To Be Argued By:

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

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

TCR SPORTS BROADCASTING HOLDING, LLP,

Petitioner-Appellant-Cross-Respondent-Respondent,

—against—

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

Respondents-Respondents-Cross-Appellants-Appellants,

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

Respondents-Respondents-Cross-Appellants,

—and—

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

Nominal Respondents-Appellants-Cross-Respondents-Respondents.

BRIEF FOR RