 2019 Award is materially different than the award in the one case this Court relied on to affirm the money judgment:

Morgan Guaranty Trust Co. v. Solow, 114 A.D.2d 818 (1st Dep't 1985).

In *Morgan Guaranty*, the arbitration award itself *actually contained* a formula for the calculation of money damages due to the claimant. And that formula in the award at issue in *Morgan Guaranty* was "*so clear and specific that the determination of the amounts owed is merely an accounting calculation.*" *Id.* (emphasis added). The text of the April 15, 2019 Award clearly does not contain any formula.

To the extent this Court rules that *Morgan Guaranty* continues to apply even where the award itself *does not expressly contain* any formula, this Court will have made new law holding that a Court can *imply* a damages calculation formula into the award in some circumstances. That novel and important arbitration law issue has not been sanctioned by any case. It is also inconsistent with the narrow authority granted in CPLR §§ 7510 and 7511 to either confirm the award, vacate the award, or modify the award to correct "a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award" or address something that makes the award "imperfect in a matter of form, not affecting the merits of the controversy." It should be certified for review by the Court of Appeals.

CONCLUSION

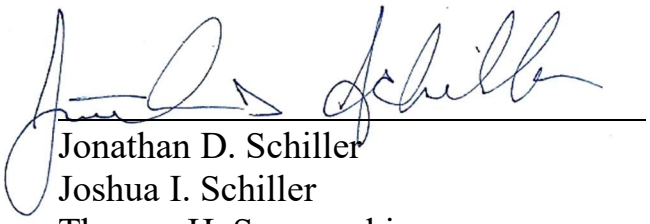
The Court should grant Appellants' motion for leave to reargue the October 22, 2020 Order, because the Court misapprehended the April 15, 2019 Award and misapplied *Morgan Guaranty Trust Co. v. Solow*, 114 A.D.2d 818 (1st Dep't 1985),

when it affirmed the $105,025,080.30 money judgment. The Court should grant leave to reargue this appeal and should vacate the monetary judgment.

The Court should grant Appellants' motion for leave to appeal and should certified the three fundamental legal questions identified herein for review.

Dated: New York, New York
November 20, 2020

Respectfully submitted,



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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 9,169 words.

Dated: New York, New York
November 20, 2020

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

TCR SPORTS BROADCASTING HOLDING, LLP,

Petitioner-Appellant,

-against-

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

Respondents-Respondents,

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

Respondents,

-and-

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

Nominal Respondents-Appellants.

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

New York County Clerk's
Index No. 652044/2014

AFFIRMATION OF JONATHAN D. SCHILLER IN SUPPORT OF MOTION FOR LEAVE TO REARGUE AND/OR FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

JONATHAN D. SCHILLER, an attorney duly admitted to practice in the courts of the State of New York, hereby affirms under penalty of perjury pursuant to CPLR § 2016 as follows:

1. I am an attorney licensed to practice law before the courts of the State of New York. I am a managing partner of Boies Schiller Flexner LLP.

2. I represent Petitioner-Appellant TCR Sports Broadcasting Holding, LLP d/b/a Mid-Atlantic Sports Network ("MASN"), and Nominal Respondents-Appellants the Baltimore Orioles Baseball Club and Baltimore Orioles Limited Partnership (the "Orioles," and collectively with MASN, "Appellants").

3. I submit this Affirmation in support of Appellants' motion, pursuant to CPLR § 2221 and 22 NYCRR § 1250.16(d)(2), for leave to reargue this appeal, and/or pursuant to CPLR § 5602(a)(1), for leave to appeal to the Court of Appeals.

4. I am fully familiar with all matters set forth in this Affirmation based on my own personal knowledge and information.

5. On October 22, 2020, this Court issued a Decision and Order in this appeal ("October 20, 2020 Order"). A copy of the October 20, 2020 Order is attached as Exhibit 1. In the October 20, 2020 Order, this Court affirmed a December 9, 2019 judgment of the Supreme Court ("December 9, 2019 Judgment"). A copy of the December 9, 2019 Judgment is attached as Exhibit 2.

6. The December 9, 2019 Judgment (i) confirmed an April 15, 2019 arbitration award ("April 15, 2019 Award") issued by Major League Baseball's ("MLB") Revenue Sharing Definitions Committee ("RSDC") and (ii) entered a

money judgment against MASN and in favor of the Nationals for $105,025,080.30. A copy of the April 15, 2019 Award is attached as Exhibit 3.

7. Pursuant to CPLR § 2221 and 22 NYCRR § 1250.16(d)(2), leave to reargue this appeal is warranted because the October 22, 2020 Order's affirmance of the December 9, 2019 Judgment (i) misapprehended the April 15, 2019 Award, which did not award monetary damages to the Nationals, and (ii) misapplied *Morgan Guaranty Trust Co. v. Solow*, 114 A.D.2d 818 (1st Dep't 1985), a case that held that when an award "fixed the formula upon which" the damages calculation was based, and the formula was "so clear and specific that the determination of the amounts owing is merely an accounting calculation," the court can apply that formula to calculate damages. 114 A.D.2d at 821-22. The April 15, 2019 Award shows that *Morgan Guaranty* is not applicable here as there is no formula in the award.

8. In addition, pursuant to CPLR § 5602(a)(1) and 22 NYCRR § 1250.16(d)(3), Appellants seek leave to appeal to the Court of Appeals and submit that the following questions of law should be reviewed by the Court of Appeals:

(1) Where a court has vacated an arbitral award because of the evident partiality of the arbitral forum, and remanded the proceedings back to the same arbitral forum, does the Federal Arbitration Act permit the arbitral forum to enter into an agreement with one party to the arbitration that gives the arbitral forum a direct $25 million financial interest in holding the arbitration hearing?

(2) Where a court has vacated an arbitral award because of the evident partiality of the arbitral forum and remanded the proceedings back to the same arbitral forum, and officials of the arbitral forum have, prior to remand, publicly argued and litigated in favor of one party and against another party about the issues to be arbitrated, are the replacement arbitrators required to disclose the communications they had with officials of the arbitral forum about the dispute?

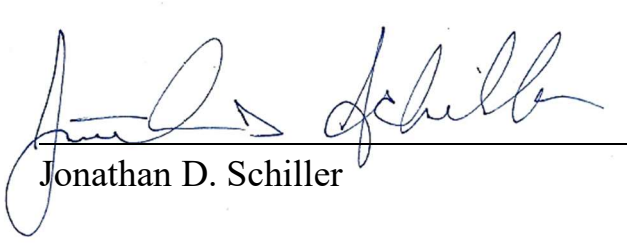
(3) If Appellants' motion for reargument on this question is denied, where the arbitrator's authority under an arbitration provision is limited to issuing a statement of value, and the arbitrators issue a statement of value that does not award any sum of money damages, and does not specify a formula by which to calculate damages, does the court have the power to perform its own calculation of damages the court deems are owed and then enter a money judgment on the award?

9. Appellants seek leave to appeal to the Court of Appeals on the above questions of law because they are fundamental issues that go to the core of what the minimum standards of fundamental fairness and impartiality are of arbitrators under the Federal Arbitration Act as interpreted by the New York State Courts, and the conversion of an award into a judgment. They are novel issues of law of public importance in New York that warrant review, 22 N.Y.C.R.R. § 500.22(b)(4).

10. Certification of these questions to the Court of Appeals is especially compelling in this case, because this Court's prior July 13, 2017 Order, which

remanded the arbitration back to MLB's RSDC, is currently before the Court of Appeals as of right pursuant to CPLR 5601(d). *See* Ex. 4 (Notice of Appeal).

Dated: New York, New York
November 20, 2020



Jonathan D. Schiller

Counsel to Mid-Atlantic Sports Network, the Baltimore Orioles Limited Partnership, and the Baltimore Orioles Baseball Club

Exhibit 1

Supreme Court of the State of New York
Appellate Division, First Judicial Department

Renwick, J.P., Kern, Scarpulla, Shulman, JJ.

12147-
12147A-
12147B

In re TCR SPORTS BROADCASTING HOLDING, LLP,
Petitioner-Appellant,

-against-

WN PARTNER, LLC, et al.,
Respondents,

WASHINGTON NATIONALS BASEBALL CLUB, LLC,
Respondent-Respondent.

- - - - -

THE BALTIMORE ORIOLES BASEBALL CLUB, et al.,
Nominal Respondents-Appellants.

Index No. 652044/14
Case No. 2019-05390
2019-05458
2019-05459

Boies Schiller Flexner LLP, New York (Jonathan D. Schiller of counsel) and Sidley Austin LLP, Washington, DC (Carter G. Phillips, of the bar of the District of Columbia, admitted pro hac vice, of counsel), for appellant and respondents-appellants.

Quinn Emanuel Urquhart & Sullivan LLP, New York (Stephen R. Neuwirth of counsel), for Washington Nationals Baseball Club, LLC, respondent.

Judgment, Supreme Court, New York County (Joel M. Cohen, J.), entered December 9, 2019, in favor of respondent Washington Nationals Baseball Club, LLC (the Nationals), unanimously affirmed, with costs. Appeals from orders, same court and Justice, entered on or about August 22, 2019 and on or about November 14, 2019, which granted the Nationals' motion to confirm an arbitration award and denied petitioner's motion to resettle the August 22, 2019 order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

In a prior appeal in this arbitration proceeding arising out of a contractual dispute between petitioner (MASN) and the Baltimore Orioles and the Washington

Nationals over Major League Baseball (MLB) telecast rights fees, this Court found that the 2014 arbitration award issued by MLB's Revenue Sharing Definitions Committee (RSDC) was correctly vacated due to "evident partiality" in the arbitrators (9 USC § 10[a][2]), i.e., the Nationals' counsel's unrelated representations at various times of virtually every participant in the arbitration except for MASN and the Orioles and the failure of MLB and the RSDC, despite repeated protests, to provide MASN and the Orioles with full disclosure or to remedy the conflict before the arbitration hearing was held (*Matter of TCR Sports Broadcasting Holding, LLP v WN Partner, LLC*, 153 AD3d 140 [1ST Dept 2017], *appeal dismissed* 30 NY3d 1005 [2017]). However, the Court found no basis for directing 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. The parties proceeded to a second arbitration before the RSDC.

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.

We have considered petitioner's remaining arguments, including the argument that the court unlawfully modified the award in its confirmation order by performing a calculation of the Nationals' damages (*see e.g. Morgan Guar. Trust Co. of N.Y. v Solow*, 114 AD2D 818, 821-822 [1ST Dept 1985], *affd* 68 NY2D 779 [1986]), and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 22, 2020

Susanna Molina Rojas
Clerk of the Court

Exhibit 2

FILED: NEW YORK COUNTY CLERK 12/13/2019 01:07 PM INDEX NO. 652044/2014
NYSCEF DOC. NO. 962 RECEIVED NYSCEF: 12/13/2019

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

TCR SPORTS BROADCASTING HOLDING, LLP,

Petitioner,

-against-

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

Respondents,

-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.

Index No. 652044/2014

(Cohen, J.)

NOTICE OF ENTRY

PLEASE TAKE NOTICE that attached is a true and correct copy of the Judgment of the Supreme Court, New York County, Commercial Division (Cohen, J.) in favor of Washington Nationals Baseball Club, LLC for $105,025,080.30, dated December 9 2019 (Doc. # 958), entered with the Clerk on December 9, 2019

DATED: New York, New York
December 12, 2019

By: /s/ Jonathan D. Schiller
Jonathan D. Schiller
Joshua I. Schiller
Thomas H. Sosnowski

FILED: NEW YORK COUNTY CLERK 12/13/2019 01:07 PM INDEX NO. 652044/2014
NYSCEF DOC. NO. 962 RECEIVED NYSCEF: 12/13/2019

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FILED: NEW YORK COUNTY CLERK 12/13/2019 01:25 PM INDEX NO. 652044/2014
NYSCEF DOC. NO. 968 RECEIVED NYSCEF: 12/13/2019

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

TCR SPORTS BROADCASTING HOLDING, LLP,

Petitioner,

-against-

WN PARTNER, LLC; NINE SPORTS HOLDING, LLC; WASHINGTON NATIONALS BASEBALL CLUB, LLC; THE OFFICE OF THE COMMISSIONER OF BASEBALL; and ALLAN H. "BUD" SELIG, AS COMMISSIONER OF MAJOR LEAGUE BASEBALL,

Respondents,

-and-

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

Nominal Respondents.

Index No. 652044/2014

Hon. Joel M. Cohen, J.S.C.

JUDGMENT

WHEREAS, on April 15, 2019, Major League Baseball's Revenue Sharing Definitions Committee ("RSDC") issued its Second Award (NYSCEF Doc. No. 813);

WHEREAS, on April 15, 2019, Respondent the Washington Nationals Baseball Club ("the Nationals") filed a motion to confirm the Second Award (the "Motion") (NYSCEF Doc. No. 783);

WHEREAS, on August 22, 2019, this Court entered its Decision and Order, granting the Motion and confirming the Second Award (NYSCEF Doc. No. 924);

WHEREAS, on August 30, 2019, Petitioner TCR Sports Broadcasting Holding, LLP d/b/a Mid-Atlantic Sports Network and Nominal Respondents the Baltimore Orioles Baseball Club and

the Baltimore Orioles Limited Partnership (collectively, "MASN") filed a motion to resettle, or in the alternative, to reargue this Court's August 22, 2019 Decision and Order (the "Motion to Resettle/Reargue") (NYSCEF Doc. No. 926);

WHEREAS, on September 20, 2019, MASN filed and served a Notice of Appeal of this Court's August 22, 2019 Decision and Order (NYSCEF Doc. No. 934);

WHEREAS, on November 12, 2019, the parties appeared before this Court for a hearing on the Motion to Resettle/Reargue;

WHEREAS, on November 14, 2019, this Court entered its Decision and Order, denying the Motion to Resettle/Reargue (NYSCEF Doc. No. 936);

WHEREAS, this Court's November 14, 2019 Decision and Order further "**ORDERED** that the parties are directed jointly to submit on or before November 21, 2019 a Proposed Judgment for the Court's review and approval in favor of the Washington Nationals in the amount of the television rights fees set forth on page 48 of the April 15, 2019 Second Award (NYSCEF 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." (NYSCEF Doc. No. 936);

WHEREAS, this Court's November 14, 2019 Decision and Order further ordered that: "The Proposed Judgment should make clear that it does not foreclose the Orioles 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. Submitting a Proposed Judgment does not constitute an admission by any party or otherwise waive any party's right to contest the Judgment on appeal." (NYSCEF Doc. No. 936); and

FILED: NEW YORK COUNTY CLERK 12/13/2019 01:07 PM INDEX NO. 652044/2014
NYSCEF DOC. NO. 968 RECEIVED NYSCEF: 12/13/2019

WHEREAS, consistent with the Court's November 14, 2019 Decision and Order, no party is making an admission or otherwise waiving their right to contest the Judgment on appeal.

UPON, this Court's August 22, 2019 Decision and Order (NYSCEF Doc. No. 924) and this Court's November 14, 2019 Decision and Order (NYSCEF Doc. No. 936); it is hereby

ADJUDGED that the Nationals' petition to confirm the Second Award is granted and the Second Award is confirmed; it is further

ADJUDGED that the Nationals, having an office at 1500 South Capitol Street, SE Washington, D.C. 20003-3599, have judgment and shall recover against TCR Sports Broadcasting Holding, LLP, having an office at 333 West Camden Street, Baltimore, Maryland 21201, the sum of **$99,203,339.14** (ninety-nine million, two-hundred three thousand, three hundred thirty nine dollars and fourteen cents), plus interest at the rate of 9% per annum from the date of April 15, 2019 through the date of judgment, as computed by the Clerk in the amount of $5,821,741.16, for the sum total of $105,025,080.30 and that the Nationals have execution therefor; it is further

ORDERED, that submission by the parties of a Proposed Judgment does not constitute an admission by any party or otherwise waive any party's right to contest the Judgment on appeal; and it is further

ORDERED, 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. The RSDC arbitration panel did not award such adjustments or recalculations in the Second Award, and thus the Court's confirmation of the Second Award does not address or adjudicate those issues.

Enter:

HON. JOEL M. COHEN
J.S.C.

Milton A. Tingling, Clerk

FILED

DEC - 9 2019

COUNTY CLERK'S OFFICE
NEW YORK

FILED: NEW YORK COUNTY CLERK 12/13/2019 01:04 PM INDEX NO. 652044/2014
NYSCEF DOC. NO. 968 RECEIVED NYSCEF: 12/13/2019

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

INDEX # 652044/2014

TCR Sports Broadcasting Holding, LLP

Plaintiff(s)/Petitioner(s)

Against

WN Partner LLC, Nine Sports Holding LLC, Washington Nationals Baseball Club, LLC, The Office Of Commissioner Of Baseball, Allan H. (Bud) Selig, As Commissioner Of Major League Baseball,

Defendant(s)/Respondent(s)

The Baltimore Orioles Baseball Club, Baltimore Orioles Limited Partnership, in its capacity as managing partner of TCR Sports Broadcasting Holding, LLP

Nominal Respondent(s)

JUDGMENT

Attorney for the Prevailing Party

QUINN EMANUEL URQUHART & SULLIVAN LLP
51 Madison Ave, 22nd Floor
New York, NY 10010
212-849-7165

Exhibit 3

EXHIBIT 1 TO SCHILLER AFFIRMATION - FINAL DECISION OF THE REVENUE SHARING DEFINITIONS COMMITTEE, DATED APRIL 15, 2019 [A- 736 - A- 785]

FILED: NEW YORK COUNTY CLERK 06/21/2019 10:35 PM INDEX NO. 652044/2014
NYSCEF DOC. NO. 813 RECEIVED NYSCEF: 07/08/2019

Revenue Sharing Definitions Committee

Hearing on Rights Fees Under March 28, 2005 Agreement amongst Major League Baseball, TCR Sports Broadcasting Holding L.L.P., Baseball Expos, L.P. D/B/A Washington Nationals Baseball Club, and the Baltimore Orioles Limited Partnership	:

FINAL DECISION OF THE REVENUE SHARING DEFINITIONS COMMITTEE

FILED: NEW YORK COUNTY CLERK 06/21/2019 10:35 PM INDEX NO. 652044/2014
NYSCEF DOC. NO. 813 RECEIVED NYSCEF: 07/08/2019

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FILED: NEW YORK COUNTY CLERK 06/21/2019 10:35 PM INDEX NO. 652044/2014
NYSCEF DOC. NO. 813 RECEIVED NYSCEF: 07/08/2019

On November 15–16, 2018, the members of the Revenue Sharing Definitions Committee (the "**RSDC**" or "**Committee**") met in Atlanta, Georgia, to hear the dispute between the Baltimore Orioles (the "**Orioles**") and Mid-Atlantic Sports Network ("**MASN**") (collectively, "**Orioles/MASN**") and the Washington Nationals (the "**Nationals**") concerning the value of the license fee to be paid by MASN for the right to telecast games of the Nationals for the years 2012 through 2016. In accordance with the agreement between the Baltimore Orioles Partnership Limited and Major League Baseball ("**MLB**") dated March 28, 2005 (the "**3/28/05 Agreement**" or "**Agreement**"), OMX 1,[1] the Committee has determined those license fees "using the RSDC's established methodology for evaluating all other related party telecast agreements in the industry." *Id.* at § 2.J.3.

In reaching its conclusions, the Committee has benefited from the excellent oral and written advocacy of counsel for the parties throughout these proceedings. Based on 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, and drawing on the experience of the Committee's members, the RSDC has determined, and hereby finds, 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

[1] "**OMX**" refers to Orioles/MASN exhibits. "**NX**" refers to Nationals exhibits.

FILED: NEW YORK COUNTY CLERK 06/21/2019 10:35 PM INDEX NO. 652044/2014
NYSCEF DOC. NO. 813 RECEIVED NYSCEF: 07/08/2019

The Committee's determinations as to fact and law are set forth below. To the extent that the Committee's recitation of facts differs from any party's position, it is the result of determination as to credibility, relevance, burden of proof, and weight of evidence. Any summary of any party's position is meant to be illustrative rather than exhaustive.

I. Background

The 3/28/05 Agreement, among other things, sets forth the license fees that MASN, a regional sports network (or "**RSN**") was obligated to pay, and did pay, the Nationals and the Orioles for the years 2005 through 2011. Agreement (OMX 1) § 2.G. The Agreement further provides that, for the years following 2011, the parties must negotiate the license fees for five-year blocks, with the first starting on 2012. *Id.* § 2.I. The Agreement describes a dispute-resolution mechanism for determining license fees if the parties cannot agree. *Id.* § 2.J.

Much of the current dispute between the parties concerns the method that the Committee should use to value the rights at issue. The Orioles/MASN favor a bottom-up analysis that calculates license fees based on the income statement of MASN, while assuming a specific operating margin and specific percentages of revenue and expenses attributable to baseball. *See* Post-Hearing Submission of Mid-Atlantic Sports Network and the Baltimore Orioles ("**Orioles/MASN Final Brief**") at 2 (Dec. 14, 2018). The Nationals favor an analysis placing considerable weight on comparable teams and deals. Post Hearing Submission of the Washington Nationals Baseball Club ("**Nationals Final Brief**") 1–2, ¶3 (Dec. 14, 2018). This dispute is central to what "established methodology" means in § 2.J.3—each side contends that its preferred methodology is the "established methodology." Orioles/MASN Final Brief at 2; Nationals Final Brief at 1–2, ¶3.

FILED: NEW YORK COUNTY CLERK 06/21/2019 10:35 PM INDEX NO. 652044/2014
NYSCEF DOC. NO. 813 RECEIVED NYSCEF: 07/08/2019

A. Structure of the 3/28/05 Agreement

Under the Agreement, MASN has the sole and exclusive right to broadcast all Nationals' and Orioles' games not retained or reserved by MLB's national rights agreements. Agreement (OMX 1) §§ 2.A, 2.D. License fees for the years 2005–2011 were set forth in the Agreement. *Id.* § 2.G. The Nationals, the Orioles, and MASN are to negotiate the license fees that MASN will pay the two teams starting on 2012 "using the most recent information available which is capable of verification to establish the fair market value of the telecast rights licensed to the RSN." *Id.* § 2.I. If the parties cannot agree upon the license fees that MASN should pay, § 2.J explains what must be done.

The RSDC typically reviews related-party transactions to see if the revenues that teams declare in the form of license fees are at market value or too low. *See, e.g.*, 16th Report[2] (OMX 4) at 5 ("Under the Revenue Sharing Plan, the Administrator is required to review all related party transactions ('RPT') to determine whether the Clubs are reporting revenues from such transactions 'as if' [the transactions] were entered into on an arm's length basis'" (quoting August 29, 1997 Revenue Sharing Definitions Subcommittee Report at 7) (alterations in original)); 39th Report (NX 47) at 2 ("[T]he Committee reviewed whether the rights fee received by the Indians . . . was consistent with fair market value.").[3]

---

[2] References to "Reports" are to Reports of the RSDC.

[3] Each of the Reports on which the parties rely echoes this. 18th Report (OMX 3) at 1 ("As such, the Revenue Sharing Definitions Committee ('RSDC') is charged with the responsibility of making a recommendation to the Administrator of the Revenue Sharing Plan on the question of whether the revenue generated by the Red Sox under the NESN agreement is the same as would have been produced by an arm's length transaction."); 34th Report (NX 3) at 1 ("The Committee has adjusted a Club's Net Local Revenue if it determined that the Club received less than fair market value for its local media rights during any Revenue Sharing Year.").

FILED: NEW YORK COUNTY CLERK 06/21/2019 10:35 PM INDEX NO. 652044/2014
NYSCEF DOC. NO. 813 RECEIVED NYSCEF: 07/08/2019

This makes sense because the Orioles control the majority of MASN's profit interest. *See* 3/28/05 Agreement (OMX 1) § 2.N. The Orioles also control MASN "as managing partner of the RSN" and "have the full authority to manage operate all of the business affairs of the RSN." *Id.* § 2.O. Any team with some ownership and control of an RSN may find itself with an incentive to takes its portion of the revenues of the RSN as profit from the enterprise rather than as license fees because the former are not subject to revenue sharing. *See* 18th Report (OMX 3) at 2 ("In contrast, the RSDC's concern is that NESN might underpay the Red Sox and thus increase the value of NESN to the benefit of both the majority and minority owners of the broadcasting entity and the detriment of the 29 other Major League Clubs."); *see also* Expert Analyses and Opinions of Chris Bevilacqua ("**Bevilacqua Report**") at 9, ¶25 (Aug. 10, 2018); Joint Pre-Hearing Submission of Mid-Atlantic Sports Network and the Baltimore Orioles ("**Orioles/MASN Opening Brief**") at 17–18, ¶30 (Aug. 10, 2018). Here, the Orioles are incentivized to prefer a higher profit dividend from MASN and a lower license fee, and the Nationals to prefer the opposite. While rights fees to the two teams are to be equal, *see* 3/28/05 Agreement (OMX 1) § 2.J.3, the profits of MASN are split such that a super-majority goes to the Orioles. *See id.* § 2.N. The RSDC is tasked with determining that MASN pay market-level license fees, rather than sub-market fees with correspondingly higher MASN profits.

B. History of the Dispute

In 2004, MLB decided to move the Montreal Expos (the "**Expos**") to Washington, D.C. *See TCR Sports Broad. Holding, LLP v. WN Partner, LLC*, 153 A.D.3d 140, 144, 59 N.Y.S.3d 672, 674 (1st Dep't 2017) (plurality opinion). When MLB voted to move the Expos to Washington, D.C., the Orioles dissented. "In an effort to resolve several issues associated with the Expos' relocation," the Orioles and MLB settled and entered into the 3/28/05 Agreement.

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TCR Sports Broad., 153 A.D.3d at 144, 59 N.Y.S.3d at 674 (plurality opinion). The Nationals were later purchased by the Lerner family, in 2006. *See* Orioles/MASN Final Brief at 4; Nationals Final Brief at 4, ¶9. Thus, MLB owned the Nationals at the time the 3/28/05 Agreement was negotiated and signed.

The Agreement was negotiated in 2005, with multiple drafts exchanged. *See, e.g.*, 3/23/05 Draft of Agreement (NX 89); 3/26/05 Draft Agreement (OMX 46).[4] The Agreement was signed by Peter Angelos on behalf of the Orioles/MASN and Commissioner Selig for MLB. 3/28/05 Agreement (OMX 1) at 18–19. After the Agreement was signed, there was apparently a carriage dispute between MASN and Comcast, during which Comcast actually took MASN off the air (at the time, MASN was broadcasting only Nationals' games). This led to an FCC complaint by MASN. The FCC sent the matter to arbitration, and it settled. *See* Richard Sandomir, *Beltway Cable Dispute: Fans Paying the Price*, N.Y. TIMES (June 28, 2005), https://www.nytimes.com/2005/06/28/sports/baseball/beltway-cable-dispute-fans-paying-the-price.html; Arshad Mohammed, *FCC Finds Possible Bias Against MASN by Comcast*, WASH. POST (Aug. 1, 2006), https://www.washingtonpost.com/archive/business/2006/08/01/fcc-finds-possible-bias-against-masn-by-comcast/1cbb3ac7-6815-480b-bd3d-5868265d7729/?utm_term=.a63f0dd52ace; *see also* Letter of Stephen B. Burke to Allan H. Selig (NX 17) (Apr. 6, 2006).

On April 3, 2012 the RSDC (then composed of different members) convened a hearing to determine the fair market value of the rights at issue here (the "**2012 RSDC Hearing**"). *See TCR Sports Broad.*, 153 A.D.3d at 147–48, 59 N.Y.S.3d at 677 (plurality opinion). This followed unsuccessful negotiations in which the Orioles/MASN offered the Nationals an average annual license fee of $34 million, while the Nationals sought more than $110 million annually.

[4] The relevant facts and contentions regarding these negotiations are discussed in § II.F.

See id. at 145, 59 N.Y.S.3d at 675. At the 2012 RSDC Hearing, the Orioles/MASN proposed an average annual license fee of $39.5 million, while the Nationals proposed $118 million. *See id.* at 148, 59 N.Y.S.3d at 677. In the summer of 2012, the parties tried to settle the dispute, after being told roughly where the previous RSDC was likely to come out. *See id*. In 2012, MLB made a loan to the Nationals in the amount of $24,574,138. *See* Letter of Steven Neuwirth to RSDC (Mar. 12, 2018) at Ex. A.

On June 30, 2014, the previous RSDC issued its final decision (the "**2014 RSDC Decision**"). *See* 2014 RSDC Decision (NX 74) at 20. The previous iteration of this Committee determined that the fair market value of each team's telecast rights was:

	2012	**2013**	**2014**	**2015**	**2016**	**Average**
License Fee (millions)	$53.2	$56.3	$59.3	$62.6	$66.7	$59.6

Id. at 19. In September 2014, MASN filed a petition in New York Supreme Court to vacate the previous Committee's award. *TCR Sports Broad.*, 153 A.D.3d at 149, 59 N.Y.S.3d at 678. The plurality opinion of the New York Supreme Court Appellate Division, First Department, summarized the allegations as follows:

> In support of its petition, MASN alleged that MLB had a financial stake in the outcome of the arbitration due to the $25 million advance it made to the Nationals; that MLB, the Nationals and the arbitrators all used the same law firm without full disclosure as to possible conflicts; that MLB controlled the arbitration process; and that the arbitrators failed to apply the Bortz methodology, as required by the agreement. MASN further alleged that the RSDC was impossibly tainted by a conflict of interest because an increase in the rights fees, which are taxed by MLB, meant that more money would go into MLB's revenue sharing pool, and the Rays and Pirates, whose representatives were on the RSDC, were teams that benefited from revenue-sharing.

Id.

The Supreme Court (the trial court) vacated the 2014 RSDC Decision for the sole reason that, in connection with the 2012 RSDC Hearing, the Nationals were represented by the same law firm (Proskauer Rose LLP) that was also counsel to MLB and to some of the teams with

representatives serving on the RSDC. *Id.* at 149–50, 59 N.Y.S.3d at 678. The Appellate Division affirmed the vacatur. The plurality agreed that the conflict requiring rehearing arose from the fact that Proskauer Rose was not only counsel for Nationals in connection with the 2012 RSDC Hearing, but also other attorneys in the firm represented both the MLB and members of the RSDC. *See id.* at 151–52, 59 N.Y.S.3d at 679–80. The plurality also held that a second arbitration under a new Committee was the correct resolution because the 3/28/05 Agreement showed a conscious intent of the parties "for arbitration before the RSDC, an industry-insider committee," whose "members are selected by MLB in its sole discretion" and that it was appropriate that "MLB staff would provide administrative, organizational and legal support, including analyzing financial information and preparing draft decisions in accordance with the instructions of the RSDC members who would make the final determinations." *See id.* at 156, 59 N.Y.S.3d at 682–83.

The concurring opinion pointed out that the parties' choice of the RSDC as the forum for arbitration overrode concerns that there could be interference in the RSDC's decision by MLB, so the arbitration could not be ordered moved to another forum. *Id.* at 161, 59 N.Y.S.3d at 686 (concurrence). The Appellate Division opinions were issued on July 13, 2017. On January 18, 2018, the Appellate Division denied leave to appeal to the New York Court of Appeals. *See* Notice of Entry, *TCR Sports Broad. Holding, LLP v. Wash. Nationals Baseball Club, LLC*, No. 652044/2014, NYSCEF Doc. No. 780 (Sup. Ct. N.Y. Cty. Jan. 19, 2018). Preparations for this hearing soon began. *See* Letter of Joseph C. Shenker to Counsel for All Parties (Feb. 28, 2018).

Sullivan & Cromwell LLP initially represented the present Committee. On May 1, 2018, Sullivan & Cromwell stepped down. *See* Letter of Joseph C. Shenker to Counsel for All Parties (May 1, 2018). The Committee retained Joseph Hage Aaronson LLC. Letter of Gregory P.

Joseph to Counsel for All Parties (May 7, 2018). The Committee originally scheduled a hearing for August 2018 but, at the request of the Orioles/MASN, the hearing was postponed to November 15–16, 2018. *See* Procedural Orders Nos. 1 and 4.

Throughout 2012–2016 MASN paid to the Nationals the license fees that the Orioles/MASN had proposed in the 2012 RSDC Hearing:

	2012	**2013**	**2014**	**2015**	**2016**	**Average**
License Fee (millions)	$34.0	$36.6	$39.3	$42.0	$45.7	$39.5

Bortz Media & Sports Group, Report ("**2012 Wyche/Bortz Report**") at 1 (Mar. 1, 2012); Orioles/MASN Opening Brief at 6, ¶9 n.17.

MASN also made profit distributions to the Nationals—and impliedly to the Orioles[5]—in the following amounts:

	2012	**2013**	**2014**	**2015**	**2016**	**Average**
Nationals' Profit Distributions (millions)	$6.8	$7.6	$9.0	$8.8	$9.4	$8.3
Orioles' Profit Distributions (millions)	$45.6	$46.4	$51.0	$46.2	$45.7	$47.0

See NX 42; NX 43.

II. Discussion

A. Applicable Law

The 3/28/05 Agreement's § 2.J.3 directs the RSDC to determine "the fair market value" of the rights licensed to MASN "using the RSDC's established methodology for evaluating all other related party telecast agreements in the industry."

[5] The equity distributions set forth in the accompanying table are drawn from NX 42 and NX 43. While neither party submitted MASN's full financial statements itemizing the parties' equity distributions, NX 42 and NX 43 set forth the Nationals' equity distributions and calculates the Orioles' implied distributions based on the Parties' relative profit ownership under the Agreement (OMX 1 at § 2.N). The Orioles/MASN did not dispute the Nationals' calculations or offer competing ones.

Maryland law governs. Agreement (OMX 1) § 11.A. Under the law of Maryland, the Committee will construe the provisions of this Agreement that are unambiguous as a matter of law, while those that are ambiguous the Committee will construe with reference to extrinsic evidence. *Calomiris v. Woods*, 727 A.2d 358, 363 (Md. 1999); *Anne Arundel Cty. v. Crofton Corp.*, 410 A.2d 228, 232 (Md. 1980). A provision is ambiguous "if, when read by a reasonably prudent person, it is susceptible of more than one meaning." *Calomiris*, 727 A.2d at 363. That determination "includes a consideration of 'the character of the contract, its purpose, and the facts and circumstances of the parties at the time of execution.'" *Id.* (quoting *Pac. Indem. Co. v. Interstate Fire & Cas. Co.*, 488 A.2d 486, 488 (Md. 1985)).

The Agreement contains an integration clause providing that the Agreement is "the entire agreement between the parties with respect to the subject matters herein and supersede all other oral and written understandings or agreements relating to the subject matters contained herein." 3/28/05 Agreement (OMX 1) § 11.B. Under Maryland law, an integration clause "can be seen as wiping clear any prior oral or implied agreements that were not included in the contract." *Hovnanian Land Inv. Grp., LLC v. Annapolis Towne Centre at Parole, LLC*, 25 A.3d 967, 986 (Md. 2011).

The Agreement disclaims the *contra proferentem* rule, the principle that "ambiguities are resolved against the draftsman of the instrument." *John L. Mattingly Constr. Co. v. Hartford Underwriters Ins. Co.*, 999 A.2d 1066, 1078 (Md. 2010). Section 11.F. provides that "[t]he parties hereby acknowledge that no provision of this Agreement shall be construed against a party solely because that party (or that party's counsel) drafted such provision." 3/28/05 Agreement (OMX 1) § 11.F.

Under Maryland law, extrinsic evidence includes:

- Statements made by the parties during negotiations, *Canaras v. Lift Truck Servs., Inc.*, 322 A.2d 866, 874 (Md. 1974);

- The parties' construction of the contract, *see First Union Nat'l Bank v. Steele Software Sys. Corp.*, 838 A.2d 404, 457 (Md. Ct. Spec. App. 2003) ("There was significant extrinsic evidence offered by both parties. This included evidence as to the parties' construction of the contract after its execution."); *Canaras*, 322 A.2d at 874 ("In such a case the court may consider evidence of extrinsic factors, *i.e.*, . . . the parties' own construction of the contract . . . ."); and

- Whether one interpretation of an agreement appears more fair than another, *see Calomiris*, 727 A.2d at 368 ("A trial court may properly consider the apparent fairness of a given result when contract language is susceptible of two different interpretations, one of which leads to a reasonable result and the other to an unreasonable result. 'Where language of a contract is open to an interpretation which is reasonable and in accordance with the general purpose of the parties, the hardship of a different interpretation is strong ground for belief that such a meaning was not intended.'").

Before reaching the parties' contentions regarding extrinsic evidence, the Committee will review the key contractual terms and determine whether they are ambiguous.

B. "Established Methodology"

Section 2.J.3 requires that the Committee determine the "fair market value of the Rights . . . using the RSDC's established methodology for evaluating all other related party telecast agreements in the industry." 3/28/05 Agreement (OMX 1) § 2.J.3. Both parties contend that this provision is unambiguous, but they propose starkly different interpretations. The Orioles/MASN maintain that the phrase "established methodology" refers to the methodology that was established at the time that the 3/28/05 Agreement was signed because *established* is in "the past-tense," and so must refer to a time already in the past when the Agreement was signed. Orioles/MASN Final Brief at 14. The Orioles/MASN contend that if the term *established* would allow any other methodology, the term would be meaningless, and it would be equivalent to not having it there at all. *Id.* at 15–16. The Orioles/MASN also note that the Agreement could have but did not use terms like "then-current" or "then-applicable" to described the "established methodology," and so such a concept should not be read into the Agreement. *See id.* at 16 &

n.56 (citing 3/28/05 Agreement (OMX 1) § 1.C); *see also* 3/28/05 Agreement § 1.I. The Orioles/MASN also contend that, in the context of the 3/28/05 Agreement, the parties opted for certainty in dealing with the important issue of the license fees, necessitating that the formula for ascertaining them be fixed at the signing, particularly because MASN's telecast license fees were "the only form of compensation" that the Orioles "received under the Agreement." *See* Orioles/MASN Final Brief at 14–15. The Orioles/MASN urge that the methodology already established at time the 3/28/05 Agreement was signed was the Bortz Methodology, encapsulated in the 16th and 18th Reports. *See id.* at 17–18. The Bortz Methodology, discussed in more detail in § II.G.1, calculates a license fee based on either projected or actual revenues and expenses by assuming a certain operating margin, and allocates what is left of revenues after deducting expenses and that operating margin for the license fee. *See id.* at 21–23.[6]

The Nationals maintain that "established methodology" means that which is *established* at the time of the hearing. Nationals Final Brief at 13–14, ¶26. The primary reason for this, the Nationals contend, is that § 2.J.3 refers to the "established methodology for evaluating all other related-party telecast agreements in the industry." *Id.* at 13–16, ¶¶26–27, 29. The Nationals point out that the 3/28/05 Agreement could have, but did not, reference either Bortz or any established formula for determining the fair market value of the license fees. *Id.* at 14–15, ¶28. Therefore, the Nationals urge the Committee to look to the 34th Report (NX 3), which has been in effect since 2012, or a 2011 Letter from Mr. Manfred to counsel for the parties (NX 55) that

[6] As discussed further in § II.G.1, the margin in question is an *operating* margin, which looks not at *all* revenues and expenses, but only those that are attributable to baseball—*i.e.*, operating revenues and expenses. *See id.* at 21–22; Washington Nationals & Baltimore Orioles TV Rights Analysis for the Years 2012 Through 2016 ("**Wyche/Bortz Report**") at 7–8 (Aug. 10, 2018).

was in effect at the time of the initial RSDC hearing in this matter and which amounts to the same thing. Nationals Final Brief at 13–14, ¶26.

The Committee concludes that both interpretations of the phrase "established methodology" are reasonable and that the phrase is ambiguous. Therefore, the Committee will look to the parties' proffered extrinsic evidence with respect to this phrase. *See* § II.F, *infra*.

C. Rights

Although the phrase "established methodology" is ambiguous, other related provisions of the Agreement are unambiguous, so they must be construed without resort to extrinsic evidence. *See Calomiris*, 727 A.2d at 366 ("One may not argue ambiguity in one contractual term or clause in order to gain the admittance of extrinsic evidence to contradict other terms or clauses in the contract that are unambiguous. The extrinsic evidence admitted must help interpret the ambiguous language and not be used to contradict other, unambiguous language in the contract.").

The term "Rights" is defined in § 2.J.1, in the following sentence:

> In the event that the Nationals and the RSN, or the Orioles and the RSN, are unable to agree on the fair market value of their respective rights within thirty (30) days or a mutually-agreed upon longer period of time (the "Negotiation Period"), the relevant parties shall follow the procedures set forth in this Subsection to establish the fair market value of the rights licensed to the RSN (the "**Rights**").

3/28/05 Agreement (OMX 1) § 2.J.1 (emphasis added).

The Nationals' argue that § 2.J.1 defines the term "Rights" with respect to a particular team's disagreement with MASN—that of the Nationals or that of the Orioles. *See* Nationals Final Brief at 24, ¶48. The Nationals' textual argument is that "Rights" refers to the "respective rights" of either the Nationals or of the Orioles. *Id.* Accordingly, the Rights defined in § 2.J.1 refer to the rights of the team disputing its fees with MASN, that "Rights" thus refers only to one

team's rights, and that in the present dispute, that the "Rights" are the Nationals' rights. *Id.*; *see also id.* at 7–8, ¶14.

The Orioles/MASN argue, *first*, that "Rights" refers to "the rights licensed to the RSN." *See* Orioles/MASN Final Brief at 12. *Second*, the Orioles/MASN contend that "the Nationals' interpretation applies only when one club is challenging MASN's determination." *See id.* at 13.

The Committee concludes that the Orioles/MASN have the correct textual analysis. The term "Rights" refers to the last set of rights mentioned, which are "the rights licensed to the RSN [*i.e.*, MASN]."[7] The Committee acknowledges that one could construe the term "rights licensed to the RSN" to refer to a disputing party's "respective rights." *See* 3/28/05 Agreement (OMX 1) § 2.J.1. The problem with that interpretation of "Rights" is that once the RSDC decides on the fair market value of the license fees of one of the two clubs, its determination is "final and binding" on both. *See* § 2.J.3. Under the Nationals' interpretation, therefore, RSDC could potentially issue a decision binding on both parties based at least in part on factors unique to the team which disputed its license fees with MASN first. This is not a reasonable interpretation.

The Committee notes the Orioles/MASN's concern that following the Nationals' approach "would result in the Orioles receiving rights fees based on the value of the Nationals' hypothetical rights." *See* Orioles/MASN Final Brief at 12. As a practical matter, that is not a

[7] This is not an application of the last antecedent rule, which holds roughly that "a qualifying clause ordinarily is confined to the immediately preceding word or phrase." *McCree v. State*, 105 A.3d 456, 466 (Md. 2014). The rule appears to be in disuse in Maryland, both for statutory construction and for contractual interpretation. *See id.* 466 ("The last antecedent rule does not apply '[w]here the sense of the entire [statute] requires that a qualifying [clause] apply to several preceding' words." (quoting *Emp't Sec. Admin. v. Weimer*, 400 A.2d 1101, 1105 (Md. 1979)); *Azam v. Carroll Independent Fuel, LLC*, 199 A.3d 701, 714 (Md. Ct. Spec. App. 2019) ("The observation that when a qualifier follows a series, it may well refer to the last item in the series unless the clear meaning of the larger passage indicates otherwise is harmless enough, as long as we are careful not to capitalize the observation or to call it a rule.").

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real risk on the present record. As discussed in § II.G, neither party has proposed an analysis that looks at factors unique to one of them. The Nationals appear to be concerned that the Committee might value "a single rights fee for the unified territory that would then be divided between the Orioles and the Nationals." *See* Nationals Final Brief at 7–8, ¶14. This perhaps would be an issue if the Committee were, for example, to value the license fees at issue as though the Nationals and the Orioles were one team, but this Committee is not inclined to do so. *See* § II.F–G, *infra*.

The Committee concludes that the "Rights" it is to value are the combined rights to the telecast of both teams' games.

D. Territory

The parties disagree on how to value the territory at issue. Section 2.K of the Agreement (OMX 1) states:

> For all purposes of determining the amount of the appropriate rights fees payable to the Orioles and the Nationals, the entire Television Territory shall be analyzed and examined as if the Television Territory were a unified territory in all respects, that is, the same geographic territory, the same DMAs, the same number of households and treated as a single television market.

The Nationals argue that § 2.K is clear and that any valuation should treat the parties as though they were in the same territory "in all respects." *See* Nationals Final Brief at 22–23, ¶45 (quoting 3/28/05 Agreement (OMX 1) § 2.K). The Orioles/MASN's argument boils down to the specific kinds of demographic statistics the Committee should review when making its analysis—namely, that under no circumstances should the Committee evaluate the Nationals *as though* they had the whole DMA of both Baltimore *and* Washington, D.C. *See* Orioles/MASN Final Brief at 31–32.

As demonstrated in § II.G.2, the question of territory is most pertinent for the purposes of comparing the license fees of the Orioles and Nationals to those of comparable teams. However,

as a matter of law, the Committee concludes that § 2.K of the Agreement requires that each team is to be assumed to have the same DMAs.

E. Prejudgment Interest

The Nationals have requested prejudgment interest. *See* Nationals Reply Brief at 56, ¶103; Nationals Final Brief at 34–35, ¶70. Maryland allows 6% simple interest. *See* Md. Const. art. 3, § 57 ("The Legal Rate of Interest shall be Six per cent. per annum"); *Mezu v. Progress Bank of Nigeria, PLC*, No. 12 Civ. 2865 (JBK), 2013 WL 6531626, at *1 (D. Md. Dec. 11, 2013); *see also Fed. Savings & Loan Ins. Corp. v. Quality Inns, Inc.*, 876 F.2d 353, 359 (4th Cir. 1989).[8]

The Orioles/MASN oppose prejudgment interest on two principal grounds. *First*, they point out that prejudgment interest is discretionary in Maryland, except for a small number of cases in which "the obligation to pay and the amount due had become certain, definite, and liquidated by a specific date prior to judgment." Orioles/MASN Final Brief at 34 (quoting *Ver Brycke v. Ver Brycke*, 843 A.2d 758, 777 (Md. 2004)). The Nationals do not expressly claim that prejudgment interest here must be awarded, as a matter of right. *See* Nationals Final Brief at 34–35, ¶70 & n.211. The parties are both correct—prejudgment interest is discretionary as a general matter, *see Ver Brycke*, 843 A.2d at 777, and the exception that would render it mandatory does not apply. That is because where "fair value" is "a question of fact involving complex principles of valuation," the "obligation to pay" is not considered "certain." *E. Park Ltd. P'ship v. Larkin*, 893 A.2d 1219, 1234–35 (Md. Ct. Spec. App. 2006); *cf. Balt. Cty. v. Balt. Cty. Fraternal Order*

[8] The Maryland constitution sets the maximum interest rate at 6% unless changed by legislature. Md. Const. art. 3, § 57. Although there is a statute setting interest at 10%, MD. CODE ANN., CTS. & JUD. PROC. § 11-107 (2013), that provision only applies to judgments of a court—*i.e.*, interest after entry of judgment. *See Fed. Savings & Loan*, 876 F.2d at 359.

of Police, 104 A.3d 986, 1026 (Md. Ct. Spec. App. 2014) (holding amount of damages "specifically ascertainable" for purposes of requiring prejudgment interest because the calculation "depended on four fixed, known numbers" that were not in dispute),*aff'd on other grounds*, 144 A.3d 1213, 1222 n.11 (Md. 2016) . Here, the calculation is sufficiently complex that interest should not be awarded as a matter of right.

Second, the Orioles/MASN maintain that if prejudgment interest were awarded, it must be decreased because any gap between what MASN paid in license fees to the Nationals, and whatever this Committee might award, should be offset by the $24.6 million loan that MLB made to the Nationals (presumably less interest paid) as well as the profit distributions that the Nationals have received (which would have been lower if license fees were higher), about $41.5 million. *See* Orioles/MASN Final Brief at 34; NX 43.

Third, the Orioles/MASN contend that any award of prejudgment interest is inappropriate because it was the Nationals' decision to hire a conflicted law firm and the Nationals' refusal to agree to a reasonable settlement that led to the lapse in time between the original hearing in 2012 and this current year 2019. *See* Orioles/MASN Final Brief at 34 & n.147.

Neither party, however, has addressed the threshold question of whether the Committee has the power to award prejudgment interest on the fair market value of the license fees. The power of the Committee is defined entirely in § 2.J.3, which states only that:

> In the event that the Nationals and/or the Orioles and RSN are unable to timely establish the fair market value of the Rights by negotiation and/or mediation as set forth above, then the fair market value of the Rights shall be determined by the Revenue Sharing Definitions Committee ("RSDC") using the RSDC's established methodology for evaluating all other related party telecast agreements in the industry.

3/28/05 Agreement (OMX 1) 2.J.3. As an arbitration panel, this Committee has the power and obligation to interpret the 3/28/05 Agreement to determine the scope of the issues before it. *See*

Balt. Cty. Fraternal Order of Police v. Balt. Cty., 57 A.3d 425, 435–36 (Md. 2012). This Committee holds that its authority runs no further than determining the fair market value of the rights at issue. *See Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 600 F.3d 190, 203 (2d Cir. 2010) (New York law) (even though the parties may have intended for an appraisal to include pre-award interest, it did not follow that "an appraisal which is limited to factual disputes over the amount of loss for which an insurer is liable" could also make a legal determination over whether prejudgment interest would be appropriate for that sum of money). Just as the Committee lacks the authority to enter a judgment, it cannot award prejudgment interest.[9]

The Committee also holds that, even if it had the power to award prejudgment interest, it would exercise its discretion to not do so. *First*, the Nationals have not provided any calculations to suggest even how much prejudgment interest they contend should be awarded—only some suggestions as to how to go about calculating it. *See* Nationals Final Brief at 34–35, ¶¶70–71 & n.212. *Second*, for purposes of calculating prejudgment interest, the Committee agrees with the Orioles/MASN that it would have to offset any net increase in Nationals' license fees determined by the Committee by both the $24.6 million MLB loan (less interest payments made) and profit distributions the Nationals have received. Consequently, it appears that the Nationals' out-of-pocket cash flow diminution in the earlier part of the 2012–2016 period has been considerably, though not entirely, offset. *Third*, the Committee has not been directed to any detailed information about when MASN profit distributions were actually received by the Nationals, making a precise calculation impossible. *Fourth*, the Orioles/MASN are not responsible for the delay in the Nationals' receipt of higher license fees. The delay was a

[9] The Nationals similarly seek an award of costs and litigation expenses. *See* Nationals Final Brief at 34–35, ¶70. The Agreement does not confer on the Committee the power to award costs and expenses.

function of the judicial process. Accordingly, the Committee would exercise its discretion to decline to award prejudgment interest, even if it were within its power to award it.

F. What Is the RSDC's "Established Methodology?"

In § II.B, the Committee determined that the phrase "established methodology" is ambiguous because both parties propose contrary but reasonable interpretations of that phrase. *See Calomiris*, 727 A.2d at 363 ("In determining whether a writing is ambiguous, Maryland has long adhered to the law of the objective interpretation of contracts. Under the objective view, a written contract is ambiguous if, when read by a reasonably prudent person, it is susceptible of more than one meaning.") (citations omitted). Specifically, the phrase "established methodology" is ambiguous with respect to whether the RSDC should use a methodology that was established as of the time of that the Agreement was signed or a methodology that is established as of the time a particular RSDC evaluates the rights fees for a given set of years.

The Orioles/MASN's argument for their textual position is described in § II.B. They advance the following pieces of extrinsic evidence, among others:

- The 16th and 18th Reports were presented to the Orioles as examples of what the RSDC does, and they exclusively referred to the Bortz Methodology. Both the 16th and 18th Report reject the use of a comparable teams or transactions approach. *See id.* at 17–18; 16th Report (OMX 4) at 7–8; 18th Report (OMX 3) at 5. *See* Orioles/MASN Final Brief at 17–18; Tr. 567:17–568:19 (Rifkin); Witness Statement of Alan M. Rifkin, Esq. ("**Rifkin Witness Statement**") at 10–11, ¶¶44–47.[10]

[10] The Nationals objected to Mr. Rifkin's statements about what MLB's representatives said to the Orioles' representatives in the 2005 negotiations. Tr. 566:15–22. However, Mr. Rifkin's description of what MLB's representative Robert DuPuy gave to Mr. Rifkin as examples of the "established methodology" are not descriptions of Mr. DuPuy's statements, and to the extent that those actions are to be construed as statements, they are not offered for the truth of Mr. DuPuy's assertions—*i.e.*, that the established methodology was or was not encapsulated in the 16th and 18th Reports—but only for the purpose of explaining the Orioles' purported reliance on those statements. *See United States v. Lancman*, No. 4:95 Civ. 880 (JRT) (RLE), 1998 WL 315346, at *2 n.3 (D. Minn. Jan. 20, 1998) (report and recommendation) (out-of-court statements admissible "to establish grounds for Defendant's reliance upon them"), *adopted*, Order, ECF No. 46 (D. Minn.

- A draft of the Agreement struck references to comparable teams or transactions. *See* Orioles/MASN Final Brief at 17; 3/25/05 11:45 p.m. Draft (OMX 44) at 8; Tr. 563:17–566:11 (Rifkin).

- Allen & Co., working for MLB, projected EBITDA margins of around 33% for MASN through 2016, and MLB provided this projection to the Orioles. *See* Orioles/MASN Final Brief at 23 & n.96 (citing Allen & Co. Projections, OMX 19); Tr. 511:8–516:7 (Haley); Rifkin Witness Statement at 6–7, ¶¶27–31.[11]

- An email from Mr. Manfred in 2012, during the 2012 RSDC Hearing, states that a "go[ing] forward" approach to valuation that abandoned the Bortz Methodology does not "really [a]ffect[] a case applying an 'established methodology.'" *See* OMX 30; Orioles/MASN Final Brief at 19.

- The Agreement is meant to compensate the Orioles for the Nationals' move to Washington, D.C., and future license fees from MASN are "the *only* form of compensation they [the Orioles] received under the Agreement." Orioles/MASN Final Brief at 1–2, 6–7, 15; Tr. 511:24–512:22 (Haley).

- The Orioles/MASN contend that the Orioles suffered harmed of "at least $50 million *per year*" when the Nationals relocated to Washington, D.C. *See* Orioles/MASN Final Brief at 6 & n.26. They offer two pieces of evidence. *See id.*

    - The first is a document dated December 21, 2004 from Deloitte suggested that the Orioles stood to lose $21.25 million to $29.8 million in revenue (the "**Deloitte Report**"). *See* Deloitte Report (Rifkin Witness Statement Ex. 2) at 16; *see also* Rifkin Witness Statement ¶17. MASN Chief Financial Officer Michael Haley testified that a Deloitte study estimated harm in "attendance driven revenues" of "[$]21 million and $30 million," and that the harm to "the Orioles' television rights . . . estimated to be $20 million," which he summed up as: "you could say [$]50 million total." Tr. 509:17–510:10 (Haley). It is not clear where Mr. Haley derived the $20 million diminution in the value of television rights. The Deloitte report in the record does not contain it. *See* Rifkin Witness Statement Ex. 2. The Committee notes, however, that the Deloitte Report in the record is labeled "Preliminary Draft — For Discussion Purposes Only."

Mar. 31, 1998); *Ferguson v. Lurie*, No. 89 Civ. 2283, 1991 WL 256869, at *3 (N.D. Ill. Nov. 21, 1991) ("[T]hese papers do not constitute hearsay because they are offered to show defendants' reliance . . . ."); *see also United States v. Yefsky*, 994 F.2d 885, 897 (1st Cir. 1993) (agreeing with parties that it was error to exclude statement: "the evidence was not hearsay because he sought to introduce it only to demonstrate his wife's reliance on the statement and his own lack of intent").

[11] The Nationals' objection to these statement as hearsay, Tr. 511:13–22, is also overruled because these statements are offered for the purpose of explaining the Oriole's purported reliance, and not for the truth of the matter asserted—*i.e.*, what MASN's margin was for a given year. *See supra* n.10.

- The second piece of evidence is an August 20, 2004 letter from Mr. Wyche to Mr. Angelos, estimating that if the Nationals moved to Dulles, Virginia, the Orioles would suffer about $43 million in annual lost revenue, 2007–2015 ("**8/20/04 Wyche Letter**"). *See* 8/20/04 Wyche Letter (OMX 39) at 1–2. The same letter also estimated that if the Nationals moved to Norfolk, Virginia, the Orioles would suffer $12.5 million in annual lost revenue, 2007–2015. *See id.* The 8/20/2014 letter states that it is a "Draft"; that it is "Confidential Attorney Work Product." *See id.* Mr. Wyche did not include these figures, or any other estimate of annual harm, in either of his expert reports in this case.

- A letter from Mr. Manfred dated December 14, 2010, describing "the methodology used by the Revenue Sharing Definitions Committee . . . to review Clubs' related-party transactions with regional sports networks," states that: "The process generally involves two steps. First, the Committee retains the Bortz Media & Sports Group to reconstruct a broadcast entity's income statement based on financial information provided by its related-party Club. . . . Second, the Committee considers the Bortz estimate . . . before recommending an adjustment or other corrective action. . . ." Orioles/MASN Brief at 19 (citing Letter of Mr. Manfred to Alan Rifkin (the "**2010 Letter**") (OMX 16) at 1).

The Nationals take a contrary view of the extrinsic evidence. *First*, the Nationals point to the statements of Peter Angelos to a Committee of the House of Representatives in 2006, in which he said:

> If at any time the Nationals would be dissatisfied with the fee structure, the rights fee structure, they have a right to complain to Major League Baseball and demand that a survey be made to guarantee that fair market value payments are being made for the rights fees for the rights to their games.

Statement of Peter Angelos at Hearing before the House Committee on Government Reform, 109th Congress, Second Session, Serial No. 109-152 (NX 16) at 42 (Apr. 7, 2006); *see* Nationals Final Brief at 19, ¶37.

Second, the Nationals dispute the import of certain of the extrinsic evidence offered by the Orioles/MASN, noting, among other things, that:

- The March 25, 2005 draft of the Agreement that deleted the reference to comparable teams and transactions also deleted a reference to the "actual operating results," which all parties acknowledge must be considered. *See* Nationals Final Brief at 18, ¶35; *see* 3/25/05 11:45 p.m. Draft (OMX 44) at 8.

- The communications between Messrs. Manfred and Rifkin in 2010 and 2011 demonstrate the lack of a strongly held belief on the part of Mr. Rifkin as to the nature of the "established

methodology"—else, there was no reason for him to be asking what "established methodology" meant. *See* Nationals Final Brief at 19, ¶38.

Third, the Nationals point out that whatever pre-agreement understanding may have been discussed between the Orioles and MLB in 2005, it was not written into the agreement so cannot have been clear to the Nationals' current owners, who purchased the team in 2006. *See* Nationals Final Brief at 4–5, ¶9.

The Committee concludes that much of the extrinsic evidence offered by the parties is itself largely ambiguous.

First, that MLB sent the 16th and 18th RSDC Reports to the Orioles showing what the RSDC was doing in 2005 can be equally interpreted as a description of (a) what the RSDC would always do or (b) what the RSDC was doing at the time across the industry. The Committee notes the absence of any promise that there would never be a change.[12]

Second, the 3/25/05 11:45 p.m. draft of the Agreement deleted not only the reference to "rights fees of comparable markets" but also to "the RSN's actual operating results." *See* OMX 44 at 8 (§ 2.I(ii)). If deletions are deemed to indicate what the parties did not intend, then it would be equally improper to apply either a comparable-teams analysis *or* the Bortz Methodology because the latter requires consideration of "actual operating results." Overall, these deletions seem to suggest that the Agreement was meant to allow the RSDC maximum freedom in the methodology it would use, rather than to prescribe a specific valuation approach.

[12] The Nationals correctly point out that the Nationals' current owners were not involved in the negotiations of the Agreement, but the Nationals' predecessor in interest was a party to the Agreement and therefore to its negotiations. The Nationals have not pointed to—nor is the Committee aware of—any law suggesting that extrinsic evidence of contractual intent is inadmissible to interpret an ambiguous contract due to a subsequent change in ownership of an entity or inapplicable to a successor-in-interest.

Third, while it is evident that the Agreement had a compensatory purpose, the Orioles/MASN have received substantial compensation, such that it is ambiguous, at best, as to whether that purpose should have any impact the setting of telecast rights fees or the interpretation of the phrase "established methodology." The Orioles have been compensated in several ways under the Agreement, including the following:

- The Orioles received a $150 million capital account at MASN without contributing any cash, while MLB (then the owner of the Nationals) contributed $75 million in return for a capital account of $75 million. *See* 3/28/05 Agreement (OMX 1) § 2.P.1; Tr. 538:10 (Haley).
- The Orioles received a franchise-value sales guarantee of $365 million, which was more than twice the price at which Mr. Angelos purchased the Orioles in 1993 ($173 million). *See* 3/28/05 Agreement (OMX 1) § 1.A–C; Tr. 536:21–537:11 (Haley).
- The Orioles received super-majority ownership in, and the permanent right to manage, MASN. 3/28/05 Agreement (OMX 1) §§ 2.O, 2.N.
- The Orioles received the right to telecast all of the Nationals' games in perpetuity through MASN. 3/28/05 Agreement (OMX 1) § 2.D.
- The Agreement guarantees the Orioles the same license fees as the Nationals. 3/28/05 Agreement (OMX 1) §§ 2.G, 2.J.3.
- From 2007 through 2011, the Orioles received at least approximately $239.9 million in license fees and equity distributions from MASN, while the Nationals received $188.1 million.[13]

The Orioles/MASN's argument that the Agreement had a compensatory purpose does not answer the question of how much the Orioles should be compensated or how, if at all, that

[13] The Orioles' games for 2005–2006 were shown on Comcast, *see* Sandomir article, *supra*, and the $239.3 million total for the Orioles does not include the sums that the team received from Comcast for those years. License fees for the years 2007–2011 for the Orioles and 2005–2011 for the Nationals are set by § 2.G of the 3/28/05 Agreement (OMX 1). These equity distributions set forth above are based in part on NX 43. As noted above in note 5, the Orioles/MASN have not disputed the Nationals' calculations and have not offered competing ones.

purpose should influence a determination of license fees that are to be based on "fair market value."

In light of the uncertain source of the claim that the Orioles suffered at least $50 million per year in losses, *see* pages 19–20, *supra*; Orioles/MASN Final Brief at 6, the Committee cannot credit it. The Deloitte Report and the 8/20/04 Wyche Letter are each labeled "Draft." *See* Rifkin Witness Statement Ex. 2; OMX 39. By their terms, therefore, they are not final analyses, and they are not supported by expert testimony in this case. They instead constitute out of court statements that are hearsay to the extent that offered for the truth of what they assert—as proof of the harm actually suffered by the Orioles from the Nationals' relocation.

The Committee agrees with the Orioles/MASN that the value of the Orioles' super-majority ownership of MASN depends on MASN's profitability. *See* Orioles/MASN Final Brief at 1–2, 6–7; *see, e.g.*, OMX 34 (estimating income, loss, and cash flow for MASN using the Nationals' proposed license fees). The Committee also agrees that the level of telecast rights fees is a substantial factor in determining how profitable MASN can be. However, the Agreement has already provided the Orioles with substantial compensation, and the Agreement does not require that telecast fees be set at a level each year that guarantees MASN a profit, much less any particular amount or percentage of profit. It requires that they be set at "fair market value." Agreement (OMX 1) § 2.J.3.

The Committee appreciates that Orioles/MASN's proposed methodology, the Bortz Methodology, explicitly takes into account MASN's profitability. But, as will be shown in § II.G.1, the Bortz Methodology is sensitive to changes in inputs. There is too wide an inferential gap between saying that the 3/28/05 Agreement intended to provide the Orioles with

compensation and saying that the 3/28/05 Agreement requires that the Orioles be compensated in the form of a particular profit margin.

The remaining extrinsic evidence is also largely ambiguous:

- Mr. Angelos' testimony in Congress is ambiguous because all he says is that a "survey" could be made, but he never explains what would be surveyed or what the result of the survey would be. He does not develop the point. *See* NX 16.

- The projections that Allen & Co. furnished the Orioles before the 3/28/05 Agreement were not referenced or incorporated in the Agreement and projected numerous things incorrectly—for example total revenue for 2015 was projected to $171 million while final revenue was $190 million, and it assumed license fee payments in 2015 of $28 million dollars to each team. *See* Allen & Co. Projections (OMX 19); Wyche/Bortz Report at Appendix B (MASN's actual financials).

- The 2012 emails between Mr. Manfred and David Frederick, Esq. (Orioles/MASN's counsel at the 2012 Hearing), on which Mr. Rifkin was copied (OMX 30), are ambiguous:

    - Mr. Manfred does say that the "go[ing] forward" view articulated by the RSDC should not "[a]ffect[] a case applying an 'established methodology.'" OMX 30.

    - At the same time, Mr. Manfred was refusing to give the Orioles/MASN examples of recent Bortz Methodology reports on the ground that they were not relevant to the present dispute—which he said did not involve applying the Bortz Methodology. *Id.*

    - Mr. Manfred explained that of the two recent Bortz analyses, one was done because of a specific "contractual overlay" and the other was done "because in the time period at issue other clubs were evaluated by [B]ortz and we thought it was unfair to shift the analysis used for different clubs." *See id.* ("We did not want to use a different analysis for different clubs in the same time period."). This indicates that the Bortz Methodology was being applied to earlier revenue sharing years, but not to 2012 and later.

    - Mr. Frederick, in his reply, indicated his understanding that Mr. Manfred was communicating that the Bortz Methodology was no longer in use because he continues to argue that the Bortz Methodology must be applied to the RSDC's analysis, rather than simply agreeing with Mr. Manfred (which he would have done had he interpreted Mr. Manfred as saying that Bortz would be used in this telecast rights determination). *See id.* ("Thus, that Bortz approach must be applied in our case and the RSDC cannot cherry-pick a new methodology and make it applicable to MASN. Whether or not the RSDC has moved away from the Bortz-style margin analysis years after the execution of the Settlement Agreement is not relevant.").

- The Committee cannot draw a conclusion about what the term "established methodology" means from these terse and ambiguous statements made seven years after the 3/28/05 Agreement was signed.

The Committee finds persuasive the actions of the Orioles/MASN's counsel, Mr. Rifkin, who (1) in 2010 "request[ed] . . . information concerning the methodology used by the Revenue Sharing Definitions Committee . . . to review Clubs' related-party transactions with regional sports networks," 2010 Letter (OMX 16) at 1, and (2) again in 2011 "asked for information regarding the Revenue Sharing Definitions Committee's 'established methodology for evaluating all other related party telecast agreements in the industry.'" 2011 Letter (NX 55) at 1. On both occasions—in 2010 and again in 2011—Mr. Rifkin was told that the RSDC would employ a methodology different from Bortz. OMX 16 at 2; NX 55 at 1. On neither occasion did Mr. Rifkin object.[14] This may be due to the fact that the 16th and 18th Reports are not as straightforward as the Orioles/MASN currently maintain. Although the 16th Report has broad language about preferring the Bortz Methodology to analysis of comparable teams' agreements, the specific comparable agreement excluded from analysis was *one* other agreement whose structure was somewhat different from that of the agreement under scrutiny. *See* 16th Report (OMX 4) at 7–8. The 18th Report also used broad language to disclaim reliance on comparable teams and transactions, but it also did include in its analysis a check on the Bortz Methodology that took the form of a sample of teams specifically selected by the RSDC. *See* 18th Report (OMX 3) at 7–8.

[14] At the hearing, Mr. Rifkin testified that he wrote a letter objecting to Mr. Manfred's 2011 Letter. Tr. 596:25–597:18. That letter was never produced or offered into evidence by the Orioles/MASN, even though it would be favorable evidence within the Orioles/MASN's ability to produce—if it existed. The Committee therefore draws the adverse inference that no such letter exists and rejects this testimony as incredible. *Cf. Hricko v. State*, 759 A.2d 1107, 1134 (Md. Ct. Spec. App. 2000) ("Like the dog that did not bark in the night in Holmes's 'Silver Blaze,' the utter absence of evidence may proclaim guilt as loudly as any affirmative clue.").

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The language of the 3/28/05 Agreement also supports the view that the "established methodology" could change. The term *established*—though indicating that there is some past time in which a methodology was established—does not necessarily refer to the past time before the parties signed the 3/28/05 Agreement. It can also refer to the time preceding the date a valuation is undertaken. For example, in § 2.J.3, "established' is also used in the sentence: "The fair market value of the rights **established** pursuant to this Subsection for the relevant five year period . . . shall be final and binding . . . ." Here the term *established* is used to mean something that is established for a particular five-year period, not perpetually.

Tellingly, § 2.J.3 requires that the "established methodology" be the methodology used "for evaluating all other related party telecast agreements in the industry." *See* 3/28/05 Agreement (OMX 1) § 2.J.3. The parties agree that the 3/28/05 Agreement is perpetual. *See* Tr. 602:4–17 (Neuwirth summation); *id*. 633:9–20 (Webster summation). If the 3/28/05 Agreement is interpreted to require using the Bortz Methodology long after the Bortz Methodology is no longer in use for "evaluating all other related party telecast agreements in the industry," it would require reading this requirement out of the Agreement—or require this Committee to insert the words "as of today" after the word "evaluating."

The law is clear that the term established can mean something that is *established* at a given time, rather than once and for all. One of the cases cited by the Orioles/MASN, *Dixon v. Board of Supervisors*, 222 A.2d 371, 373–74 (Md. 1966) (cited at Orioles/MASN Final Brief at 14 & n.50), held that an electoral boundary was "established" less than a year prior to the decision. In other words, the law is consistent with "established" meaning something that has been established *recently* and which may replace an earlier established form.

Thus, the Committee concludes the most reasonable interpretation of the phrase "established methodology," *see Calomiris*, 727 A.2d at 368, and the weight of the evidence in this case, both lead to the conclusion that "established methodology" in this perpetual contract refers to a methodology that the RSDC uses for all other telecast agreements at the time that license fees are determined under § 2.J.3. *Cf.* Ruling of the Administrator on the 34th Report (NX 3) at 1–2. Among other things, it would unreasonable to conclude on this record that the parties in 2005 intended to compel an RSDC sitting 20, 50 or 75 years in the future to use an unstated methodology that was in use in 2005 while at the same time explicitly requiring that RSDC to employ the established methodology it was "using ... for evaluating all other related party telecast agreements in the industry." Agreement (OMX 1) § 2.J.3.

The Committee concludes that the applicable methodology is the methodology set forth in the 2011 Letter. *First*, this methodology was supplied to the parties well in advance of the 2012 RSDC Hearing, and neither party objected contemporaneously. The first objection was not recorded until April of 2012, in connection with the 2012 RSDC Hearing. *See* OMX 30. *Second*, as the Nationals point out, the methodology described in the 2011 Letter is substantially the same as that set forth in the 34th Report. Nationals Final Brief at 1–2, ¶3. This is important because the Agreement's § 2.J.3 requires this Committee to apply the "established methodology" that is used "for evaluating all other related party telecast agreements in the industry." The 34th Report (NX 3), as modified by the Administrator's ruling, though released in late 2012 and then modified by the Administrator in early 2013, applies to all transactions including those beginning with the 2012 revenue-sharing year. *See* Ruling of the Administrator on the 34th Report (NX 3) at 1. Because the 34th Report and the 2011 Letter express the same methodology for all practical purposes, this Committee does not need to resolve whether to use the 34th Report in light of the

fact that neither the previous Committee nor the Parties had access to this Report at the time of the 2012 RSDC Hearing.

The 2011 Letter's approach, like the methodology set forth in the 34th Report, includes an analysis of comparable transactions. Nationals Final Brief at 1–2, ¶3. However, and most importantly for this Committee, both the 2011 Letter and the 34th Report also include a bottom-up analysis: The 2011 Letter, includes as a factor "a third-part[y] valuation expert to estimate a Club's appropriate rights fee by way of a bottom-up evaluation of the related-party entity's operating income." NX 55. This sounds very much like the Bortz Methodology. The 34th Report also includes a "review" of "the income statement of the RSN," and "make[s] assumptions regarding the expected operating margin of the RSN." NX 3 at 6. This too, more or less, describes the Bortz Methodology.[15] The primary difference between the two approaches is that the 34th Report uses an unspecified econometric model and considers the facts and circumstances of a given deal to determine whether it is a market-value deal. Neither of these two factors is central to the disagreement between the parties.[16]

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[15] The Committee notes that, although the parties do not discuss this, two of the more recent RSDC reports in evidence apply a bottom-up analysis of an RSN's financials to determine if the license fees paid by that RSN are set at fair market value. *See* 39th Report (NX 47) at 12–14; 38th Report (NX 13) at 8–14.

[16] The 34th Report's analysis of the history of the agreement at issue actually entails considering a proposed license fee in light of the negotiation of that license fee, to see if it is the result of arm's-length bargaining. *See* 34th Report (NX 3) at 7 ("The RSDC will consider facts relating to the Club's negotiation of its rights fee agreement that the RSDC or the Club believes are relevant to a determination of whether the rights fee is of fair market value."). The license fees that MASN paid to the Nationals for the years 2012 and thereafter are about the same as those that it proposes as fair market value to this Committee now. *Compare* Orioles/MASN Opening Brief at 6, ¶9 n.17 (MASN paid to Nationals amounts determined by Wyche in 2012 Wyche/Bortz Report); 2012 Wyche/Bortz Report at 1 (showing Orioles/MASN proposed license fees from 2012) *with* Wyche/Bortz Report at iv. This suggests that the license fees actually paid were not the result of an arm's length negotiation (which means only that this Committee should not presume that the Orioles/MASN's proposed license fees are market-based). The econometric

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Thus, the Committee concludes that the phrase "established methodology for evaluating all other related party telecast agreements in the industry" in § 2.J.3 of the Agreement is the methodology that the RSDC used to evaluate other telecast agreements in 2012, at the time of the initial hearing in this dispute. Specifically, this methodology requires that the Committee consider both a bottom-up, Bortz-style analysis and look at comparable teams' transactions.

G. What Is the Fair Market Value of the Rights?

The Committee has therefore determined that the correct approach is to perform both a bottom-up, Bortz-style analysis and to perform a comparable-teams analysis. The Orioles/MASN apply the Bortz Methodology using certain assumptions that the Nationals criticize. The Orioles/MASN also contend that a comparison of similarly-situated teams' license fees supports their analysis. The Nationals, in turn, base their analysis on comparisons to a different sample of comparable teams. This Committee has considered the calculations of both parties, and for the reasons stated below, finds neither entirely persuasive. The parties' proposals, their critiques of each other's proposal, and the Committee's conclusion follow.

1. The Bottom-Up, Bortz Methodology

The Bortz Methodology's bottom-up approach is the preferred method of the Orioles/MASN. *See* Orioles/MASN Final Brief at 21–23. The Orioles/MASN's expert, Mark C. Wyche, applied it to the actual income statement of MASN for 2012–2016 using certain assumptions, and he obtained the following result:

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model referenced in the 34th Report has fallen into disuse. *See* 39th Report (NX 47) at 15 n.6. Unlike other factors listed in the 34th Report, the econometric model has not been uniformly applied to revenue sharing years 2012 and on. *Compare* 38th Report (NX 13) at 14 (applying econometric model to revenue sharing year 2012), *with* 39th Report (NX 47) at 15 n.6 (declining to apply econometric model to revenue sharing years 2012–2018).

Year	2012	2013	2014	2015	2016	Average
License Fee (millions)	$34.5	$39.3	$40.9	$43.0	$44.3	**$40.4**

See Wyche/Bortz Report at iv. This analysis is premised on the following assumptions:

- The margin between baseball revenue and baseball expenses (including license fees)—*i.e.*, the operating margin—should be 20%.
- 80% of affiliate revenues and 93.2% of direct advertising revenue should be considered baseball-related.
- About 88% of expenses should be considered baseball-related. (Note that Mr. Wyche broke down all expense categories and assigned them either 80% or 100% to baseball. The weighted average was about 88% for the period 2012–2016.)

Orioles/MASN Opening Brief at 29–31, ¶¶47–52; Tr. 450:16–453:13 (Wyche); Wyche/Bortz Report at 5–7 & Appendix A.

The Nationals criticize the Orioles/MASN's bottom-up analysis on two primary grounds. *First*, the Nationals contend that a margin of 20% should not be presumed. *See* Nationals Final Brief at 31–33, ¶¶64–67. The Nationals argue that nothing in the Agreement requires such a margin. *Id.* at 31, ¶64. The Nationals also contend that lower margins have been accepted by this Committee, *id.*, and by the industry when companies are in a start-up phase, which the Nationals liken to any point when an RSN's license fee agreement with a team is renewed. *See id.* at 31–32, ¶¶65–67. *Second*, the Nationals argue 100% of all revenues should be allocated to baseball programming because no RSN can actually bargain for higher affiliate fees or direct advertising revenues based on its shoulder programming. *See id.* at 33–34, ¶¶68–69. The Nationals' expert, Chris Bevilacqua, calculated that a bottom-up analysis that allocated all expenses and revenues to baseball, using operating margins of five percent and negative five percent produced license fees of $64.2 million and $73.4 million. *See* Bevilacqua Report at 44–45, ¶106 & n.100; NX 48.

The assumptions used in applying the Bortz Methodology are key. The Committee's analysis of Mr. Wyche's figures, for example, shows that if all revenues and expenses are allocated to baseball, and if a 0% operating margin is presumed, the result is an average license fee of approximately $69.4 million, which is about 70% higher than the Orioles/MASN average annual proposed license fee of $40.4 million, based on their application of the Bortz Methodology using different assumptions.

This makes it imperative for the Committee to explore the logic of the assumptions. The Committee finds that neither the 16th nor the 18th Report states that the Bortz Methodology requires either a specific allocation of revenues and expenses to baseball or a particular operating margin. Neither report even references any percentage allocation of revenues and expenses to baseball. The 16th Report mentions a 30% margin used by Bortz, while the Chicago Cubs tried to persuade the RSDC that the license fees proposed by Bortz were *too high* (suggesting that the implied margin sought by the Cubs was even higher than Bortz's 30% because that would have led to *lower* license fees than Bortz proposed). 16th Report (OMX 4) at 6. The 18th Report uses a 20% operating margin to explain why the RSDC declined to adopt the even lower license fees proposed by the Red Sox and the expert Houlihan Lokey (whose proposal assumed a 30% operating margin). *See* 18th Report (OMX 3) at 10–11 & n.6.

The Committee agrees with the Nationals that the 20% operating margin used in the 16th and 18th Reports is more in the nature of a maximum allowed margin than a minimum. *See* Reply Memorandum of the Washington Nationals ("**Nationals Reply Brief**") at 24–25, ¶46 (Sept. 21, 2018).

To support their assumptions, the Orioles/MASN rely on the testimony of their valuation expert, Mr. Wyche, who is also the creator of the Bortz Methodology. *See* Wyche/Bortz Report

at 5–7; Tr. 450:23–454:16 (Wyche). The Orioles/MASN also rely on the testimony of Leo Hindery, Jr., their industry expert, to corroborate the reasonableness of both the 20% operating margin and the 80% allocation of revenue to baseball programming. *See* Expert Witness Statement of Leo Hindery, Jr. ("**Hindery Report**") at 4–6, ¶¶7–14 (Aug. 10, 2018); Tr. 205:19–23, 258:2–9 (Hindery). The Nationals counter with their industry expert, Melinda Witmer, who testified that "[t]ypical 'back drop style' 'shoulder' programming (that is, non-live game programming) represents, at best, trivial value to affiliates of the RSN." Expert Witness Statement of Melinda Witmer ("**Witmer Statement**") at 6, ¶19 (Sept. 21, 2018); Tr., 407:25–412:13 (Witmer). She also testified that agreements between RSNs and Clubs in the market typically did not premise themselves on a particular margin for the RSN. Witmer Statement at 4, ¶14; Tr. 393:25– 395:24 (Witmer).

Weighing all of the evidence and taking into account the industry experience of the Committee members, the Committee concludes that it would be inappropriate to assign a significant portion of MASN's revenues and expenses to anything other than baseball. This is consistent with the testimony of the experts. 235:18–237:13 (Hindery); Tr. 316:16–317:7 (Bevilacqua); Tr. 410:23–412:13 (Witmer); *see also* Tr. 548:5–10 (Haley). Ms. Witmer opined that it is "worthless." Tr. 424:5–8 (Witmer).[17] Ms. Witmer did acknowledge that most RSNs still carry shoulder programming, even if it is a "vestige" of earlier times. *See* Tr.411:14–412:13 (Witmer). Nevertheless, the Committee cannot find any objective support for the relative value of MASN's shoulder programming in this record, which does not include any evidence showing precisely what shoulder programming MASN actually broadcast during 2012–2016. Therefore,

[17] MASN's shoulder programming is identified on its website. *Programming Schedule*, MASN, http://www.masnsports.com/shows-and-programming/ (last visited on Apr. 9, 2019).

based on the evidence and the industry experience of its members, the Committee concludes that it is appropriate to allocate 100% of affiliate fees revenues to baseball. On the other hand, the Committee credits the testimony of Orioles/MASN's expert Mr. Wyche that his allocations of Orioles/MASN's direct advertising revenues (93.2%) and expenses (approximately 88%) to baseball programming are based on MASN's financial documents. *See* Wyche/Bortz Report at 6–7; Tr. 451:14–452:18 (Wyche).

The question of the appropriate margin is closer. The Orioles/MASN's expert, Mr. Wyche, points out that using his proposed license fees would give MASN an EBITDA of about 33% on average, which is in line with industry norms. Wyche/Bortz Report at 13–14; Tr. 455:11–14 (Wyche); *see also* OMX 7 (SNL Kagan data on average operating margins of selected RSNs). The Nationals' respond that networks sometimes have to take on lower margins when they are in a start-up phase. *See* Nationals Final Brief at 31–32, ¶¶64–66. Every expert agreed that networks that are starting up or attempting to conclude a long-term deal with a team would often have lower margins in the immediate aftermath of signing a new deal with a team. *See* Tr. 244:16—248:19 (Hindery); *id.* 318:10–23, 319:16–20 (Bevilacqua); *id.* 396:12–22, 399:4–400:5, 433:5–12 (Witmer); *id.* 456:7–19 (Wyche). On the other hand, MASN has the guaranteed right to all of the Nationals' and Orioles' games, but it must renegotiate these rights every 5 years. *See* 3/28/05 Agreement (OMX 1) §§ 2.D, 2.I. The expert witnesses of both sides agreed that the margins of an RSN tend to be lowest immediately after a reset to a higher license fee and that the margins usually rise after the RSN subsequently resets to higher affiliate fees. *See* Tr. 377:2-14 (Bevilacqua) ("Q. Not only are they [RSNs] a great business, but even though there may have been this paradigm shift you claim, that didn't put a dent in the operating margins that they were earning, did it? A. No. . . . [A]ll the affiliate agreements are getting reset along the way."); Tr.

396:23–397:13 (Witmer) ("[W]here the rights come up for renewal and there's a reset and it's substantial and it drives the margin down. The process then becomes one of elevating the revenue and increasing the revenue in order to be able to . . . achieve better economics."); Tr. 494:2–495:16 (Wyche) ("Any given year that EBITDA margin can drop based on a reset for a major product.").

The Nationals' broader criticism of Mr. Wyche's proposed margins is that other networks appear to make more in affiliate fees, when normalized (per-subscriber, per-game). *See* Nationals Final Brief at 27–28, ¶¶55–56; NX 41. But selecting an appropriate sample of RSNs is tricky. RSNs that show more than 250 games per year, such as MASN tend to have normalized (per-subscriber, per-game) license fees in same neighborhood as MASN. *See* Rebuttal Expert Report of Mark C. Wyche ("**Wyche Reply Report**") at 9–10, ¶21 (Sept. 21, 2018). MASN is one of only two RSNs that show two baseball teams. The other is NBC Sports Chicago, whose normalized (per-subscriber, per-game) affiliate fees are the same. *See* NX 41. Further, the only other RSN in the Baltimore–Washington, D.C., area is NBC Sports Washington, whose normalized (per-subscriber, per-game) affiliate fees are about the same as MASN's. *See id.* Nor do MASN's rates (affiliate fees per subscriber) stand out as particularly low. *See id.*; Wyche/Bortz Report at 4–5.

The Committee's charge is to calculate the "fair market value" of the teams' license fees in five-year increments. This is somewhat challenging for the 2012–2016 period at issue, given, among other things, that MASN's affiliate revenues for this period are significantly determined by a 12-year deal with Comcast, that was entered in 2006, Tr. 508:13–19 (Haley), and the

Committee's simultaneous recognition that the Agreement has a compensatory purpose.[18] Comcast represents a significant portion of MASN's affiliate revenues. *See* Tr. 553:18–554:2 (Haley) ("Comcast is responsible for the majority of the network's revenues—not the majority, but it's the single largest affiliate . . . ."); *see also* Tr. 526:24–527:3 (Haley). Based on the Committee members' experience in the industry, the Committee believes such a long-term deal has the practical effect of putting a ceiling on the license fees that MASN could afford, particularly if MASN were found to be entitled to a guaranteed operating margin along the lines that the Orioles/MASN contend. The Committee finds credible the expert testimony suggesting that MASN's ownership structure creates an unusual set of incentives in negotiation. *See* Tr. 321:23–322:4 (Bevilacqua). While it is true that, as the majority owner of MASN, the Orioles logically always prefer to receive higher revenues than lower, *see* Tr. 577:21–25 (Haley), the Orioles also must share that revenue with the Nationals—particularly in the form of license fees—which decreases the reward that the Orioles get for taking on the risk of a black-out of MASN. *See* Tr. 329:16–24 (Bevilacqua); Tr. 507:3–23 (Haley). For every $1 that a privately-owned or single-team owned RSN can hope to get in return for a risky fight with an affiliate that could end in a black-out, the Orioles only get between 50 cents (if that revenue is converted to license fees) and something for present purposes over 80 cents (if it is converted to MASN profits). *See* Wyche/Bortz Report at Appendix C (showing Nationals interest in MASN profits 2012–2016); NX 43 (same).

[18] The Committee observes that it would be difficult to reconcile the Agreement's compensatory purpose with the value of the license fees the Nationals propose. If awarded, that level of fees would have the effect of forcing MASN to operate at a roughly $50 million per year loss, 2012–2016. *See* Pre-Hearing Reply Submission of Mid-Atlantic Sports Network and the Baltimore Orioles at 1 (Sept. 21, 2018); OMX 34.

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Moreover, as previously discussed, a reset with an affiliate is one way that an RSN is able to raise its margin, especially after it enters into a new deal with a team for higher license fees. *See* Tr. 377:2-14 (Bevilacqua); Tr. 396:23–397:13 (Witmer); Tr. 494:2–495:16 (Wyche). Yet here, MASN has forgone its ability to reset its affiliate fees with Comcast around 2012, even though it had to reset its license fees with the Nationals and the Orioles in 2012.

Weighing all of the evidence and arguments, and viewing them through the prism of the Committee members' substantial experience in the industry, this Committee believes that an RSN would normally be able to reset its affiliate fees after resetting its license fees, achieving higher margins as the years pass from its deal with a team for license fees. Therefore, taking into account this economic reality, the Committee finds that most appropriate operating margin to apply to MASN would be an increasing margin that starts at zero in 2012 and increases by 5% each year until it reaches 20% in 2016.[19] An increasing operating margin implies decreasing license fees (all other things assumed to be equal). Applying such an operating margin to

[19] The Nationals contend that MASN could afford higher license fees if it "earned just *average* affiliate revenues for a market its size." Nationals Final Brief at 9–10, ¶18. The Committee notes that the Orioles/MASN's expert Leo Hindery, Jr., acknowledged on direct examination that, with respect to affiliate fees, "MASN is a little undernourished." Tr. 220:13 (Hindery). But the Nationals' figures do not bear out its contention. MASN's per-subscriber affiliate fees are within the range of other RSNs. *See* NX 41; *see also* Wyche/Bortz Report at 4–5. It is true that MASN's affiliate fees when normalized per-game, per-subscriber are $0.09 and so lower than those of many RSNs, but it also true that the only other RSN with two baseball teams, NBC Sports Chicago, has the same normalized affiliate fees, and that the only other RSN in the same geographic area as MASN, NBC Sports Washington, receives about the same normalized fees—namely, $0.10. *See* NX 41. Nor could the Nationals' expert, Mr. Bevilacqua, offer an opinion on what exactly MASN could have done to achieve higher fees and whether it was actually possible to do so. *See* Tr. 336:6–9 (Bevilacqua) ("Q. And you have no basis to say that they should have made that extra 700 million, do you? A. I can't tell you they should or they shouldn't have."). This Committee will not opine on whether MASN should or should not be earning higher affiliate fees, nor does it put any weight on this factor in determining the fair market value of the license fees at issue.

MASN's income statement yields license fees that fall in most years. *See* Wyche/Bortz Report at Appendix A.

Applying this operating margin and allocating 100% of all of MASN's affiliate revenues to baseball (while using the Orioles/MASN's assumptions for allocation of direct advertising revenue and expenses), the Committee finds that the result of the Bortz Methodology is:[20]

Year	License Fee
2012	$62,680,542.50
2013	$64,707,733.18
2014	$63,562,739.43
2015	$60,746,463.02
2016	$57,640,572.70
Average Annual Value	$61,867,610.16

2. The Comparable Teams Approach

The Nationals' expert focused on comparable metrics and produced a total of six. The Nationals used a sample of six teams to produce *four* of those metrics. *See* Bevilacqua Report at 33–36, ¶¶77–82. The Nationals also produced two more metrics, using different samples. *See id.* at 38–39, ¶¶89, 92.

The Nationals' primary analysis focused on the six teams that the Nationals considered comparable. These were the New York Yankees, the Los Angeles Dodgers and Angels, the Texas Rangers, the Houston Astros, and the Philadelphia Phillies. *See* Nationals Final Brief at 25, ¶50; Bevilacqua Report at 6–7, ¶18. The Nationals presented two rationales for selecting these teams: all had entered deals in or after 2010, and all occupied "top-10 media markets." Nationals Final Brief at 9, 25, ¶¶17, 50; Bevilacqua Report at 6–7, ¶18; *see also* Tr. 291:23–292:16 (Bevilacqua). Additionally, five of the six teams were in "two-Club markets." *See*

[20] The Committee uses MASN's operating results shown in Appendix A of the Wyche/Bortz Report.

Nationals Final Brief at 25, ¶50 n.134; Bevilacqua Report at 30, ¶70; Tr. 292:23–25 (Bevilacqua).

Most of the Nationals' expert analysis was focused on these six teams. The first analysis appear to have been presented principally for illustrative purposes. The Nationals offered an average of their sample teams' license fees, with a twist—backcasting: All of the agreements of their sample teams other than the Yankees started after 2012 (*i.e.*, in 2013, 2014, 2015 or 2016). The Nationals replaced the license fees actually paid by the team in the years prior to the year the new deal was effective with a new license fee based on the later-entered transaction, discounted back by 4% per year. *See* Bevilacqua Report at 32, ¶74; NX 33; *see also* Tr. 296:19–297:23 (Bevilacqua). Thus, for example, if a deal took effect in 2015, as it did for the Texas Rangers, the Nationals used the new contractual values for 2015–2016 and backcast for 2012, 2013 and 2014. *See* NX 33. This has a large impact on the license fees attributed to some teams. For example, the Dodger's actual Net Defined Local Revenue ("**NDLR**") income in 2012 was $34.8 million, but with backcasting it became $104.8 million. *See id.* This analysis produced an illustrative metric: an average license annual license fee of $93.1 million. Nationals Final Brief at 26, ¶53. Notably, without backcasting the same teams produced average license fees of only $71.8 million. *See* NX 33.

The Nationals' *primary* analysis involved even more backcasting. The Nationals normalized each of their sample teams' license fees in 2016, applied those fees to the Baltimore–Washington, D.C., DMA in 2016, and then used an annual 4% discount to backcast the license fees for 2012–2015. Bevilacqua Report at 34–35, ¶¶79–80; NX 34. This produced an average annual license fee of $92.9 million. Pre-Hearing Submission of the Washington Nationals Baseball Club ("**Nationals Opening Brief**") at 42, ¶93 (Aug. 10, 2018); Bevilacqua Report at

35, ¶80; *see also* Tr. 298:5–20 (Bevilacqua). This normalization used the two teams' DMAs' data on households with pay-tv subscriptions in each DMA. *See* Bevilacqua Report at 14–15, 34–35, ¶¶33, 79–80.

The Nationals repeated this analysis by normalizing to each team's home television territory ("**HTT**") (rather than DMA, as previously) and produced an average annual license fee of $121.6 million. Bevilacqua Report at 35, ¶81 & n.80; NX 35.[21] The Nationals also used a third population statistic, RSN subscriber numbers, to normalize license fees, and got an average license fee of $106.9 million. Bevilacqua Report at 36, ¶82; NX 38.[22] Thus, the Nationals extracted four metrics from their six-team sample.

The Nationals also extracted a normalized license fee from the fees adjusted by the RSDC in its 38th Report for the Boston Red Sox and applied those normalized fees to the Baltimore–Washington, D.C., DMAs in 2016 (backcasting to 2012). Bevilacqua Report at 36–38, ¶¶85–89; Tr. 300:20–301:8 (Bevilacqua); NX 39. This produced an average annual license fee of $96.5 million. *See id.*

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[21] Regarding HTT, Mr. Bevilacqua commented that "the RSDC in its 38th Report indicated the entire metric [HTT] showed a lower correlation to local television rights fees than other metrics, such as the number of Pay-TV subscribers in the Club's Core DMA." Bevilacqua Report at 35, ¶81 n.80 (citing 38th Report (NX 13) at 5–6). However, Mr. Bevilacqua did not offer a rationale for the use of this demographic, except to say that he "believe[s] this figure represents a credible data point." *Id.* This is, therefore, nothing more than *ipse dixit* (*i.e.*, something asserted but not proved). *See Rochkind v. Stevenson*, 164 A.3d 254, 261 (Md. 2017) ("[N]othing . . . requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.") (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)); *Blue v. Univ. of Md. Med. Sys. Corp.*, No. 24C10-006438, 2011 Md. Cir. Ct. LEXIS 252, at *3–4 (Md. Cir. Ct. Balt. Cty. Oct. 12, 2011) ("[*I*]*pse dixit* opinions are inadmissible.").

[22] The method for doing this was slightly different. The Nationals normalized license fees for each year, took annual averages, and applied those to the MASN subscriber numbers for each of 2012–2016. *See* NX 38. The Committee has not been able to replicate these particular calculations based on the information that the Nationals provided, but notes that the Orioles/MASN did not expressly challenge them.

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Last, the Nationals looked at four teams outside the top-10 markets—the San Diego Padres, the Cleveland Indians, the Seattle Mariners, and Arizona Diamondbacks. Bevilacqua Report at 38, ¶90; NX 40; Tr. 302:2–303:9 (Bevilacqua). All of these teams had signed deals after 2010. *Id.* The Nationals used these teams' data in an analysis analogous to their primary comparison of their six teams (*i.e.*, normalizing to 2016 and backcasting) to produce a result similar to their primary analysis, though a much larger number: $128.4 million. *Id.*

Ultimately, the Nationals proposed the following license fees, as supported by their above-described six metrics:

Year	**2012**	**2013**	**2014**	**2015**	**2016**	**Average**
License Fee (millions)	$87.7	$91.2	$94.9	$98.6	$102.6	**$95.0**

Nationals Opening Brief at 47, ¶103; *see also* Tr. 303:17–24, 322:7–13 (Bevilacqua).

The Orioles/MASN heavily critiqued Mr. Bevilacqua's analysis. Among other things, the Orioles/MASN argued that the Nationals' sample was not representative, and that any backcasting was inappropriate. MASN/Orioles Final Brief at 33. The Orioles/MASN proposed a sample of all teams with shared markets, without backcasting, coming to a normalized *median* license fee of $0.112 per game, per-subscriber. Wyche/Bortz Report at 9–10 & Appendix D. The Nationals asserted that the *average* of the sample proposed by the Orioles/MASN was, therefore, actually $0.121. *See* Reply Report of Chris Bevilacqua ("**Bevilacqua Reply Report**") at 26–27, ¶50 (Sept. 21, 2018). The Nationals' proposed that the average license fee of $95.0 million, normalized to per-subscriber, per-game is about $0.193.[23]

[23] Although the Nationals did not provide this metric, the Committee was able to calculate it by dividing the proposed $95 million by 150 games and the average number of households in the combined Washington, D.C., and Baltimore DMA. *See* NX 12.

The Orioles/MASN disagree with Mr. Bevilacqua's normalization method. They urge that the license fees of the Nationals should be normalized to the DMA of Washington, D.C., rather than that of the combined DMAs of Washington and Baltimore. The DMA of Washington, D.C., is about 2.2 million. NX 12. The DMA of Baltimore is about 1 million. *Id.* This brings to a head the parties' disagreements about the effect of § 2.K of the Agreement. Using the Orioles/MASN's methodology, their proposed license fee for the Nationals is normalized to $0.119 using only the DMA of Washington, D.C., *see* Wyche/Bortz Report at 9–10, but normalized to only $0.0823 using the combined DMA. *See* Bevilacqua Reply Report at 23–24, ¶44.

The parties agree that the Orioles and Nationals share a market, Bevilacqua Report at 30, ¶70; Tr. 462:4–18 (Wyche), even as they disagree on the import of § 2.K and whether it requires that the Nationals and Orioles be treated as having the same DMA. *See* Nationals Final Brief at 22–23, ¶45 (quoting 3/28/05 Agreement (OMX 1) § 2.K); Orioles/MASN Final Brief at 31–32.

The resolution of this dispute is important both in order to be able to normalize license fees and to select the correct sample of teams.

- There are currently eight teams in four markets that share the same DMA with another team: the New York Yankees and Mets, the Los Angeles Dodgers and Angels, the Chicago White Sox and Cubs, and the San Francisco Giants and Oakland Athletics.
- There are also four teams that are considered to share a market but not a DMA with each other: the Tampa Bay Rays and Miami Marlins, and the Houston Astros and Texas Rangers (in Dallas).[24]

The Orioles/MASN suggest that the correct sample of teams consists of those in shared markets, regardless of whether they share a DMA. *See* Wyche/Bortz Report at 9–10. The

[24] *See* NX 12.

Orioles/MASN point out that MLB's documents indicate that Washington, D.C., and Baltimore are separate DMAs,[25] and, as noted, their expert, Mr. Wyche, treats Washington, D.C. and Baltimore as separate DMAs. *See* Wyche/Bortz Report at 9.

However, the Committee has already determined that § 2.K is unambiguous and requires that, "[f]or all purposes of determining the amount of the appropriate rights fees . . . the entire Television Territory shall be analyzed and examined as if the Television Territory were a unified territory in all respects, that is, the same geographic territory, the same DMAs, the same number of households treated as a single television market." 3/28/05 Agreement (OMX 1) § 2.K.

The Committee therefore concludes that the Orioles and Nationals should be treated as having "the same DMAs and the same number of households," as § 2.K requires.[26] Further, a geographic comparison suggests that the Nationals and Orioles are much more akin to two teams in the same DMA than two teams that merely share a market. This Committee takes notice of the following distances, by road, between the stadiums of teams in the same DMA:

- New York: 9 miles between New York Yankees' and Mets' stadiums,
- Los Angeles: 31 miles between Los Angeles Dodgers' and Angels' stadiums,
- Chicago: 10 miles between Chicago Cubs' and White Sox' stadiums, and
- San Francisco: 15 miles between San Francisco Giants' and Oakland Athletics' stadiums.

By comparison, the teams identified as sharing markets but not DMAs are an order of magnitude further apart:

- Tampa Bay Rays and Miami Marlins are 265 miles apart.

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[25] *See* NX 14; Tr. 360:11–363:10 (Bevilacqua) (admitting on cross-examination that NX 14, an MLB document created in 2017, assigned different DMAs to the Nationals and Orioles.

[26] The Committee observes that the parties' submissions all treat teams in shared DMAs as having the same population statistics, while treating teams with different DMAs as having different population statistics. *See* NX 34; Wyche/Bortz Report at Appendix D.

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- Houston Astros and Texas Rangers (in Dallas) are 259 miles apart

The Orioles/MASN argue that the reason for the 3/28/05 Agreement in the first place was to address the harm to the Orioles from the move of the Expos to "just 38 miles from Oriole Park at Camden Yards." Orioles/MASN Final Brief at 1. This distance of 38 miles puts the Orioles and Nationals much closer to the range between teams in the same DMA than to teams that merely share markets. Consequently, the Committee agrees with the Nationals and Mr. Bevilacqua that the Orioles and Nationals should be treated as having the same DMA—the sum of the DMAs of Baltimore and Washington, D.C.

The Committee agrees with the Orioles/MASN and Mr. Wyche that the Nationals' sample of teams is selective, in part due to the exclusive focus on transactions occurring in and after 2010. The Committee does not agree with Mr. Bevilacqua's opinion that deals negotiated before 2010 are irrelevant. Indeed, the obvious change in 2010 was the inclusion of equity in an RSN as part of the compensation for a team's telecast rights, but neither party quantified this. Tr. 293:25–294:21, 294:24–298:4 (Bevilacqua); 496:14–20 (Wyche)—and the Nationals already have an equity stake in MASN. *See* 3/28/05 Agreement (OMX 1) § 2.N. The Committee also notes that the 2010 Rangers deal that Mr. Bevilacqua considers to have been record-setting only went into effect in 2015. *See* Bevilacqua Report at 6–7, 30, ¶¶18, 69. Moreover, the Nationals' focus on 2010 led them to ignore other teams in unified markets that had markedly lower license fees—namely, the teams in Chicago and San Francisco, as well as the New York Mets. *Compare* NX 33, *with* Wyche/Bortz Report at Appendix D.

The Committee disagrees with the Mr. Bevilacqua's use of backcasting and cannot assess his methodology for amortizing the signing bonuses because the underlying data were not provided. As discussed above, with backcasting, the Nationals were able to use the relatively high license fees of their sample teams for 2016 and ignore significantly lower license fees

actually received earlier years. *See* NX 33. Mr. Bevilacqua also opined that the way that the signing bonuses are amortized in the NDLR data is incorrect, so he used the underlying data to redistribute the signing bonus payments over more years. *See* Bevilacqua Report at 32–33, ¶¶75–76; *see also* NX 33. This has a large effect on what license fees one can infer from this set of teams:

- Using the Nationals' sample of teams, and applying both backcasting and Bevilacqua's signing bonus amortization, yields an average annual license fee of $92.9 million. *See* Nationals Opening Brief at 42, ¶93; Bevilacqua Report at 35, ¶80; *see also* Tr. 298:5–20 (Bevilacqua).

- The Committee found that by simply removing Mr. Bevilacqua's signing bonus amortization—thus, reverting to the basic figures provided by the NDLR—even while keeping backcasting yielded average annual license fees of $88.9 million.

- Removing backcasting, but following Mr. Bevilacqua's amortization of signing bonuses, yielded a still lower average annual license fee of $70.6 million.

- Finally, removing backcasting and removing Mr. Bevilacqua's signing bonus normalization yielded an average annual license fee of $68.1 million.

The very large gap between $68.1 million and $92.9 million[27] highlights the importance of backcasting and signing-bonus normalization to the Nationals' analysis.[28] The Committee

[27] The Committee notes that this disparity is consistent with that seen in Mr. Bevilacqua's calculations in NX 33, which show that the average of the Nationals' sample teams' license fees without backcasting, $71.8 million, and the average with backcasting, $93.1 million.

[28] To make the above calculations, the Committee used DMA figures from NX 12, and the data provided by the Nationals for their six-team sample in NX 33. This (except for Bevilacqua's signing bonus amortization) also matches the data provided by the Orioles/MASN. *Compare* NX12 (DMA data), *and* NX 33 (NDLR data), *with* Wyche/Bortz Report at Appendix D (DMA and NDLR data). The Committee calculated a normalized (per-game, per-subscriber) license fee for each of the sample teams and for each year. Then, the Committee applied each year's average normalized fee to the combined DMA of Washington, D.C., and Baltimore for 2012–2016 to reach the implied license fees for the Nationals or Orioles for 2012–2016. For backcasting, the Committee simply used the above approach to calculate the license fee for the Nationals or Orioles for 2016 only, and applied a 4% annual discount back to 2012. *Cf.* Bevilacqua Report at 35, ¶80; NX 34.

finds that the correct measure of a market in a given year is what the market actually paid in that year, not speculation as to what might have been paid in a given year, if transactions had been negotiated earlier.[29] Therefore, the Committee rejects the Nationals' use of backcasting.

The Committee cannot analyze or verify Mr. Bevilacqua's amortization of signing bonuses, or meaningfully compare it to that of the unmodified NDLR data, because the Nationals did not provide any supporting data to show this particular piece of Mr. Bevilacqua's calculations. Therefore, the Committee cannot accept Mr. Bevilacqua's signing-bonus amortization as valid, necessary or useful.

The Committee believes that the correct sample of teams for comparison to the Nationals and Orioles are the teams that share markets *and* DMAs—the New York Yankees and Mets, the Los Angeles Dodgers and Angels, the Chicago White Sox and Cubs, the San Francisco Giants, and the Oakland Athletics. For that reason, the Committee rejects Mr. Bevilacqua's comparable metrics from the Philadelphia Phillies, the Boston Red Sox, and the Nationals sample of four, smaller-market teams.

Relatedly, the Committee agrees with both parties that the best metric for the size of a team's market is its "core DMA." *See* Tr. 445:7–25 (Wyche) ("We normalize it on a subscription TV Household, per game basis with the DMA, the core DMA."); Bevilacqua Report

[29] The Nationals point to the fact that the prior RSDC analyzed comparable teams' license fees using backcasting to 2012. *See* Nationals Final Brief at 25–26, ¶52; Tr. 294:22–296:2 (Bevilacqua). The Committee finds this unpersuasive. Among other things, the prior RSDC did not have the benefit of seeing the comparable teams' actual income as reported by MLB. *Compare* 2014 RSDC Decision (NX 74) at 16–18 ("[T]he Nationals failed to report verifiable terms for any of their cited comparables. . . . But because this dispute covers future years for which comparative Club data are confidential, MASN's Bortz analysis lumps its four comparables into a single number: the average of aggregated rights income per average aggregated game per average aggregated DMA household."), *with* Bevilacqua Report at 31, ¶72 (using teams' NDLR), *and* Wyche/Bortz Report at Appendix D (same).

at 14, ¶33 ("In my experience, of the factors identified in Category 1, the size (*e.g.*, the number of TV or Pay-TV households) of a Club's core inner market or 'Core DMA' (*i.e.*, the area in or near the city in which the Club is located) is the leading factor that drives the value of a Club's telecast rights."). The Committee also credits the views of Mr. Bevilacqua that NDLR is, over all, a better measure of a team's income than the self-reported Financial Information Questionnaire ("**FIQ**"). *See* Bevilacqua Report at 31, ¶72 n.69.[30]

Therefore, looking at the above-mentioned teams, averaging their annual normalized license fees (from NDLR data), applying those to a combined Baltimore–Washington, D.C., DMA, and excluding both backcasting and Mr. Bevilacqua's signing bonus amortization, the Committee finds this result:[31]

Year	**License Fee**
2012	$47,076,002.76
2013	$50,827,359.86
2014	$57,258,448.79
2015	$61,981,467.24
2016	$67,187,998.79
Average Annual Value	$56,866,255.49

3. Conclusion on Fair Market Value

Because the Committee's two numerical analyses yielded such similar results, the Committee finds that the most appropriate measure of fair market value is the average of the two—the license fees produced by its bottom-up analysis and its comparable teams analysis, which yield the following license fees:

[30] The Orioles/MASN offered their comparable teams analysis in terms of both NDLR and FIQ, but did not state a preference for either. *See* Orioles/MASN Opening Brief at 46–47, ¶78; Wyche/Bortz Report at 9–10 & Appendix D; Tr. 463:2–15 (Wyche).

[31] The Committee uses the NDLR data for the teams reported in the Wyche/Bortz Report at Appendix D and the DMA data reported in NX 12.

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

Although the Committee does not believe that the "fair market value" of the license fees is to be determined in reference to anything other than "RSDC's established methodology for evaluating all other related party telecast agreements in the industry," 3/28/05 Agreement (OMX 1) § 2.J.3, the Committee appreciates that the Orioles/MASN feel strongly that the Agreement's compensatory purpose can be accomplished only if the Orioles/MASN's proposal for license fees is used. The Committee stresses, however, that the Orioles have received and continue to compensation, among other ways through the Oriole's super-majority profit interest under § 2.N of the 3/28/05 Agreement:

- MASN distributed $197.6 million to the Orioles in license fees 2012–2016. *See* 2012 Wyche/Bortz Report at 1.
- MASN also distributed about $234.9 million to the Orioles in profit distributions. *See* NX 43.
- Thus, the Committee estimates that the Orioles have received $432.5 million for 2012–2016, in both license fees and profit distributions. This compares with the Nationals' $239.2 million. *See* 2012 Wyche/Bortz Report at 1; NX 43.
- If the above license fees had been paid instead, the Committee estimates that the Orioles would have received a total of $362.9 million (in license fees and profit distributions) for 2012–2016, compared to the Nationals' $308.8 million. The Committee notes that, under this formulation, the ratio of the Orioles' total compensation to that of the Nationals is 1.18, with a difference of $54.1 million. Both the ratio and the difference are largely in line with the parties' contractually agreed-to compensation from 2007 through 2011, discussed *supra* at page 22, during which the ratio was 1.28, and the difference $51.9 million.

Thus, while the Orioles will receive less compensation with the above license fees, the Agreement's compensatory purpose, is still fulfilled, including through the Orioles' super-

FILED: NEW YORK COUNTY CLERK 06/21/2019 10:35 PM INDEX NO. 652044/2014
NYSCEF DOC. NO. 813 RECEIVED NYSCEF: 07/08/2019

majority equity interest, under § 2.N of the Agreement. And this is in addition to the Orioles' other compensation under the Agreement, including (as discussed at page 22, *supra*):

- A guaranteed purchase price for the team, § 2.A.
- A guarantee of the same rights fees as the Nationals, §§ 2.G, 2.J.3.
- A right to broadcast the Nationals' games in perpetuity, § 2.D.
- A $150 million capital account without any cash paid, § 2.P.1.
- Permanent control over MASN, § 2.O.

III. Conclusion

The Committee has considered the Parties' remaining contentions and finds them to be without merit.

The Committee concludes that the fair market value of MASN's rights to the telecast of each of the Orioles and Nationals is:

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

Dated: April 15, 2019

Mark Attanasio

Kevin Mather

Mark Shapiro

Exhibit 4

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, COMMERCIAL DIVISION

TCR SPORTS BROADCASTING HOLDING, LLP,

Petitioner,

-against-

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

Respondents,

-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.

N.Y. County Clerk's
Index No.: 652044/2014

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

NOTICE OF APPEAL TO THE COURT OF APPEALS PURSUANT TO CPLR 5601(d)

PLEASE TAKE NOTICE that, Petitioner TCR Sports Broadcasting Holding, LLP (d/b/a Mid-Atlantic Sports Network), and Nominal Respondents the Baltimore Orioles Limited Partnership, in its capacity as managing partner of TCR Sports Broadcasting Holding, LLP, and the Baltimore Orioles Baseball Club (collectively, "Appellants") hereby appeal, pursuant to CPLR 5601(d), to the Court

of Appeals of the State of New York, from the October 22, 2020 Order of the Supreme Court, Appellate Division, First Department, duly entered on October 22, 2020 ("October 22, 2020 First Department Order," Ex. 1), and from each and every part thereof, which finally determined an appeal from a final judgment of the Supreme Court, New York County, Commercial Division (Cohen, J.), dated December 9, 2019, and duly entered in the Office of the New York County Clerk on December 9, 2019 ("December 9, 2019 Judgment," Ex. 2), confirming an arbitration award issued by Major League Baseball's Revenue Sharing Definitions Committee dated April 15, 2019, and seek review, pursuant to CPLR 5501(b), of the Decision and Order of the Supreme Court, Appellate Division, First Department dated July 13, 2017, duly entered on July 13, 2017 ("July 13, 2017 First Department Order," Ex. 3), which is (i) an order of the Appellate Division on a prior appeal in the action which necessarily affected the December 9, 2019 Judgment and October 22, 2020 First Department Order, and (ii) satisfies the requirements of CPLR 5601(a) because it contains a dissent by two justices on a question of law in favor of Appellants.

Dated: New York, New York
November 19, 2020

By: /s/ *Jonathan D. Schiller*

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TO: Stephen Neuwirth, Esq.
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David Adler, Esq.
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Attorneys for WN Partner, LLC, Nine Sports Holding, LLC, and the Washington Nationals Baseball Club

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Attorneys for the Office of the Commissioner of Major League Baseball and the Commissioner of Major League Baseball

(via NYSCEF)

Exhibit 1
To Notice of Appeal

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

TCR SPORTS BROADCASTING HOLDING, LLP, Petitioner-Appellant, -against- WN PARTNER, LLC, et al., Respondents, WASHINGTON NATIONALS BASEBALL CLUB, LLC, Respondent-Respondent. --- THE BALTIMORE ORIOLES BASEBALL CLUB, et al., Nominal Respondents-Appellants.	Index No. 652044/14 Case No. 2019-05390 2019-05458 2019-05459 **NOTICE OF ENTRY**

PLEASE TAKE NOTICE that the within is a true and correct copy of the Decision and Order issued by the Supreme Court, Appellate Division, First Department duly entered in the office of the Clerk of the Supreme Court, Appellate Division, First Department, on October 22, 2020.

Dated: New York, New York
October 22, 2020

By: /s/ *Stephen R. Neuwirth*
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& SULLIVAN, LLP
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& FREDERICK, P.L.L.C.
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Supreme Court of the State of New York
Appellate Division, First Judicial Department

Renwick, J.P., Kern, Scarpulla, Shulman, JJ.

12147-
12147A-
12147B

In re TCR Sports Broadcasting Holding, LLP,
Petitioner-Appellant,

-against-

WN Partner, LLC, et al.,
Respondents,

Washington Nationals Baseball Club, LLC,
Respondent-Respondent.

- - - - -

The Baltimore Orioles Baseball Club, et al.,
Nominal Respondents-Appellants.

Index No. 652044/14
Case No. 2019-05390
2019-05458
2019-05459

Boies Schiller Flexner LLP, New York (Jonathan D. Schiller of counsel) and Sidley Austin LLP, Washington, DC (Carter G. Phillips, of the bar of the District of Columbia, admitted pro hac vice, of counsel), for appellant and respondents-appellants.

Quinn Emanuel Urquhart & Sullivan LLP, New York (Stephen R. Neuwirth of counsel), for Washington Nationals Baseball Club, LLC, respondent.

Judgment, Supreme Court, New York County (Joel M. Cohen, J.), entered December 9, 2019, in favor of respondent Washington Nationals Baseball Club, LLC (the Nationals), unanimously affirmed, with costs. Appeals from orders, same court and Justice, entered on or about August 22, 2019 and on or about November 14, 2019, which granted the Nationals' motion to confirm an arbitration award and denied petitioner's motion to resettle the August 22, 2019 order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

In a prior appeal in this arbitration proceeding arising out of a contractual dispute between petitioner (MASN) and the Baltimore Orioles and the Washington

Nationals over Major League Baseball (MLB) telecast rights fees, this Court found that the 2014 arbitration award issued by MLB's Revenue Sharing Definitions Committee (RSDC) was correctly vacated due to "evident partiality" in the arbitrators (9 USC § 10[a][2]), i.e., the Nationals' counsel's unrelated representations at various times of virtually every participant in the arbitration except for MASN and the Orioles and the failure of MLB and the RSDC, despite repeated protests, to provide MASN and the Orioles with full disclosure or to remedy the conflict before the arbitration hearing was held (*Matter of TCR Sports Broadcasting Holding, LLP v WN Partner, LLC*, 153 AD3d 140 [1ST Dept 2017], *appeal dismissed* 30 NY3d 1005 [2017]). However, the Court found no basis for directing 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. The parties proceeded to a second arbitration before the RSDC.

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.

We have considered petitioner's remaining arguments, including the argument that the court unlawfully modified the award in its confirmation order by performing a calculation of the Nationals' damages (*see e.g. Morgan Guar. Trust Co. of N.Y. v Solow*, 114 AD2D 818, 821-822 [1ST Dept 1985], *affd* 68 NY2D 779 [1986]), and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 22, 2020

Susanna Molina Rojas
Clerk of the Court

Exhibit 2
To Notice of Appeal

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

TCR SPORTS BROADCASTING HOLDING, LLP,

Petitioner,

-against-

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

Respondents,

-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.

Index No. 652044/2014

(Cohen, J.)

NOTICE OF ENTRY

PLEASE TAKE NOTICE that attached is a true and correct copy of the Judgment of the Supreme Court, New York County, Commercial Division (Cohen, J.) in favor of Washington Nationals Baseball Club, LLC for $105,025,080.30, dated December 9 2019 (Doc. # 958), entered with the Clerk on December 9, 2019

DATED: New York, New York
December 12, 2019

By: /s/ Jonathan D. Schiller
Jonathan D. Schiller
Joshua I. Schiller
Thomas H. Sosnowski

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Counsel to Mid-Atlantic Sports Network and the Baltimore Orioles Limited Partnership

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

TCR SPORTS BROADCASTING HOLDING, LLP,

Petitioner,

-against-

WN PARTNER, LLC; NINE SPORTS HOLDING, LLC; WASHINGTON NATIONALS BASEBALL CLUB, LLC; THE OFFICE OF THE COMMISSIONER OF BASEBALL; and ALLAN H. "BUD" SELIG, AS COMMISSIONER OF MAJOR LEAGUE BASEBALL,

Respondents,

-and-

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

Nominal Respondents.

Index No. 652044/2014

Hon. Joel M. Cohen, J.S.C.

JUDGMENT

WHEREAS, on April 15, 2019, Major League Baseball's Revenue Sharing Definitions Committee ("RSDC") issued its Second Award (NYSCEF Doc. No. 813);

WHEREAS, on April 15, 2019, Respondent the Washington Nationals Baseball Club ("the Nationals") filed a motion to confirm the Second Award (the "Motion") (NYSCEF Doc. No. 783);

WHEREAS, on August 22, 2019, this Court entered its Decision and Order, granting the Motion and confirming the Second Award (NYSCEF Doc. No. 924);

WHEREAS, on August 30, 2019, Petitioner TCR Sports Broadcasting Holding, LLP d/b/a Mid-Atlantic Sports Network and Nominal Respondents the Baltimore Orioles Baseball Club and

the Baltimore Orioles Limited Partnership (collectively, "MASN") filed a motion to resettle, or in the alternative, to reargue this Court's August 22, 2019 Decision and Order (the "Motion to Resettle/Reargue") (NYSCEF Doc. No. 926);

WHEREAS, on September 20, 2019, MASN filed and served a Notice of Appeal of this Court's August 22, 2019 Decision and Order (NYSCEF Doc. No. 934);

WHEREAS, on November 12, 2019, the parties appeared before this Court for a hearing on the Motion to Resettle/Reargue;

WHEREAS, on November 14, 2019, this Court entered its Decision and Order, denying the Motion to Resettle/Reargue (NYSCEF Doc. No. 936);

WHEREAS, this Court's November 14, 2019 Decision and Order further "**ORDERED** that the parties are directed jointly to submit on or before November 21, 2019 a Proposed Judgment for the Court's review and approval in favor of the Washington Nationals in the amount of the television rights fees set forth on page 48 of the April 15, 2019 Second Award (NYSCEF 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." (NYSCEF Doc. No. 936);

WHEREAS, this Court's November 14, 2019 Decision and Order further ordered that: "The Proposed Judgment should make clear that it does not foreclose the Orioles 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. Submitting a Proposed Judgment does not constitute an admission by any party or otherwise waive any party's right to contest the Judgment on appeal." (NYSCEF Doc. No. 936); and

WHEREAS, consistent with the Court's November 14, 2019 Decision and Order, no party is making an admission or otherwise waiving their right to contest the Judgment on appeal.

UPON, this Court's August 22, 2019 Decision and Order (NYSCEF Doc. No. 924) and this Court's November 14, 2019 Decision and Order (NYSCEF Doc. No. 936); it is hereby

ADJUDGED that the Nationals' petition to confirm the Second Award is granted and the Second Award is confirmed; it is further

ADJUDGED that the Nationals, having an office at 1500 South Capitol Street, SE Washington, D.C. 20003-3599, have judgment and shall recover against TCR Sports Broadcasting Holding, LLP, having an office at 333 West Camden Street, Baltimore, Maryland 21201, the sum of **$99,203,339.14** (ninety-nine million, two-hundred three thousand, three hundred thirty nine dollars and fourteen cents), plus interest at the rate of 9% per annum from the date of April 15, 2019 through the date of judgment, as computed by the Clerk in the amount of $5,821,741.16, for the sum total of $105,025,080.30 and that the Nationals have execution therefor; it is further

ORDERED, that submission by the parties of a Proposed Judgment does not constitute an admission by any party or otherwise waive any party's right to contest the Judgment on appeal; and it is further

ORDERED, 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. The RSDC arbitration panel did not award such adjustments or recalculations in the Second Award, and thus the Court's confirmation of the Second Award does not address or adjudicate those issues.

Enter:

HON. JOEL M. COHEN
J.S.C.

Milton A. Tingling, Clerk

FILED

DEC - 9 2019

COUNTY CLERK'S OFFICE
NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

INDEX # 652044/2014

TCR Sports Broadcasting Holding, LLP

Plaintiff(s)/Petitioner(s)

Against

WN Partner LLC, Nine Sports Holding LLC, Washington Nationals Baseball Club, LLC, The Office Of Commissioner Of Baseball, Allan H. (Bud) Selig, As Commissioner Of Major League Baseball,

Defendant(s)/Respondent(s)

The Baltimore Orioles Baseball Club, Baltimore Orioles Limited Partnership, in its capacity as managing partner of TCR Sports Broadcasting Holding, LLP

Nominal Respondent(s)

JUDGMENT

Attorney for the Prevailing Party

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Exhibit 3
To Notice of Appeal

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

TCR SPORTS BROADCASTING HOLDING, LLP,

Petitioner,

-against-

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

Respondents,

-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.

Index No. 652044/2014

NOTICE OF ENTRY

PLEASE TAKE NOTICE that the within is a true and correct copy of the Decision and Order issued by the Supreme Court, Appellate Division, First Department duly entered on July 13, 2017, in the office of the Clerk of the Appellate Division of the Supreme Court, First Department.

DATED: New York, New York
July 14, 2017

By: */s/ Eamon P. Joyce*
Benjamin R. Nagin
Eamon P. Joyce
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By Permission of the Court
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Attorneys for Respondents The Office of Commissioner of Baseball and The Commissioner of Major League Baseball

Acosta, P.J., Richter, Andrias, Kahn, Gesmer, JJ.

3595-
3596 Index 652044/14

In re TCR Sports Broadcasting Holding, LLP,
Petitioner-Appellant-Respondent,

-against-

WN Partner, LLC, et al.,
Respondents,

Washington Nationals Baseball Club, LLC, et al.,
Respondents-Respondents-Appellants,

The Baltimore Orioles Baseball Club, et al.,
Nominal Respondents-Appellants-Respondents.

- - - - -

In re TCR Sports Broadcasting Holding, LLP,
Petitioner-Respondent,

-against-

WN Partner, LLC, et al.,
Respondents,

Washington Nationals Baseball Club, LLC,
Respondent-Appellant,

The Baltimore Orioles Baseball Club, et al.,
Nominal Respondents-Respondents.

- - - - -

E. Leo Milonas, Diamond Dealers Club, Inc., Kenneth R. Feinberg and Robert S. Smith
Amici Curiae.

Chadbourne & Parke LLP, New York (Rachel W. Thorn of counsel), for TCR Sports Broadcasting Holding, LLP, appellant-respondent/respondent.

Sidley Austin LLP, Washington, DC (Carter G. Phillips of the bar of the District of Columbia and the State of Maryland, admitted pro hac vice, of counsel), for TCR Sports Broadcasting Holding, LLP, the Baltimore Orioles Baseball Club and the Baltimore Orioles Limited Partnership, appellants-respondents/respondents.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Stephen R. Neuwirth of counsel), for Washington Nationals Baseball Club, LLC, respondent-appellant/appellant.

Kirkland & Ellis LLP, Washington, DC (Paul Clement of the bar of the District of Columbia, admitted pro hac vice of counsel), for the Office of Commissioner of Baseball and the Commissioner of Major League Baseball, respondents-appellants.

Pillsbury Winthrop Shaw Pittman LLP, New York (David G. Keyko of counsel), for E. Leo Milonas, amicus curiae.

Moses & Singer LLP, New York (Lawrence I. Ginsburg of counsel), for Kenneth R. Feinberg, amicus curiae.

Jenner Block LLP, New York (Irene M. Ten Cate of counsel), for Diamond Dealers Club, Inc., amicus curiae.

Friedman Kaplan Seiler and Adelman, New York (Robert S. Smith of counsel), for Robert S. Smith, amicus curiae.

Order, Supreme Court, New York County (Lawrence K. Marks, J.), entered on or about November 4, 2015, affirmed, without costs. Order, same court and Justice, entered July 11, 2016, modified, on the law, to grant the Nationals' motion, and otherwise affirmed, without costs.

Andrias and Richter, JJ. concur in a separate Opinion by Andrias, J. Kahn, J. concurs in a separate Opinion. Acosta, P.J. and Gesmer, J. dissent in part in an Opinion by Acosta, P.J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, P.J.
Rosalyn H. Richter
Richard T. Andrias
Marcy L. Kahn
Ellen Gesmer, JJ.

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Index 652044/14

x

In re TCR Sports Broadcasting Holding, LLP,
Petitioner-Appellant-Respondent,

-against-

WN Partner, LLC, et al.,
Respondents,

Washington Nationals Baseball Club, LLC, et al.,
Respondents-Respondents-Appellants,

The Baltimore Orioles Baseball Club, et al.,
Nominal Respondents-Appellants-Respondents.

- - - - -

In re TCR Sports Broadcasting Holding, LLP,
Petitioner-Respondent,

-against-

WN Partner, LLC, et al.,
Respondents,

Washington Nationals Baseball Club, LLC,
Respondent-Appellant,

The Baltimore Orioles Baseball Club,
et al.,
Nominal Respondents-Respondents.

- - - - -

E. Leo Milonas, Diamond Dealers Club, Inc.,
Kenneth R. Feinberg and Robert S. Smith,
Amici Curiae.

x

Cross appeals from the order of the Supreme Court, New York County (Lawrence K. Marks, J.), entered on or about November 4, 2015, which, insofar as appealed from as limited by the briefs, denied respondent Washington Nationals Baseball Club, LLC's (the Nationals) motion to confirm an arbitration award issued June 30, 2014 by Major League Baseball's Revenue Sharing Definitions Committee, granted the part of petitioner's motion seeking to vacate the award, and denied the part of petitioner's motion seeking to direct that a second arbitration proceed before an impartial panel unaffiliated with Major League Baseball. Respondent the Nationals appeals from the order of the same court and Justice, entered July 11, 2016, which denied its motion to compel the parties to re-arbitrate the claim before the Revenue Sharing Definitions Committee, and granted petitioner's cross motion to stay the parties from compelling or conducting another arbitration of this dispute until the final determination of the appeals from the November 4, 2015 order.

Chadbourne & Parke LLP, New York (Thomas J. Hall of counsel), and Cooley LLP, New York (Rachel W. Thorn, Alan Levine and Caroline Pignatelli of counsel), for TCR Sports Broadcasting Holding, LLP, appellant-respondent/respondent.

Sidley Austin LLP, Washington, DC (Carter G. Phillips of the bar of the District of Columbia and the State of Maryland, admitted pro hac vice, of counsel), for TCR Sports Broadcasting Holding, LLP, the Baltimore Orioles Baseball Club and the Baltimore Orioles Limited Partnership, appellants-respondents/respondents.

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Kirkland & Ellis LLP, Washington, DC (Paul Clement of the bar of the District of Columbia, admitted pro hac vice, Erin E. Murphy of the bar of the District of Columbia and the State of Virginia, admitted pro hac vice, and Michael H. McGinley of the bar of the District of Columbia, admitted pro hac vice, of counsel), Williams & Connolly, New York (John J. Buckley, Jr. of counsel), and Lupkin and Associates, New York (Jonathan D. Lupkin of counsel), for the Office of Commissioner of Baseball and the Commissioner of Major League Baseball, respondents-appellants.

Pillsbury Winthrop Shaw Pittman LLP, New York (David G. Keyko of counsel), for E. Leo Milonas, amicus curiae.

Jenner Block LLP, New York (Stephen L. Ascher, Irene M. Ten Cate and Jeremy H. Ershow of counsel), for Diamond Dealers Club, Inc., amicus curiae.

Moses & Singer LLP, New York (Lawrence I. Ginsburg, Jay R. Fialkoff and Robert B. McFarlane of counsel), for Kenneth R. Feinberg, amicus curiae.

Friedman Kaplan Seiler and Adelman, New York (Robert S. Smith, Robert J. Lack and Nora Bojar of counsel), for Robert S. Smith, amicus curiae.

PER CURIAM

The order of the Supreme Court, New York County (Lawrence K. Marks, J.), entered on or about November 4, 2015, which, insofar as appealed from as limited by the briefs, denied respondent Washington Nationals Baseball Club, LLC's motion to confirm an arbitration award issued June 30, 2014 by Major League Baseball's Revenue Sharing Definitions Committee, granted the part of petitioner's motion seeking to vacate the award, and denied the part of petitioner motion seeking to direct that a second arbitration proceed before an impartial panel unaffiliated with Major League Baseball, should be affirmed, without costs. The order of the same court and Justice, entered July 11, 2016, which denied the Nationals' motion to compel the parties to re-arbitrate the claim before the Revenue Sharing Definitions Committee, and granted petitioner's cross motion to stay the parties from compelling or conducting another arbitration of this dispute until the final determination of the appeals from the November 4, 2015 order, should be modified, on the law, to grant the Nationals' motion, and otherwise affirmed, without costs.

Andrias and Richter, JJ. concur in a separate Opinion by Andrias, J. Kahn, J. concurs in a separate Opinion. Acosta, P.J. and Gesmer, J. dissent in part in an Opinion by Acosta, P.J.

ANDRIAS, J.

Pursuant to the negotiated terms of the parties' written agreement, the subject arbitration, governed by the Federal Arbitration Act (FAA) (9 USC § 1 *et seq.*), was initiated before the Revenue Sharing Definitions Committee (RSDC) of Major League Baseball (MLB), to resolve a contractual dispute over telecast rights fees between TCR Sports Broadcasting Holding, LLP d/b/a the Mid-Atlantic Sports Network (MASN) and the Baltimore Orioles, and the Washington Nationals. For the reasons stated herein, we find that the arbitration award issued by the RSDC on June 30, 2014 was correctly vacated based on "evident partiality" (9 USC § 10[a][2]) arising out of the Nationals' counsel's unrelated representations at various times of virtually every participant in the arbitration except for MASN and the Orioles, and the failure of MLB and the RSDC, despite repeated protests, to provide MASN and the Orioles with full disclosure or to remedy the conflict before the arbitration hearing was held. However, even if this Court has the inherent power to disqualify an arbitration forum in an exceptional case, on the record before us 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.

Contrary to the view of the dissent, there has been no showing of bias or corruption on the part of the members of the reconstituted RSDC, and the Nationals will use new counsel at the second arbitration. Speculation that MLB will dictate the outcome of the second arbitration by exerting pressure on the new members of the RSDC does not suffice to establish that they will not exercise their independent judgment or carry out their duties impartially, or that the proceedings will be fundamentally unfair.

In 2001, the Orioles and TCR Sports Broadcasting Holding, LLP (TCR) established the Orioles' Television Network as a platform to broadcast Orioles games in a seven-state television territory. In 2002, MLB purchased the failing Montreal Expos for $120 million. In 2004, MLB announced the relocation of the Expos to Washington, D.C. to become the Nationals. The Orioles objected to the move on the grounds that the introduction of the Nationals into its previously-exclusive markets would cause it significant economic harm.

In an effort to resolve several issues associated with the Expos' relocation, on March 28, 2005, MLB, TCR, the Nationals, and the Orioles entered into an agreement which provided, among other things, that TCR would be converted into a two-club

regional sports network, MASN, which would have the sole and exclusive right to telecast, in the television territory, Nationals' and Orioles' games that were not otherwise retained or reserved by MLB's national rights agreements. The Orioles would be the managing partner and, initially, own 90% of MASN. The Nationals would own 10%, with its stake increasing, starting in 2010, by 1% per year, until it reached 33% in 2032. This allocation would allow the Orioles to receive reparative compensation through the distribution of profits in accordance with its then-applicable supermajority interests.

The agreement set the annual telecast fees to be paid to the teams between 2005 and 2011.[1] For 2005-2006, the Nationals would be paid $20 million per year. The Orioles would be paid up to $75,000 per game, with the final amount to be agreed upon between TCR and the Orioles. Beginning in 2007, the Orioles and the Nationals would each be paid $25 million per year, escalating at a noncompounded 4% rate.

The agreement also provided a methodology for determining future fees. "After 2011, and for each successive five year period, the Orioles, the Nationals and [MASN] [had to] first

[1]Because telecast rights fees are MASN's single largest expense, the amount of those fees directly affects MASN's profitability. Thus, any increase in telecast rights fees necessarily decreases the Orioles' compensation.

negotiate in good faith using the most recent information available which is capable of verification to establish the fair market value [FMV] of the telecast rights." If they were unable to agree on FMV during the mandatory negotiation period (30 days), they were to enter into nonbinding mediation under the auspices of the American Arbitration Association (AAA) or JAMS. If negotiation and mediation failed, "then the fair market value of the Rights [would] be determined by [the RSDC] using the RSDC's established methodology for evaluating all other related party telecast agreements in the industry." The RSDC determination would be final and binding on the parties, who could seek to vacate or modify the FMV determination "only on the grounds of corruption, fraud or miscalculation of figures."

In anticipation of the negotiations for 2012-2016, MASN, with MLB's consent, retained the Bortz Media and Sports Group to calculate the fees pursuant to the "Bortz methodology," an accounting based profit margin analysis derived from a regional sports network's actual revenues and expenses. MASN maintains that the Bortz methodology is the "established methodology" adopted by the RSDC in at least 19 prior FMV determinations.

On January 4, 2012, MASN sent the Nationals a proposed rights fee schedule of $34 million per year. The Nationals, by their counsel, Proskauer Rose, LLP (Proskauer) rejected the

proposal, valuing the Nationals' rights at more than $110 million per year based on a different methodology which analyzed fees obtained by MLB clubs in comparable markets.

In 2012, after negotiations failed and the parties waived mediation before the AAA or JAMS, the matter proceeded to arbitration before the RSDC, which was to be comprised of representatives from the Tampa Bay Rays, Pittsburgh Pirates, and New York Mets. In accordance with customary practice, the arbitration was administered by MLB staff, who also provided analytical and legal assistance to the RSDC.

The Nationals were represented by Proskauer. Because Proskauer served as MLB's longtime outside counsel, in January 2012, the Orioles' counsel sent separate emails to MLB's then-Senior Vice President and General Counsel and its then-Executive Vice President, Labor Relations and Human Resources (Robert D. Manfred, Jr.), inquiring about Proskauer's representation of MLB and MLB Clubs, including those with representatives on the RSDC. In reply, counsel was told that Proskauer had been MLB's principal labor counsel for years, represented MLB in the Los Angeles Dodgers bankruptcy matter and other matters, assisted in a small number of seminars/conference calls for club counsel about ADA and DOJ enforcement, and possibly did salary arbitration work for the Rays. Counsel was

advised to contact the clubs directly for further information concerning their relationships with Proskauer.

In a January 27, 2012 letter, the Orioles' counsel advised Proskauer that the arbitration

> "cannot be insulated from your firm's deeply ingrained, concurrent representations of [MLB], and various [MLB] clubs ('Clubs') including one, if not more of the Clubs appointed by the Commissioner to serve on the RSDC as to the present rights fee dispute. As you know, the RSDC functions under the direct control of MLB and the Office of the Commissioner, and as your correspondence confirms, your firm has 'performed certain work for the Office of the Commissioner ....'"

In a separate letter dated that same day, TCR's counsel advised Proskauer that he too had "serious concerns" about the firm's role in the arbitration, including its

> "longstanding representation of MLB itself, MLB's Labor Relations Committee (which is tightly lined with the RSDC), and at least one of the three Clubs that are voting members of the RSDC. We do not believe it is appropriate for a firm that represents the decision-maker in the instant dispute also to represent a litigant before that decision maker."

On February 2, 2012, the Nationals, the Orioles, and MASN met with Manfred and MLB staff for a pre-hearing organizational meeting. Counsel for MASN and the Orioles provided Manfred with a letter dated February 1, 2012 which reiterated that Proskauer's substantial past and current representation of the Orioles, which Proskauer unilaterally terminated, and of MLB and various MLB clubs, "including at least one of the Clubs appointed by the

Commissioner to serve on the RSDC," tainted the proceedings. Particularly, the letter stated that

> "Proskauer's longstanding representations of litigant, ultimate decision-maker and participating RSDC member Club(s) raise, at a minimum, serious questions of partiality, prejudice, and misuse of confidential and proprietary information, which in view of well-established fair hearing and due process protections, compromise this proceeding and the rights and privileges to which the parties are entitled. Moreover, as a practical matter and, at the very least, the appearance of a conflict of interest on the part of Proskauer cannot be avoided and will thus diminish the credibility of the RSDC proceeding and undermine principles of fairness and impartiality.
>
> "The full scope of Proskauer's representations of MLB, including the Labor Relations Committee and other matters, and MLB Clubs, including at least the one Club participating on the RSDC, is not fully known at present to TCR or the Orioles and may, in fact, extend even further. Under the circumstances, therefore, and in view of recognized principles of fairness and due process, the Orioles and TCR respectfully request that the RSDC preclude Proskauer from participating in this proceeding. Anything less would he procedurally and substantively inappropriate and compromise the integrity of this appeal. We submit that this issue should be addressed prior to the RSDC addressing any substantive matters."

Because MLB had yet to reveal the identities of the individuals representing the clubs that would be on the RSDC, and had instructed the parties not to communicate with the arbitrators directly, MASN and the Orioles asked Manfred to transmit the February 1, 2017 letter to the arbitrators (who were shown as "cc, Members Revenue Sharing Definition Committee"), and

inform them of their objections to Proskauer's participation in the arbitration.[2] When MASN and the Orioles asked that Proskauer be disqualified from representing the Nationals, Manfred replied that the RSDC lacked the legal authority to disqualify counsel. Counsel for MASN then asked Manfred for a continuing objection as to Proskauer's participation in the arbitration, which Manfred granted.

In March 2012, in their submissions statements to the RSDC, MASN and the Orioles expressly reserved their objections arising out of Proskauer's conflicts and participation in the proceedings on behalf of the Nationals. Pursuant to protocol, these submission statements, as well as the Orioles' reply, which reiterated the continuing objection to Proskauer's involvement, were sent to Manfred for distribution to the RSDC members.

On April 3, 2012, the RSDC, composed of the president of the Pittsburgh Pirates, the principal owner of the Tampa Bay Rays and the chief operating officer of the New York Mets, held a one-day hearing. The Nationals asserted that their rights had an FMV averaging $118 million per year for 2012-16, based on an analysis of factors including the size and attractiveness of the Nationals' television market, a survey of the economic value of

[2]Only during the vacatur proceeding did MASN and the Orioles learn that MLB claimed that it never did so.

recent deals entered into by teams in other comparable markets, and the escalating value of live sports programming. MASN asserted that the Nationals should be paid an average $39.5 million per year based on the Bortz methodology, including an assumption that MASN should be guaranteed a 20% profit margin on baseball programming. During the arbitration, MASN and the Orioles repeated their objections to Proskauer's representation of the Nationals numerous times.

In the summer of 2012, the approximate amounts of the rights fees determined by the RSDC were announced to the parties. However, the release of a final decision was deferred while then Commissioner Bud Selig attempted to negotiate a broader settlement.

During the course of these negotiations, MASN paid the Nationals for their telecast rights in the amounts that it had proposed to the RSDC. When the Nationals made clear that they viewed the resolution of their 2012-2013 compensation as a "condition precedent" to any broader settlement, MLB, to keep the negotiations going, advanced $25 million to the Nationals to reduce the shortfall between RSDC's unreleased award and the amounts that MASN was paying for those two years. MLB documented this payment, which was made more than a year after the RSDC had informed the parties what its decision would be, in a letter

agreement with the Nationals stating that "if the RSDC issues a decision that covers 2012 and/or 2013, any payments from MASN otherwise due to the Nationals will be made first to [MLB] to cover" the $25 million, plus interest. The agreement provided in the alternative that MLB could recover the $25 million if MASN was sold to a third party.

On June 30, 2014, the RSDC issued its final written decision in which it determined that the Nationals' rights fees for 2012 would be roughly $53 million, and would rise by approximately $3 million per year through 2016. The RSDC rejected MASN's and the Orioles' argument that their interpretation of the Bortz methodology was the "RSDC's established methodology," stating that Bortz "does not estimate the fair market value of a Club's broadcasting rights by reviewing the network's revenue and expenses and nothing more," but includes "additional information relevant to the Committee's deliberations, including, for example, comparisons of the Club's local rights fees with verified fees of Clubs in comparable Major League markets." The RSDC also rejected the Nationals' position that the RSDC'S "'established methodology' consists primarily of an analysis of rights fees obtained by Clubs in comparable markets." Instead, the RSDC stated that its "established methodology includes an analysis of the income statement of the network, a review of

broadcast agreements in comparable markets to verify the financial statement analysis, and a consideration of any additional factors raised by the parties that may impact the analysis."

Although MLB cautioned all parties that they should not challenge the award in court, and threatened them with the strongest sanctions available under MLB's constitution if they did so, in September 2014, MASN (on behalf of itself and the Orioles) commenced this proceeding seeking to vacate the arbitration award on the ground it was procured through bias, evident partiality, misconduct, fraud, corruption, and undue means, and was rendered beyond the scope of the arbitrators' authority and in manifest disregard of the law. MASN also sought to have the matter remanded for a second arbitration before a different forum. The Nationals cross-moved to confirm the RSDC's award.

In support of its petition, MASN alleged that MLB had a financial stake in the outcome of the arbitration due to the $25 million advance it made to the Nationals; that MLB, the Nationals and the arbitrators all used the same law firm without full disclosure as to possible conflicts; that MLB controlled the arbitration process; and that the arbitrators failed to apply the Bortz methodology, as required by the agreement. MASN further

alleged that the RSDC was impossibly tainted by a conflict of interest because an increase in the rights fees, which are taxed by MLB, meant that more money would go into MLB's revenue sharing pool, and the Rays and Pirates, whose representatives were on the RSDC, were teams that benefited from revenue-sharing.

By order dated November 4, 2015, the court denied the Nationals' motion to confirm and granted the part of MASN's motion seeking to vacate the RSDC's award. The sole basis for this determination was the court's finding that "evident partiality" had resulted from the Nationals' representation by Proskauer. The court rejected MASN's and the Orioles' other challenges to the award, finding that there was no fraud or prejudicial misconduct, that there was no proof that RSDC had been improperly influenced by MLB's purported financial stake in the award, and that the RSDC's award was "reasonable on its face" and did not exceed the RSDC's powers or constitute manifest disregard of the law.

In reaching its finding of evident partiality, the court stated that the arbitration proceedings had been rendered fundamentally unfair by (i) Proskauer's representation of "MLB, its executives and closely related entities in nearly 30 other matters" and "interests associated with all three arbitrators," and (ii) MLB, the arbitrators, the Nationals and/or Proskauer's

failure to take reasonable steps to address MASN and the Orioles concerns over Proskauer's involvement. The court rejected the Nationals and MLB's argument that such conflicts were to be expected because MASN and the Orioles agreed to an "inside baseball" arbitration, stating that MASN and the Orioles had not agreed to "a situation in which MASN's arbitration opponent, the Nationals, was represented in arbitration by the same law firm that was concurrently representing MLB and one or more of the arbitrators and/or the arbitrators' clubs in other matters."

The court denied the part of petitioner's motion seeking to direct that a second arbitration proceed before an impartial panel unaffiliated with MLB, stating that "re-writing the parties' Agreement is outside of [the court's] authority."

MASN appealed on the issue of whether the court properly rejected its argument that a new arbitration should be before a different forum. The Nationals filed a cross appeal challenging the determination of evident partiality. Before the appeals were heard, the Nationals moved for an order compelling MASN and the Orioles to submit to a new RSDC arbitration. MASN opposed and cross-moved pursuant to CPLR 2201 for a stay of proceedings pending determination of the appeals.

The court denied the Nationals' motion to compel a new arbitration before the RSDC. Pursuant to CPLR 2201, the court

stayed the parties "from compelling or conducting another arbitration of this dispute, without the agreement of all the parties to this proceeding, until the final determination of the appeals."

To vacate an award because of evident partiality under the FAA (9 USC § 10[a][2]), the movant bears the burden of showing that a reasonable person, considering all the circumstances, would have to conclude that an arbitrator was partial to one party to the arbitration (*see Kolel Beth Yechiel Mechil of Tartikov, Inc. v YLL Irrevocable Trust*, 729 F3d 99, 104 [2d Cir 2013]; *U.S. Elecs., Inc. v Sirius Satellite Radio, Inc.*, 17 NY3d 912 [2011] [adopting the Second Circuit's "reasonable person standard"]). Although this requires "something more than the mere appearance of bias" (*see Morelite Constr. v New York City Dist. Council Carpenters Benefit Funds*, 748 F2d 79, 83 [2d Cir 1984] [internal quotation marks omitted]), "[p]roof of actual bias is not required" (*Scandinavian Reins. Co. Ltd. v St. Paul Fire & Marine Ins. Co.*, 668 F3d 60, 72 [2d Cir 2012]). Rather, a finding of partiality can be inferred "from objective facts inconsistent with impartiality" (*Kolel Beth Yechiel Mechil*, 729 F3d at 104 [internal quotation marks omitted]).

"Among the circumstances under which the evident-partiality standard is likely to be met are those in which an arbitrator

fails to disclose a relationship or interest that is strongly suggestive of bias in favor of one of the parties" (*Scandinavian Reinsurance Co. Ltd.*, 668 F3d at 72). Factors to be considered include "(1) the extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceedings; (2) the directness of the relationship between the arbitrator and the party he is alleged to favor; (3) the connection of that relationship to the arbitrator; and (4) the proximity in time between the relationship and the arbitration proceeding" (*Yosemite Ins. Co. v Nationwide Mut. Ins. Co.*, 2016 WL 6684246, *7, 2016 US Dist LEXIS 157061, *19-20 [SD NY 2016] [internal quotation marks omitted]). "While the presence of actual knowledge of a conflict can be dispositive of the evident partiality test, the absence of actual knowledge is not" (*Applied Indus. Materials Corp. v Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F3d 132, 138 [2d Cir 2007]).

The record shows that Proskauer, while representing the Nationals in the arbitration, had an extensive relationship with the clubs that comprised the RSDC and/or their representatives, and with MLB, which administered the proceeding. Discovery in the vacatur proceeding revealed that

(i) the Proskauer attorneys representing the Nationals represented the Pirates in *Senne v Office of the Commissioner of*

Baseball, No. 14-00608 (ND Cal) and *Garber v Office of the Commissioner of Baseball*, No. 12-03704 (SD NY). Proskauer had also represented the Pirates president, who was its representative on the RSDC, in *Phillips, et al. v Selig*, No. 1966 EDA 2007 (Pa Super Ct), and advised the Pirates on Americans with Disability Act matters.

(ii) Proskauer represented the Rays in *Senne* and four separate salary arbitrations, one of which occurred during the arbitration; and

(iii) Proskauer defended the father of Jeffery Wilpon, the Mets chief operating officer and its representative on the RSDC, and the father's company, in a class action arising out of the Madoff Ponzi scheme, which was ongoing during the arbitration. Proskauer also represented the Mets in *Senne*.

Proskauer also concurrently represented MLB, its executives and closely-related entities in approximately 50 engagements. Although MASN and the Orioles repeatedly protested Proskauer's involvement and requested complete disclosure so they could assess the extent of the potential conflicts, MLB and the arbitrators undisputedly failed to provide full disclosure or seek to conduct the proceeding with arbitrators who had no prior relationships with Proskauer. While the arbitrators aver in this proceeding that they have no recollection of MASN's and the

Orioles' disclosure requests or objections, the record establishes conclusively that MASN and the Orioles reiterated their objections in their written submissions to the RSDC before the merits hearing was held and at the hearing itself.

The evidence that the same lawyers in the same firm were representing interests of the arbitrators and MLB at the same time as they represented the Nationals in the arbitration is an objective fact inconsistent with impartiality. The arbitrators had a duty to, but did not, investigate or disclose their relationships with Proskauer, and MLB failed to exercise what power it had to ensure confidence in the fairness of the proceedings in light of MASN's stated concerns (*see Applied Indus. Materials Corp.*, 492 F3d at 137 [where "[a]n arbitrator . . . knows of a material relationship with a party" but fails to disclose it, "[a] reasonable person would have to conclude that [the] arbitrator who failed to disclose under such circumstances was partial to one side," even where the award itself was not clearly favorable to the other party]; *Morelite*, 748 F2d at 84 [vacating award based on "a father-son relationship between an arbitrator and the President of an international labor union," without any suggestion that the father was sitting in some representative capacity]).

MASN did not waive its evident partiality challenge by

failing to move for the disqualification of the arbitrators. MASN demonstrated its belief that it was improper for Proskauer to represent the Nationals given its role as MLB's outside counsel, its representation of MLB clubs, including one club that had a representative of the RSDC panel, and MLB's role in administering the proceeding and appointing the RSDC arbitrators, who might also have relationships with Proskauer. Particularly, in a February 13, 2012 email, Manfred stated that the Orioles and MASN's objections should be separately documented to him. On February 14, 2012, counsel for the Orioles and MASN complied, asking Manfred whether anything more was needed. On February 16, 2012, counsel for the Orioles again wrote to Manfred, stating,

> "To reiterate, what we agreed to when we met in New York on February 4, 2012 [sic], and what has been consistently stated in our discussions and all correspondence is that since the RSDC would not - or believed it did not have the authority to - preclude Proskauer as we had requested, the RSDC would grant, and in fact, granted the Orioles and TCR [MASN] a continuing objection to Proskauer's representation of the Nationals and that all of the Orioles' and TCR's [MASN's] objections, reservations, rights, privileges, claims and actions related to Proskauer's participation in these proceedings would be preserved for all purposes, without any waiver of any kind, including by virtue of the Orioles' and TCR's [MASN's] continued participation in this RSDC proceeding."

In their March 12 submission statements to the RSDC, counsel for the MASN and the Orioles expressly stated that they reserved and preserved all rights, claims, causes of action and

privileges, waiving none, arising from or related to Proskauer's participation in the proceedings on behalf of the Nationals. In a September 2, 2013 email, Manfred advised the Orioles' counsel that "We would never assert that you have waived your objection to Proskauer's involvement."

Accordingly, the trial court was correct in vacating the RSDC's determination based on "evident partiality." However, even if the dissent is correct that it must be within the inherent equitable power of the court to protect fundamental fairness by sending the arbitration to a new forum, we conclude, on the record before us, that the court correctly rejected MASN's and the Oriole's argument that the parties' agreement should be disregarded and the matter remanded to an arbitral forum unaffiliated with MLB.[3]

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[3] Citing *Rabinowitz v Olewski* (100 AD2d 539, 540 [2d Dept 1984]), the dissent finds that courts, in an appropriate case, have inherent power to disqualify an arbital forum before an award has been rendered. However, *Rabinowitz* did not involve the FAA and the Second Circuit and other federal courts have held that although the FAA provides for vacatur where there was "evident partiality or corruption in the arbitrators, it does not provide for pre-award removal of an arbitrator" (*Aviall, Inc. v Ryder Sys., Inc*, 110 F3d 892, 895 [2d Cir 1997] [internal quotation marks and citation omitted]; *PK Time Group, LLC v Robert*, 2013 WL 3833084, *2-4, 2013 US Dist LEXIS 104449, *5-11 [SD NY 2013]; *see also Gulf Guar. Life Ins. Co. v Connecticut General Life Ins. Co.* 304 F3d 476, 490 [5th Cir 2002]). The concurrence, citing *Matter of Salvano v Merrill Lynch, Pierce, Fenner & Smith, Inc.* (85 NY2d 173, 181-182 [1995] and *Matter of Cullman Ventures [Conk]*, 252 AD2d 222, 228 [1st Dept 1998]) would

The FAA "requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms" (*Volt Info. Sciences, Inc. v Board of Trustees of Leland Stanford Jr. Univ.*, 489 US 468, 478 [1989]). "Where, as here, the parties have agreed explicitly to settle their disputes only before particular arbitration fora, that agreement controls" (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v Georgiadis*, 903 F2d 109, 113 [2d Cir 1990]).

The dissent nevertheless states that, under the "rare circumstances" presented, MASN and the Orioles' expectations of a reasonably fair and impartial arbitration forum in the RSDC have been frustrated, and that the arbitration clause selecting the RSDC as the arbitral forum should be reformed to require a rehearing before a new forum. In delineating these rare circumstances, the dissent asserts that MLB and the Commissioner effectively control the RSDC, appointing its members and

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also hold that "[t]his Court may not order that the arbitration take place in a forum other than the one selected by the parties, notwithstanding the possibility of a more impartial proceeding in another forum." However, we need not, and, contrary to the dissent's characterization, indeed do not, determine whether, in an exceptional case, *Rabinowitz* should apply to cases governed by the FAA. As discussed *infra*, even if such inherent power exists, MASN and the Orioles have not established that remand to the RSDC will be fundamentally unfair under the particular circumstances before us. Thus, we leave the issue for another day, if it arises in an appropriate case.

participating in the evidentiary and decision-making process, and that they have endorsed the original award in public comments and filings in this case that prejudge and predetermine the outcome of a future arbitration before the RSDC. The dissent also finds that the RSDC would be conflicted in a second arbitration because the only way MLB can now recover its $25 million advance is if the RSDC rejects the lower amount of telecast rights fees put forth by MASN and the Orioles, and awards the Nationals significantly higher amounts. Thus, the dissent posits that a rehearing by the same arbitral forum would be all but guaranteed to yield the same result, even though the panel has changed.

However, the circumstances cited by the dissent do not warrant the removal of the RSDC. While the dissent waxes poetic about the purity of the game of baseball, MLB is first and foremost a business, governed by its constitution and innumerable agreements and contracts. Because arbitration is a matter of contract, "the parties to an arbitration can ask for no more impartiality than inheres in the method they have chosen" (*National Football League Mgt. Council v National Football League Players Assn.*, 820 F3d 527, 548 [2d Cir 2016]) and the FAA permits parties to select arguably partial arbitrators, if doing so serves their interests (*see Sphere Drake Ins. Ltd. v All Am. Life Ins. Co.*, 307 F3d 617 [7th Cir 2002], *cert denied* 538 US 961

[2003]). In *Sphere Drake*, the Seventh Circuit explained:

> "Parties are free to choose for themselves to what lengths they will go in quest of impartiality. Section 10(a)(2) just states the presumptive rule, subject to variation by mutual consent. Industry arbitration, the modern law merchant, often uses panels composed of industry insiders, the better to understand the trade's norms of doing business and the consequences of proposed lines of decision. The more experience the panel has, and the smaller the number of repeat players, the more likely it is that the panel will contain some actual or potential friends, counselors, or business rivals of the parties. Yet all participants may think the expertise-impartiality tradeoff worthwhile; the Arbitration Act does not fasten on every industry the model of the disinterested generalist judge. To the extent that an agreement entitles parties to select interested (even beholden) arbitrators, § 10(a)(2) has no role to play" (307 F3d at 620 [internal citations omitted]); *see also Yonkers Contr. Co. v Port Auth. Trans-Hudson Corp.*, 87 NY2d 927, 929 [1996] ["As a general proposition, parties to an arbitration contract are completely free to agree upon the identity of the arbitrators, and New York courts have therefore regularly refused to disqualify arbitrators on grounds of conflict of interest or partiality even in cases where the contract expressly designate[s] a single arbitrator . . . employed by one of the parties" [internal quotation marks omitted]).

Here, MASN, the Orioles and the Nationals expressly chose to carve out disputes over telecast fees for arbitration before the RSDC, an industry-insider committee with specialized knowledge on the complex issue of how to calculate the appropriate fees that television networks should pay to teams for broadcast rights. In contrast, their agreement specified that other disputes would be arbitrated before the Commissioner or the AAA, evidencing that

the decision to carve out telecast fee disputes for arbitration before the RSDC was a conscious choice.

In making that choice, as the dissent acknowledges, the sophisticated parties, represented by experienced counsel, knew full well how the RSDC operated, including that MLB would have significant influence over the arbitration process. MASN and the Orioles knew that RSDC's members are selected by MLB in its sole discretion, that there are no written rules of evidence, discovery rights or obligations, sworn testimony, or direct or cross-examination of witnesses. Most significantly, they knew that MLB staff would provide administrative, organizational and legal support, including analyzing financial information and preparing draft decisions in accordance with the instructions of the RSDC members who would make the final determinations. Indeed, while objecting to Proskauer's involvement, MASN's counsel acknowledged during proceedings before the motion court that MASN "bought into whatever the structure was, whatever [MLB]'s role was; we agreed to that, we had to live with that."

Furthermore, in 2004, the Orioles had used the RSDC to determine the FMV of the telecast rights fees the Orioles were receiving from their then regional sports network. In 2006, Orioles owner Peter G. Angelos testified before Congress as to the advantages of using the RSDC as a neutral body to determine

the FMV of the future rights fees under the agreement, stating:

> "Last year, we paid the Nationals $20 million to televise their games, which is more than Comcast SportsNet paid us to televise Orioles games. The agreement provides a mechanism to revalue the rights fees at a market-based rate through an MLB committee in the event TCR/MASN and the Nationals are not able to agree on a new contract. The benefits of that arrangement to both the Nationals and Orioles cannot be overstated. It guarantees each team a market rate as evaluated and set by a neutral third party determined by [MLB]."

MASN and Orioles also waived the opportunity to mediate this dispute before the AAA or JAMS, electing to proceed directly to arbitration before the RSDC, as the preferred entity to resolve the dispute. The only reason that their position has changed is that they are unhappy with the RSDC's refusal to accept their interpretation of the Bortz methodology as RSDC's established methodology, which led to an award that exceeded their expectations.

Insofar as the dissent finds that MLB demonstrated a lack of concern for the fairness of the first proceeding by taking no action in response to petitioner's objections to the participation of Proskauer as counsel for the Nationals, this defect has been remedied. Proskauer is no longer representing the Nationals and the composition of the RSDC has changed, with the appointment of three new arbitrators affiliated with different clubs.

The dissent's position that the new panel will remain puppets of MLB, rather than exercise its independent judgment, is pure conjecture. An attack on the impartiality of the arbitrators "must be based on something overt, some misconduct on the part of an arbitrator[s], and not simply on [their] interest in the subject matter of the controversy or [their] relationship to the party who selected [them]" (*Matter of Astoria Med. Group [Health Ins. Plan of Greater N.Y.]*, 11 NY2d 128, 137 [1962]). Indeed, if the dissent's position is adopted, and the RSDC is disqualified based on the mere possibility that MLB will unduly influence it, it would eliminate the viability of any future arbitration by any MLB club before the RSDC, and place into question the viability of industry-insider arbitrations in general.

The dissent finds that MLB has a direct financial stake in the amount of the fees that will be awarded in the second arbitration because MLB will only recoup its $25 million advance if the Nationals are awarded more than the amount MASN and the Orioles have proposed. However, the Nationals have offered to post a bond to guarantee repayment of the advance to MLB regardless of the outcome of the arbitration. While the dissent states in conclusory fashion that the posting of a bond will not resolve the issue, and should not be considered because it was

raised at oral argument, it does not persuasively explain why that is so, and ignores the circumstances that led to the advance and its purpose, turning the parties' intent behind the advance on its head.

After the arbitrators made their draft decision known, the issuance of a final decision was deferred in the hope of reaching a global settlement among the parties. While negotiations continued and settlement proposals were exchanged, MASN continued to pay the Nationals the $39.5 million per year it maintained was due, notwithstanding its awareness that the RSDC would award over $50 million. The Nationals were not content with this continuing shortfall and MLB made the $25 million advance to keep the club at the negotiating table, which benefited both parties by allowing the Nationals to receive the proposed award at no financial cost to MASN and the Orioles, thereby forestalling litigation to enforce the RSDC award. To 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. Furthermore, given the fact that MASN has paid the Nationals over $30 million per year for the last five years for their telecast rights, it is speculative at best to conclude that the Nationals do not have

the ability to repay the advance if the result of the second arbitration changes to its detriment.

Nor does the fact that MLB has made certain public statements expressing the view that the RSDC acted within the scope of its authority in setting the rights fees, and that MASN would have to abide by that determination "sooner or later," warrant the transfer to a new forum. Again, it is the RSDC, not MLB or its Commissioner that will render a final decision in this matter. Indeed, while the dissent casts MLB's Commissioner as a "de facto fourth arbitrator," it concedes that he does not have a vote. As to the dissent's reliance on evidence that MLB has actively opposed MASN's claims by threatening sanctions for pursuing a judicial remedy, those warnings were addressed to all parties. In taking this position, MLB was merely attempting to protect the binding arbitration process that the parties had previously agreed to and MLB's constitution.

In an attempt to bring the forum dispute within the purview of the FAA, the dissent also finds that the initial decision reflects that the RSDC has been shown to be "so corrupt or biased" as to undermine the expectations of the parties to have a fundamentally fair hearing. However, when viewed in the context of the RSDC's actual award, the dissent's position is without foundation. In fact, the RSDC rejected both sides' arguments as

to the methodology that should be used to determine FMV and the award of $53 million per year was far closer to the $39.5 million proposed by MASN and the Orioles than the $118 million demanded by the Nationals. There has been no showing that the RSDC was either corrupt or biased.

Even if the second arbitration was referred to the AAA, as proposed by the dissent, any panel selected would necessarily be comprised of arbitrators with expertise in professional sports and broadcast fees. Thus, given the small pool of qualified arbitrators available, there would be no assurance that all potential conflicts or bias would be removed or that MASN and the Orioles would be satisfied with the RSDC's successor and "would not bring yet another proceeding to disqualify him or her" (*Marc Rich & Co. v Transmarine Seaways Corp. of Monrovia*, 443 F Supp 386, 388 [SD NY 1978]).

The dissent's reliance on *Aviall, Inc. v Ryder Sys., Inc.* (110 F3d 892 [2d Cir 1997], *supra*), and *Erving v Virginia Squires Basketball Club* (349 F Supp 716 [ED NY 1972], *affd* 468 F2d 1064 [2d Cir 1972]) as a basis for reforming the arbitration clause is misplaced.

In *Aviall*, the agreement required that the disputes only be submitted to the designated arbitrator if it were an "independent auditor" of both parties (*Aviall* at 894). The plaintiff sought

removal of the arbitrator due to a "business relationship" with a party (*id.* at 893). While stating that in certain limited circumstances a court has the power to remove an arbitrator pursuant to section 2 of the FAA if the arbitration agreement itself "is subject to attack under general contract principles" (*Aviall* at 895), the Second Circuit affirmed the district court's decision not to adjudicate the dispute over which arbitrator would hear the matter. The court reasoned that the dispute over whether the auditor arbitrator was sufficiently "independent" to satisfy the terms of the arbitration agreement did not constitute a claim "invalidating the contract" or a claim of some type of fraud in the inducement that would invalidate the agreement under general contract principles (*id.* at 895-897). This reasoning is equally applicable to this case.

In *Erving*, the Second Circuit affirmed the district court's decision to substitute a neutral arbitrator in place of the Commissioner of the American Basketball Association based on an impermissible conflict of interest, that is, that the Commissioner was a partner at the law firm representing the defendant. Here, the dissent's criticism is directed at MLB, not the arbitrators.

Even if a challenge to the panel's independence was an equitable ground for reformation, we are not asked to replace

arbitrators who have shown themselves to be less than impartial. Indeed, the new arbitrators on the reconstituted RSDC have not demonstrated any bias in the matter and there has been no showing of an impermissible conflict between them and MASN or the Orioles. Thus, MASN and the Orioles have not made the extraordinary showing of grounds needed to reform the agreement or disqualify the RSDC, without which we lack the authority to reform the contract.

In sum, it cannot be said that MASN's and the Orioles' expectation of a reasonably fair and impartial arbitration forum in the RSDC has been frustrated, and there is no basis to sever the clause in the parties' agreement selecting the RSDC as the arbitral forum for this dispute or to reform the clause to require a rehearing before a new forum unconnected to MLB.

The motion court's decision vacating the award was based solely on Proskauer's conflicts, a defect that has been remedied in that the Nationals have retained new counsel. MASN and the Orioles have not and cannot show that the agreement is unenforceable under general contract principles. Everyone was aware that the RSDC was composed of MLB owners, or their designees, and of the inherent conflicts the panel's relationship with MLB created. MASN and the Orioles have not established that MLB, whose staff are required to treat each Club "fairly and

equitably," would wield any improper or unforeseen power over a newly constituted RSDC arbitration panel. Nor has it been shown that the new RSDC members (the principal owner of the Milwaukee Brewers and executives of the Toronto Blue Jays and Seattle Mariners) have any bias against MASN or the Orioles.

Under these circumstances, to compel the parties to arbitrate before a body other than one to which they knowingly agreed, just because MASN and the Orioles are dissatisfied with the result, would violate the Nationals' right to assert their contractual rights under the agreement and create undue uncertainty within this industry, and others, that have chosen to use panels composed of industry insiders, with specialized expertise, to arbitrate complex disputes.

KAHN, J. (concurring)

I agree that Supreme Court correctly vacated the award based on evident partiality. I also concur in the result reached by the plurality that the arbitration may not be referred to another forum, but I do so on different grounds.

This arbitration is governed by the Federal Arbitration Act (FAA) (9 USC § 1 *et seq.*), and the substantial body of case law under the FAA holding that the terms of negotiated arbitration agreements must be judicially enforced according to their terms (*Volt Info. Sciences, Inc. v Board of Trustees of Leland Stanford Jr. Univ.*, 489 US 468, 476 [1989]), in the absence of an established ground for setting such agreement aside, such as fraud, duress, coercion or unconscionability (*Matter of Cullman Ventures [Conk]*, 252 AD2d 222, 228 [1st Dept 1998], citing *Matter of Salvano v Merrill Lynch, Pierce, Fenner & Smith*, 85 NY2d 173, 181-182 [1995]). The duty of courts in promoting the goal of the FAA is to "'rigorously enforce' arbitration agreements according to their terms" (*Salvano* at 181), even when they appear to be unwise.

Here, the conduct of Major League Baseball and its representatives has been far from neutral and balanced. But this was the forum the parties chose, even avoiding the opportunity for a hearing before a panel of the American Arbitration

Association and proceeding directly to the Revenue Sharing Definitions Committee (RSDC). New arbitrators have been designated to hear the matter for the RSDC. This Court may not order that the arbitration take place in a forum other than the one selected by the parties, notwithstanding the possibility of a more impartial proceeding in another forum (*Salvano*, *at* 181-182; *Cullman Ventures*, 252 AD2d at 228 ["Nor may courts direct that the arbitration take place in a forum other than that specified in the agreement, notwithstanding a possibly fairer or more convenient proceeding in a forum not designated in the agreement"]).

ACOSTA, P.J. (dissenting in part)

Part of what makes baseball such a beloved sport is its rules, which preserve the integrity and popularity of the game (*see* Office of the Commissioner of Baseball, Official Baseball Rules [2016], available at http://mlb.mlb.com/mlb/downloads/y2016/official_baseball_rules.pdf [accessed June 29, 2017]). Players take the field with the expectation that the umpires are not predisposed to apply those rules in favor of one team over the other. The players win or lose each game based on their own skills and the fair application of the rules - not the influence of some outside force, such as partial umpires or illegal betting. In short, the game is fundamentally fair, a concept that is equally important in arbitrations. An arbitration, like most sports, requires that adversaries begin on a level playing field, with ground rules that are applied fairly to both sides, and without decision makers who will prejudge the matter. Otherwise, there would be no integrity or trust in the process. Unfortunately, in this case, we are confronted with a fundamentally unfair arbitration that was conducted by Major League Baseball and involved a dispute between two baseball clubs.

I cannot recall having previously encountered such a confluence of factors that call for judicial intervention in an

arbitration: Not only does the entity administering the arbitration (Major League Baseball [MLB]) have significant influence over the arbitrators, including the power to marshal evidence and draft arbitral award decisions, but it also made a bet on the outcome of the arbitration by loaning one of the parties $25 million to be repaid after an award in that party's favor.[1] And, more egregiously still, the Commissioner of Baseball who controls the arbitration process made public statements during post-award litigation indicating a position on the merits of the case. Under these unique circumstances, a rehearing by the same arbitral forum that conducted the initial arbitration under the purview of the Commissioner's office would be all but guaranteed to yield the same result. Therefore, to effectuate the intent of the parties as expressed by their contractual choice to arbitrate the dispute before a panel of

[1] Coincidentally, in recent decision issued by the MLB Commissioner's office, the Commissioner noted that the "severe rule [that led to a player's permanent ban from the sport for betting] is a reflection of the fact that gambling by players and managers on games involving their Clubs has the potential to undermine the integrity of the game on the field and public confidence in the game" (Office of the Commissioner, Major League Baseball, *Decision of Commissioner Robert D. Manfred, Jr., Concerning the Application of Rose for Removal from the Permanently Ineligible List*, Dec. 14, 2015, available at http://mlb.mlb.com/documents/8/4/6/159619846/Commissioner_s_Decision_on_Pete_Rose_Reinstatement_u35dqem0.pdf [hereinafter MLB Rose Decision] [accessed June 29, 2017].

experts, I would hold that it is necessary and appropriate to exercise our inherent equitable power to reform the contract and refer the matter to a neutral arbitral forum, one that is possessed of expertise relevant to the specific issues involved, to conduct a fundamentally fair arbitration.

Justice Andrias's concurring opinion (the plurality) appears to acknowledge that this Court may have the power to refer the matter to a neutral arbitral forum other than that chosen by the parties under the appropriate circumstances, but chooses not to exercise that power here. This invites the question: If courts do have the power to reform an arbitration clause to provide fundamental fairness in an arbitration, where, if not here, would the exercise of such power be proper? While I agree that the arbitral award was properly vacated due to evident partiality - where it was not fully disclosed that the law firm representing one of the parties also represented the entity conducting the arbitration and the interests of all three arbitrators in unrelated matters, and the arbitral forum refused to take any steps to correct this obvious unfairness - I dissent because this particularly egregious set of circumstances warrants the referral of the case to a neutral arbitral forum. Thus, I would instead hold that courts can and should refer the matter to an alternative forum in the rare circumstances presented here.

To the extent that Justice Kahn's concurrence (the concurrence) suggests that this Court lacks the power to substitute an arbitral forum even in the most compelling circumstances, that argument is belied by the case law indicating that fundamental fairness is a requirement in any arbitration. And it fails to convincingly explain why this Court should abdicate its inherent equitable power to dispense justice in every case that comes before it (*see* New York Const., art. VI, § 7[a]; *People v Correa*, 15 NY3d 213, 227-228 [2010]). The concurrence would render this Court impotent to do anything other than vacate an arbitral award and remand it to the same forum for a subsequent arbitration - resulting in an endless loop of partial arbitrations, vacaturs, and remands - even where the parties' chosen forum has shown itself to be unwilling to guarantee a baseline of impartiality. To adopt that position would be a mistake. In the same way that the Commissioner of Baseball has a duty to protect "the integrity of play on the field through appropriate enforcement of the Major League Rules" (MLB Rose Decision, at 2), so too does this Court have the obligation, and the power, to ensure fundamental procedural fairness in an arbitration that is brought before it for review.

I. Background

Major League Baseball (MLB) purchased the Montreal Expos

baseball franchise in 2002 and, in 2004, renamed the team "the Nationals" and relocated it to Washington, D.C.. The Baltimore Orioles Baseball Club (the Orioles) objected to the relocation, as it had been the only MLB club in the Baltimore/D.C. area since 1972 and had developed TCR Sports Broadcasting Holding (TCR), a regional sports network that gave the team the exclusive right to telecast baseball games in most of a seven-state television territory. The Orioles were concerned that the Nationals would dilute the market, cause fan attrition, and diminish the value of the Orioles' telecast rights and other investments in the region.

In March 2005, after the Orioles and TCR threatened to take legal action, MLB, TCR, the Nationals, and the Orioles entered into an agreement to resolve the dispute. The agreement provided for annual compensation to the Orioles and TCR for the significant economic harms caused by the Nationals' relocation. As relevant here, the agreement converted TCR into a two-club regional sports network named the Mid-Atlantic Sports Network (MASN), which was to be owned in supermajority by the Orioles and in minority by the Nationals and was given the exclusive right to present the games of both teams. The Orioles were initially given a 90% ownership stake in MASN, which would decrease by 1% per year from 2010 to 2032, at which point the Orioles would have a final stake of 67%. The Orioles would receive ongoing payments

from MASN's profits in proportion to their supermajority interest (i.e., for each dollar of profit, the Orioles would receive a percentage equal to their ownership stake at the time of profit distribution).

Because the telecast rights fees paid to the teams are MASN's single largest expense, the amount of the fees directly impacts MASN's profitability. Thus, any increase in telecast rights fees necessarily decreases the Orioles' compensation. The parties negotiated the specific fees to be paid annually by MASN to the teams between 2005 and 2011, as well as a methodology for determining future fees. With regard to future fees, the agreement provided that, for each five-year period after 2011, "the Orioles, the Nationals and [MASN] first shall negotiate in good faith using the most recent information available which is capable of verification to establish the fair market value of the telecast rights."

The agreement included a dispute resolution clause to be used in the event that the three entities (the Orioles, the Nationals, and MASN) could not reach an agreement on a fair market value of the rights. That clause provided that, if there was no resolution after a mandatory negotiation period, the entities would enter a nonbinding mediation "under the auspices of the American Arbitration Association or JAMS." If that

failed, the entities would then submit the dispute to arbitration before the MLB's Revenue Sharing Definitions Committee[2] (RSDC), which would make a binding determination as to the fair market value of the parties' rights using "the RSDC's established methodology for evaluating all other related party telecast agreements in the industry."

In 2011, in advance of negotiations with the Nationals regarding the fair market value for the telecast rights fees for the 2012-2016 period, MASN devised a fee schedule based upon what it believed to be the "RSDC's established methodology" - an accounting-based profit margin analysis derived from a regional sports network's actual revenues and expenses that was developed by Bortz Media and Sports Group, Inc. (Bortz). With MLB's consent, MASN retained Bortz to determine the fees pursuant to the Bortz methodology, and on January 4, 2012, MASN sent the Nationals a proposed fee schedule of $34 million per year for the period of 2012-2016. The Nationals rejected that valuation, instead valuing its rights at more than $110 million per year

[2] The RSDC is a standing committee of MLB consisting of three representatives from MLB clubs appointed by the Commissioner of Baseball. The RSDC's principal role is to analyze transactions between clubs and other parties that involve baseball-related revenue (including telecast agreements with regional sports networks) to ensure that the revenue clubs receive under those transactions faithfully represents fair market value for revenue-sharing purposes.

according to a different methodology, which was based on factors including the size and attractiveness of the Nationals' television market, a survey of the economic value of recent deals entered into by teams in other comparable markets, and the escalating value of live sports programming.

The parties failed to resolve their dispute through negotiation, waived the agreement's mediation requirement, and submitted the dispute to the RSDC.[3] The RSDC conducted an arbitration administered by MLB staff, including Robert D. Manfred, Jr., then an executive vice president of MLB and currently the Commissioner of Baseball. MLB and Manfred's staff provided significant support to the RSDC, including legal analysis, participation in the decision-making process, and the drafting of an arbitral award.

At the RSDC arbitration, the Nationals were represented by Proskauer Rose LLP (Proskauer), a law firm that also served as MLB's longtime outside counsel. MASN and the Orioles objected to Proskauer's representation of the Nationals and sought complete disclosure of MLB's and the individual arbitrators' relationships with the firm. MLB provided only limited disclosures, which did

[3] As constituted at that time, the RSDC was comprised of Stuart Sternberg, principal owner of the Tampa Bay Rays; Francis Coonelly, President of the Pittsburgh Pirates; and Jeffrey Wilpon, Chief Operating Officer of the New York Mets.

not reveal the full extent of Proskauer's representations of MLB and the arbitrators' clubs and interests. In February 2012, Manfred held an organizational meeting to discuss the procedures for the arbitration before the RSDC; the arbitrators were not present at that meeting. MASN and the Orioles persisted in their objection - which they repeated at least 18 times throughout the arbitration - but Manfred stated that he did not believe MLB had the authority to disqualify Proskauer. In addition, counsel for MASN and the Orioles sent Manfred a letter dated February 1, 2012, explaining that Proskauer's past representation of the Orioles - which Proskauer had unilaterally terminated - and the firm's representation of MLB and various MLB clubs, "including at least one of the Clubs appointed by the Commissioner to serve on the RSDC," tainted the proceedings. Counsel for MASN and the Orioles asked Manfred to transmit the letter to the individual arbitrators (whose identities had yet to be revealed) and to inform them of the objections to Proskauer's participation in the arbitration.[4]

In discovery before the motion court, it was revealed that Proskauer represented MLB, its executives, and closely related

[4] It was not until the instant action that MASN and the Orioles learned that MLB claimed that it never transmitted the letter to the arbitrators.

entities in nearly 50 separate engagements and that the firm also represented interests associated with all three arbitrators. Many of those representations were concurrent with the RSDC arbitration yet were not disclosed to the Orioles or MASN at the time. In the order appealed from, the motion court noted that there were nearly 30 engagements between MLB and Proskauer during the 2½ years that the arbitration was pending.

The RSDC held a one-day hearing on the merits in April 2012. According to a sworn affidavit of MASN's outside counsel who was present at the hearing, Manfred sat at the head table with the arbitrators and asked questions of counsel. That summer, MLB's staff prepared a draft decision for the RSDC and all parties were advised of the approximate amounts of the telecast rights fees under it. Release of the RSDC's final decision was deferred until June 2014 while then-Commissioner Allan H. (Bud) Selig attempted to negotiate a resolution of the dispute. In the interim, MASN paid the Nationals the Bortz-calculated fees, which were significantly lower than the estimated fees as set forth in the draft decision.

In August 2013, while negotiations were ongoing, MLB paid a $25 million advance to the Nationals in anticipation of the Nationals being awarded the same amount in the RSDC's final determination as in the draft decision. Pursuant to an agreement

between MLB and the Nationals, the Nationals would only be required to repay MLB if MASN were sold or if the RSDC awarded fees to the Nationals for the years 2012 and 2013 at the amount set forth in the draft decision. MASN and the Orioles were aware of the advance but were not apprised of all of the repayment terms between MLB and the Nationals, and claim that they were told at the time that MLB was lending the Nationals only $7.5 million.

On June 30, 2014, the RSDC issued its final decision in writing. With respect to the methodology of fair market valuation, the RSDC explained that the parties' agreement requires the MLB to apply the RSDC's "established methodology" (not the so-called Bortz methodology advocated by MASN and the Orioles). The RSDC also rejected the Nationals' argument that the "'established methodology' consists primarily of an analysis of rights fees obtained by Clubs in comparable markets." Instead, the RSDC explained, its "established methodology includes an analysis of the income statement of the network, a review of broadcast agreements in comparable markets to verify the financial statement analysis, and a consideration of any additional factors raised by the parties that may impact the analysis." Applying this methodology to the parties' dispute, the RSDC valued the Nationals' telecast rights fees from MASN at

roughly $53 million in 2012, with the fees rising more than $3 million each year thereafter, culminating in fees of approximately $66 million in 2016. It appears based on emails in the record on appeal that the RSDC's written determination was essentially similar to the draft decision.

In a letter dated June 30, 2014, the same day as the RSDC award, then-Commissioner Selig expressed his disappointment to the principal owners of the Orioles and the Nationals that the two clubs were unable to negotiate a settlement. In addition, Selig advised the parties that they were not authorized to commence litigation seeking judicial review of the award, and issued the following threat: "[I]f any party [i.e. the Orioles, the Nationals, or MASN] initiates any lawsuit, or fails to act in strict compliance with the procedures set forth in the Agreement concerning the RSDC's decision, I will not hesitate to impose the strongest sanctions available to me under the Major League Constitution."

Despite that threat, MASN commenced this special proceeding in July 2014 (on behalf of itself and the Orioles) to vacate the RSDC arbitration award, arguing, inter alia, that it was procured through evident partiality. Specifically, the petition noted the following as evidence of partiality: (1) the Nationals' choice to be represented in the arbitration by Proskauer; (2) MLB's $25

million loan to the Nationals; (3) MLB's significant role in the arbitration process; and (4) the inadequacy of disclosures made by the arbitrators and/or MLB as to possible conflicts.[5]

In October 2014, the Nationals submitted a verified answer to the petition and a cross motion to confirm the arbitration award and dismiss the petition. MLB also submitted an answer asking the court to deny the petition and grant the Nationals' cross motion to confirm the RSDC's decision.

During the pendency of this action, now-Commissioner Manfred was quoted in the press as saying, "I think the agreement's clear . . . . I think the RSDC was empowered to set rights fees. That's what they did, and I think sooner or later MASN is going to be required to pay those fees" (Associated Press, *Manfred: MASN eventually must pay Nats increased rights fees*, USA Today, May 21, 2015, available at https://www.usatoday.com/story/sports/mlb/2015/05/22/manfred-masn-eventually-must-pay-nats-increased-rights-fees/27735977/ [accesed June 29, 2017]). In addition, Manfred submitted an

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[5] After MASN commenced the instant action, MLB continued to threaten sanctions, leading MASN to seek and obtain from the motion court a temporary restraining order and preliminary injunction against MLB and Nationals to prevent enforcement of the arbitral award until judicial review was completed.

In filings and arguments in the instant action, MLB and its officials have continued to defend the RSDC award and to seek to have it confirmed.

affirmation in the present litigation in which he states that he advised the Orioles' attorney that the Orioles' interpretation of the parties' agreement

> "did not conform to the text. . . . The relevant contract provision makes no reference to any 'Bortz Methodology,' and certainly includes no reference to MASN maintaining a 20 percent operating margin, which is what MASN and the Orioles now claim the Bortz Methodology requires. . . . [I]f MASN maintaining a mandatory 20 percent operating margin had been intended by the parties, it would have been very easy to write those words into the contract."

In an order entered on or about November 4, 2015 (the November 2015 order), Supreme Court denied the Nationals' motion to confirm the RSDC decision, and granted MASN's petition to the extent of vacating the RSDC award due to evident partiality. Specifically, the court found evident partiality based on Proskauer's representation of the Nationals in the RSDC arbitration "while concurrently representing MLB, its executives and closely related entities in nearly 30 other matters" and "concurrently representing interests associated with all three arbitrators during [the relevant] period" (from January 5, 2012 to June 30, 2014). The court determined that the objective facts were "unquestionably inconsistent with impartiality," and that MLB's "complete inaction" in addressing MASN's concerns about Proskauer's conflicts "demonstrates an utter lack of concern for fairness of the proceeding that is 'so inconsistent with basic

principles of justice' that the award must be vacated" (quoting *Pitta v Hotel Assn. of New York City, Inc.*, 806 F2d 419, 423 [2d Cir 1986]). However, the court, reasoning that it lacked the authority to rewrite the parties' agreement, rejected the Orioles' argument that the matter should not be remanded to the RSDC and should instead be referred to a body of neutral arbitrators not subject to MLB's influence.

The Nationals subsequently advised the other parties that they would forgo representation by Proskauer, and moved for an order compelling MASN to comply with the November 2015 order by arbitrating before the RSDC. MASN opposed the motion and cross-moved for a stay of further arbitral proceedings pending resolution of the appeal of the prior order. In an order entered July 11, 2016 (the July 2016 order), Supreme Court denied the motion to compel arbitration before the RSDC and granted the cross motion to stay arbitration pending resolution of the appeal of the November 2015 order.

MASN and the Orioles appeal from the November 2015 order to the extent that the court declined to direct that a second arbitration proceed before a different arbitral forum, and the Nationals and MLB cross-appeal from that order to the extent that it vacated the award and denied the motion to confirm the arbitration award. The Nationals also appeal from the July 2016

order.

II. Discussion

Under section 10(b) of the FAA, if an arbitral award is vacated, "the court may, in its discretion, direct a rehearing by the arbitrators" (9 USC § 10[b]). Moreover, while the FAA generally upholds arbitration agreements as "valid, irrevocable, and enforceable," such agreements may be vitiated "upon such grounds as exist at law or in equity for the revocation of any contract" (9 USC § 2). "Although not made explicit in the statute, courts have discretion to remand a matter to the same arbitration panel or a new one" (*Sawtelle v Waddell & Reed, Inc.*, 304 AD2d 103, 117 [1st Dept 2003]). This is a logical extension of courts' "broad discretion in fashioning appropriate relief" (*Aircraft Braking Sys. Corp. v Local 856, UAW*, 97 F3d 155, 162 [6th Cir 1996] [discussing powers of federal district courts], *cert denied* 520 US 1143 [1997]; *see also* New York Const, art VI, § 7 [New York "supreme court shall have general original jurisdiction in law and equity and the appellate jurisdiction herein provided"]; *Correa*, 15 NY3d at 227-228). The inherent discretion of the courts to fashion the appropriate remedy is necessary to ensure, among other things, that arbitrations are conducted in a fundamentally fair manner.

Fundamental fairness is indeed a foundational precept of any

arbitration (*see e.g. Bowles Fin. Group., Inc. v Stifel, Nicolaus & Co.*, 22 F3d 1010, 1012 [10th Cir 1994] ["Courts have created a basic requirement that an arbitrator must grant the parties a fundamentally fair hearing"]; *Bell Aerospace Co. Div of Textron, Inc. v Local 516, UAW*, 500 F2d 921, 923 [2d Cir 1974] ["(A)n arbitrator need not follow all the niceties observed by the federal courts. He (or she) need only grant the parties a fundamentally fair hearing"]). What is meant by fundamental fairness is that the parties can reasonably expect that the arbitrators will approach the dispute without bias, that the arbitrators will view evidence without prejudgment as to the merits, and that the dispute is not predetermined as it enters arbitration (*see Bowles Fin. Group*, 22 F3d at 1013 ["(C)ourts seem to agree that a fundamentally fair hearing requires only notice, opportunity to be heard and to present relevant and material evidence and argument before the decision makers, and that the decisionmakers (sic) are not infected with bias"]; *see also Matter of Astoria Med. Group [Health Ins. Plan of Greater N.Y.]*, 11 NY2d 128, 137 [1962] [applying state law and noting that even "partisan" arbitrators in tripartite arbitration, where two party-selected arbitrators select a "neutral" third, may not "be deaf to the testimony or blind to the evidence presented. Partisan [they] may be, but not dishonest"]). Indeed, as the

United States Supreme Court has held, the "provisions of [Section 10 of the FAA] show a desire of Congress to provide not merely for any arbitration but for an impartial one" (*Commonwealth Coatings Corp. v Continental Cas. Co.*, 393 US 145, 147 [1968]). In *Commonwealth Coatings Corp.*, the Court also rejected the argument that Congress intended "to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another" (393 US at 150).

The Nationals' argument that fundamental fairness is not required in arbitration - and the concurrence's implication that the courts have no role to play in protecting fundamental fairness in arbitrations - is perplexing, as an arbitration conducted by partial or conflicted arbitrators who are permitted to prejudge a case would be nothing more than a farce. Likewise, it would be farcical to permit an arbitration to proceed in an arbitral forum whose administrator has signaled an intent to do everything in his or her power to compel a particular result. And yet, the concurrence apparently takes the position that, no matter how egregious the case, the courts are powerless to refer an arbitration to a forum other than the one selected in the parties' contract. This view, taken to its logical conclusion, would lead to an absurd result: an endless cycle of partial

arbitrations, vacaturs, and remands. While the plurality leaves open the question of whether this Court has the authority to refer the matter to a neutral forum, the concurrence's categorical position would strip this Court of its inherent discretion to fashion an appropriate remedy and would undermine the role of courts in protecting at least an elemental degree of fairness in the adjudicative process of arbitration. Therefore, it must be within the inherent equitable power of the courts to protect fundamental fairness in any arbitration that is submitted for their review.

What, then, may a court do when presented with an arbitration that was (or a subsequent arbitration that would almost certainly be) devoid of fundamental fairness? There is no real dispute that courts are empowered to substitute a contractually chosen arbitrator where there is evidence of a conflict or bias (*see* 4 Commercial Arbitration § 131:17*; Erving v Virginia Squires Basketball Club*, 468 F2d 1064, 1068 n 2 [2d Cir 1972] [affirming district court's substitution of a neutral arbitrator for parties' chosen arbitrator "to insure a fair and impartial hearing," where the chosen arbitrator had become a partner of the law firm representing one of the parties]). Where the parties differ is on the question of whether courts have the discretion to direct a rehearing before an entirely different

arbitral forum, where it is shown that a fundamentally fair hearing cannot be had in the parties' chosen forum.

Although the Nationals, MLB, and the concurrence argue that courts have no such discretion, they fail to cite any authority that specifically prohibits courts from fashioning a remedy that includes ordering an arbitration in a different forum under the appropriate circumstances. There also does not appear to be any clear authority that under the FAA a court can direct a new arbitration to be administered by an arbitral organization different from the one agreed to by the parties; yet, the statute does permit courts to reform an arbitration agreement on legal or equitable grounds (9 USC § 2; *see also Aviall, Inc. v Ryder Sys., Inc.*, 110 F3d 892, 896 [2d Cir 1997], discussing reformation of contract in *Erving v Virginia Squires Basketball Club*, 349 F Supp 716 [ED NY 1972], *affd* 468 F2d 1064 [2d Cir 1972], *supra*). Moreover, such a result has been approved under New York law (*see Rabinowitz v Olewski*, 100 AD2d 539 [2d Dept 1984]). In *Rabinowitz*, the Second Department, applying state law, affirmed the trial court's removal of an arbitration from the forum that the parties had selected, because "the appearance of bias . . . permeate[d] the entire [arbitral forum] including the board of arbitrators from which the arbitrators for th[e] dispute were selected" (*id.* at 540). Because "the FAA was modeled after New

York's arbitration law" as codified in the CPLR, and "no significant distinction can be drawn between the policies supporting the FAA and the arbitration provisions of the CPLR" (*Matter of Smith Barney, Harris Upham & Co. v Luckie*, 85 NY2d 193, 205-206 [1995]), it is appropriate to apply the reasoning of *Rabinowitz* here.

Thus, while the parties' contractual choice to select a particular arbitral forum is entitled to great deference, courts nevertheless retain their inherent judicial power, and their statutory power under 9 USC § 2, to override that choice in the event that the forum is shown to be so corrupt or biased as to undermine the reasonable expectations of the parties to have a fundamentally fair hearing.

The plurality appears to view as unequivocal the quote excerpted from a Second Circuit decision that the FAA "does not provide for pre-award removal of an arbitrator" (quoting *Aviall*, 110 F3d at 895). However, the plurality takes this quote out of context by omitting the very next sentence of that Court's opinion, which explained that "an agreement to arbitrate before a particular arbitrator may not be disturbed, *unless the agreement is subject to attack under general contract principles* 'as exist at law or in equity'" (*id.*, quoting 9 USC § 2 [emphasis added]). Indeed, the Court in *Aviall* noted the plaintiff's citation to

"cases in which an arbitrator was removed prior to arbitration on account of a relationship with one party to the dispute," cases that "manifest the FAA's directive that an agreement to arbitrate shall not be enforced when it would be invalid under general contract principles" (*id.* at 895-896). In one of those cases, *Erving*, the Second Circuit affirmed the district court's reformation of an arbitration agreement where the parties' chosen arbitrator had become a partner at the law firm representing one of the parties (*see Aviall*, 468 F2d at 1064). This shows that courts applying the FAA have the power in egregious cases to remove an arbitrator or reform an arbitration agreement, even pre-award, where an arbitration clause is invalid under general contract principles (*cf. Matter of Astoria Med. Group [Health Ins. Plan of Greater N.Y.]*, 11 NY2d at 132 [holding under state law that, "in an appropriate case, the courts have inherent power to disqualify an arbitrator before an award has been rendered"]). This is one of those cases.

Here, notwithstanding the contractual provision naming the RSDC as the arbitral forum, the circumstances call for an equitable remedy providing that the second arbitration take place in a forum unaffiliated with MLB or the RSDC. MASN and the Orioles persuasively argue that they would be unable to obtain a fundamentally fair arbitration if the RSDC were to rehear the

matter. This argument is supported by amici curiae Robert S. Smith and Kenneth R. Feinberg and the following facts: MLB's apparent lack of concern for fairness at the first proceeding; MLB's refusal to address the Orioles' complaints of the unfairness created by Proskauer's multiple roles; MLB's direct monetary stake in the outcome of the dispute as a result of its $25 million loan to the Nationals; evidence that MLB has actively opposed MASN's claims by threatening sanctions for pursuing a judicial remedy, disparaging the claims, and making clear its view that MASN's reading of the agreement is incorrect; evidence that MLB has actively supported the Nationals' attempts to confirm the award and/or compel a rehearing before the RSDC; MLB's continued defense of the original arbitration award which all members of this bench agree was affected by evident partiality; and evidence of the current Commissioner's personal involvement in the prior arbitration, including the drafting of the vacated award, and his publicly stated views about the dispute.

To be sure, MASN and the Orioles were aware at the time of entering into the contract that MLB would have significant influence over the arbitration process at the RSDC, as is consistent with MLB's standard practice in RSDC proceedings (MLB typically provides administrative support, legal analysis, and

drafting assistance). But, over the course of those proceedings and in the instant litigation, it has become clear that their choice of the RSDC as a fundamentally fair forum comprised of industry-insider arbitrators has been frustrated. Thus, contrary to the plurality, while they "knew full well how the RSDC operated, including that MLB would have significant influence over the arbitration process," they did not know at the time of contracting how far MLB would go to obtain the outcome it wanted.

For example, MLB failed to protect the parties' confidence in the fairness of the proceeding when it refused to adequately address the objections to Proskauer's participation. While the removal of Proskauer from further involvement resolves the inherent conflicts resulting from the firm's participation, contrary to the plurality, the firm's removal does not negate the finding that MLB conducted itself poorly in failing to intercede, nor does it guarantee that MLB will prioritize fundamental fairness in a subsequent arbitration. In fact, MLB does not yet acknowledge that there was anything wrong with its conduct during the original arbitration. Thus, MLB's lack of concern for fairness at the first proceeding supports a remedy directing a rehearing before a different arbitral body unattached to MLB. Moreover, in light of MLB's refusal to acknowledge its wrongful conduct that led to the now-vacated arbitral award, the plurality

fails to answer this critical question: If the decision maker cannot see the flaws in its decision-making process, why should it be trusted to go through the process again?

MLB's $25 million loan to the Nationals during the first arbitration also suggests that a second arbitration at the RSDC would be bereft of fundamental fairness. At the time it made the loan, MLB bore little risk that it would not be repaid, because it made the loan only after the arbitrators had issued the draft decision, which covered that amount. Now that the Court is affirming the vacatur of the first award, however, MLB's actual financial interest in the outcome of the second arbitration is quite significant. Since MASN has already paid the Nationals the full amount of telecast rights fees as calculated under the Bortz methodology, the Orioles' and MASN's position in a second arbitration will likely be that an appropriate award would be zero. Thus, the only way MLB can now recover the loan amount is through an award in excess of the Bortz-calculated fees. In other words, if MASN's calculations are adopted (and the Nationals' and MLB's calculations rejected) at the second hearing, MLB will not be repaid. As MLB's counsel acknowledged in proceedings before the motion court, "[I]f the award had changed [from the amount set forth in the draft decision], . . . Major League Baseball would have been out the money." It is

surprising to me that the plurality fails to appreciate the incentive this provides to MLB to do whatever it can to steer a second arbitration in its (and the Nationals') favor.

Moreover, as amicus curiae Robert S. Smith points out, the motion court described the support role of MLB's Commissioner's Office in the first arbitration as "generally akin to the support that a law clerk provides to a judge." Notwithstanding that MLB's role in the arbitration went far beyond the role of a law clerk, Mr. Smith writes that "[t]his case may thus be viewed as presenting the question: When is it acceptable for the arbitral counterpart of a judge's law clerk to have a significant financial stake in the outcome of an arbitration? We respectfully submit that the answer should be 'Never.'" I agree.[6] Just as betting is an affront to the integrity of

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[6] We should not countenance the Nationals' proposal to post a bond to guarantee repayment of the $25 million advance to MLB, as it was not raised in the briefs and, instead, was raised for the first time at oral argument before this Court. Thus, the argument that this proposal should assuage the Court's concerns regarding fundamental fairness in a subsequent arbitration before the RSDC is unpreserved (*see Matter of Erdey v City of New York*, 129 AD3d 546, 547 [1st Dept 2015]; *OFSI Fund II, LLC v Canadian Imperial Bank of Commerce*, 82 AD3d 537, 538 [1st Dept 2011], *lv denied* 17 NY3d 702 [2011]).

In any event, contrary to the plurality, the Nationals' proposal to post a bond does not sufficiently eliminate the potential of unfairness if the arbitration were to return to the RSDC. The issue of fundamental fairness involves due process concerns, and MLB's loan to the Nationals is but one indicium of bias. Posting a bond to ensure that the loan would be repaid to

baseball (*see* MLB Rose Decision, at 2), staking money on a result in an arbitration under one's own control is anathema to the nature of arbitration as an adjudicative process and to the ability of courts to do justice by the parties.

The fact that the RSDC is comprised of three new members does not change the analysis, because MLB retains its significant influence over the panel. Indeed, the Commissioner sat with the RSDC arbitrators and asked questions during the hearing at the first arbitration, acting as a de facto fourth arbitrator. Although he did not provide a fourth vote, his influence on the panel, including his ability to marshal and exclude evidence and draft an award, remains substantial. Given the Commissioner's public comments touching upon the merits of the dispute and telegraphing his support for the Nationals' position, it is highly unlikely that the RSDC would come to a different conclusion if it were to rehear the case. While it is true that the parties chose the RSDC with the understanding that MLB would have significant influence over the arbitration process, they did not consent to MLB dictating the result. The plurality misses

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MLB regardless of who wins the subsequent arbitration would not overcome the other procedural infirmities described herein. In other words, the Nationals cannot buy their way out by offering to post bond for the amount of the advance to be repaid to MLB.

the point when it states that the three new RSDC arbitrators have not shown any bias. While that may be true, the salient point is that MLB still controls nearly every facet of the RSDC and has shown itself - through its past conduct and the Commissioner's statements - to be incapable of protecting fundamental fairness in administering an arbitration of the instant dispute. Here, as in *Rabinowitz*, the arbitral forum initially selected by the parties is tainted by "the appearance of bias," which "permeates the entire [arbitral forum]" (100 AD2d at 540).

Therefore, I would hold that the matter cannot be reheard by the RSDC and should be referred to a neutral arbitral body, namely the American Arbitration Association (AAA). This is the proper result in the circumstances of this case. The AAA is the logical choice given that Section 8.C of the parties' agreement selected the AAA as a catchall to arbitrate disputes that were not specifically covered by other clauses in the contract.[7] Although, in Section 2.J of the agreement, the parties

[7] Section 8.C of the agreement states that those disputes "shall be arbitrated before a three-person panel in accordance with the Commercial Rules of the American Arbitration Association," and Rule R-2 of those rules states that "[w]hen parties agree to arbitrate under these rules . . . they thereby authorize the AAA to administer the arbitration" (American Arbitration Association Commercial Arbitration Rules and Mediation Procedures § R-2, available at https://www.adr.org/sites/default/files/Commercial%20Rules.pdf [accessed June 30, 2017]).

specifically selected the RSDC for disputes over telecast rights fees, the RSDC is no longer an appropriate forum for this particular dispute. Accordingly, applying the catchall provision's selection of the AAA to conduct the arbitration is the best method to effectuate the intent of the parties while protecting fundamental procedural fairness. To the extent that the parties intended to select arbitrators who have some level of expertise relevant to the dispute - a concern also voiced by amicus curiae E. Leo Milonas - Section 8.C satisfies that prerequisite: it states that the three-person panel of the AAA "shall be constituted of persons with specialized knowledge, experience or expertise in broadcasting, media rights, or professional sports." Surely the AAA, a nationally renowned arbitration organization, has on its roster several arbitrators with the desired expertise or its equivalent; the parties would not have selected the AAA to arbitrate Section 8.C disputes if that forum lacked such arbitrators.

The plurality is simply wrong in its assertion that "there is no basis, in law or in fact," to order a rehearing in a different arbitral forum from the one originally selected by the parties. As discussed above, courts are empowered to do so through their inherent discretion and the reformation power embodied in section 2 of the FAA. Even 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."[8] In my view, they have made such a showing here.[9]

The cases relied on by the plurality are distinguishable. For example, the plurality quotes the Second Circuit in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Georgiadis*, which stated that where "parties have agreed explicitly to settle their disputes only before particular arbitration fora, that agreement controls" (903 F2d 109, 113 [2d Cir 1990]). The difference

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[8] Ironically, the plurality's eloquent description of the defects in the original arbitration convincingly shows that it was affected by an extraordinary degree of bias.

[9] Surprisingly, the plurality speculates that the "only reason" MASN and the Orioles challenged the RSDC award is that "they are unhappy with the RSDC's refusal to accept their interpretation of the Bortz methodology as RSDC's established methodology." That view does not comport with the plurality's position that the first arbitration was properly vacated due to evident partiality. The Orioles may very well be unhappy with the amount of the arbitral award, but they likewise are legitimately unhappy with the defective manner in which the arbitration was conducted.

Furthermore, the plurality's suggestion that the arbitration amount was fair because the dollar amount of the award was closer to the Orioles' calculations than to the Nationals' does not show that the arbitration process was fair, that it was free of undue influence by MLB, or that a second arbitration would be fair. The amount of the award may simply reflect that the Nationals' proposed valuation was outlandish (an issue I do not decide).

between that case and this one is obvious from the word "fora," the plural form of the term "forum" (Merriam-Webster Online Dictionary, fora [https://www.merriam-webster.com/dictionary/fora][accessed June 30, 2017]). In other words, the agreement in *Georgiadis* allowed the plaintiff to "select one of several arbitration fora in which to arbitrate" (903 F2d at 110-111) - and none of those were shown to be biased - whereas the agreement in the instant matter named a single arbitral *forum* (the RSDC) that has shown itself to be incapable of observing fundamental fairness in arbitrating this particular dispute. Moreover, the plurality quotes *Matter of Salvano v Merrill Lynch, Pierce, Fenner & Smith*, in which the Court of Appeals noted that "courts have refused . . . to direct that the parties arbitrate in a forum other than that specified in their agreement, even though permitting the choice of a different forum might seem fairer or more suited to the needs of a particular party" (85 NY2d 173, 181-182 [1995]). That courts have refused to do so, however, does not mean that courts are without the power to do so where fundamental fairness cannot be obtained in the parties' chosen forum. Here, a different forum not only "seems fairer," but the parties' chosen forum is decidedly unfair under the circumstances. And, critically, none of the cases cited by the plurality (and the concurrence) holds

that courts lack the power to order an arbitration in a new forum where the parties' only selected forum is too biased to fairly arbitrate the dispute.[10]

Moreover, notwithstanding the plurality's statement that "the FAA permits parties to select arguably partial arbitrators, if doing so serves their interests," MASN and the Orioles did not agree to an arbitration before a panel that would prejudge the case in their adversary's favor. Nor is it likely that such a concession would comport with fundamental fairness. Of course, the parties may select arbitrators who have specific expertise

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[10] Neither *Salvano* nor *Matter of Cullman Ventures (Conk)* (252 AD2d 222 [1st Dept 1998]) confronted the issue of pervasive bias and fundamental fairness in an arbitration. *Salvano* held that the trial court lacked "the authority to order the parties to proceed [with an expedited arbitration pursuant to CPLR art 75] absent any provision explicitly authorizing expedited arbitration in the parties' agreements" (85 NY2d at 178). *Cullman Ventures* held that the trial court improperly enjoined an arbitration in another state and consolidated it with an arbitration in New York (252 AD2d at 228 ["By conflating two different arbitrations, arising under separate and distinct agreements, involving different parties, the court improperly intruded into what clearly were binding contractual arrangements"]).

Thus, to the extent that those decisions touch upon the issue raised in this case - by suggesting that courts may not "direct that the arbitration take place in a forum other than that specified in the agreement, notwithstanding a possibly fairer . . . proceeding in a forum not designated in the agreement" (*id.; see also Salvano*, 85 NY2d at 182) - they did so only in dicta and without the threat of a forum that had revealed its unwillingness to provide the parties with a fundamentally fair arbitration.

relevant to the dispute and who may therefore be somewhat non-neutral, but there is no authority that supports the proposition that parties may select an arbitral panel that is predisposed to ruling in favor of one party regardless of the evidence presented to it. To the contrary, "simply because arbitrators can be non-neutral does not mean that such arbitrators are excused from their ethical duties and the obligation to participate in the arbitration process in a fair, honest and good-faith manner" (*Matter of Excelsior 57th Corp. [Kern]*, 218 AD2d 528, 531 [1st Dept 1995] [internal quotation marks omitted]).

The plurality's reliance on *National Football League Mgt. Council v National Football League Players Assn.* (820 F3d 527 [2d Cir 2016]) is also inapposite. That case involved a labor arbitration (not a commercial arbitration, as here) in which the court specified that "[t]he basic principle driving both our analysis and our conclusion is well established: a federal court's review of labor arbitration awards is narrowly circumscribed and highly deferential–indeed, among the most deferential in the law (*id.* at 532)." That level of deference does not apply here. Moreover, although "the parties to an arbitration can ask for no more impartiality than inheres in the method they have chosen" (*id.* at 548), an arbitral award may still be set aside even "where the parties have expressly agreed

to select partial party arbitrators" and "the objecting party proves that the arbitrator's partiality prejudicially affected the award" (*Winfrey v Simmons Foods, Inc.*, 495 F3d 549, 551 [8th Cir 2007] [internal quotation marks omitted], cited by *National Football League Mgt. Council*, at 548).

Even the plurality's lengthy quote from *Sphere Drake Ins. Ltd. v All Am. Life Ins. Co.* does not support the proposition that party-appointed arbitrators may completely prejudge a case (307 F3d 617, 620 [7th Cir 2002], *cert denied* 538 US 961 [2003] [noting that the arbitrators under arbitration rules in that case could "engage in *ex parte* discussions with their principals until the case is taken under advisement, but they are supposed thereafter to be impartial adjudicators"]). Furthermore, that court determined that section 10(a)(2) of the FAA had no role to play in determining whether an award could be vacated due to evident partiality of party-appointed arbitrators, but it said nothing about section 10(b), which explicitly permits courts "in [their] discretion" to "direct a rehearing" once an arbitral award is vacated.

Furthermore, the plurality's fears that my position, if adopted, would "eliminate the viability of any future arbitration by any MLB club before the RSDC, and place into question the viability of industry insider arbitrations in general" are

entirely unfounded. Presumably, MLB does not regularly place bets on other disputes that come before the RSDC, nor does the Commissioner of Baseball typically make public comments and sworn statements in favor of one party or outcome. And, presumably, other industry insider arbitrations do not often include egregious showings of bias as presented here. By contrast, as I have stated above, this case involves extraordinary circumstances that necessitate removing this particular matter from the RSDC and MLB's purview.

The plurality may be correct that I "wax[] poetic about the purity of the game of baseball," but it misses the point by stating that "MLB is first and foremost a business, governed by its constitution and innumerable agreements and contracts." This case is not solely about business. It is also about arbitration, which, at its core, is about fairness. To be sure, arbitration does not contain the same procedural and evidentiary rules as litigation, and it may be truncated and, at times, not absolutely fair. But it remains an adjudicatory process in which adversaries submit their disputes to relatively impartial decision makers who are expected to fairly decide matters on the evidence. To say that arbitration is simply a matter of business overlooks its essence as a tool for administering justice outside of the courts.

At bottom, MLB's pervasive bias and unfair conduct has infected the RSDC so as to frustrate the parties' intent to submit their dispute to a fundamentally fair arbitration. Even if the parties' initial choice to arbitrate before the RSDC was not a choice for a totally neutral forum, we must assume that they intended to arbitrate in a forum that offered at least a reasonable level of fairness and impartiality. Because that intent has been frustrated, reformation of the agreement to require a rehearing not administered by MLB or the RSDC is warranted. Therefore, we should substitute our discretion for that of the motion court and direct the parties to submit the subsequent arbitration to the AAA.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 13, 2017

CLERK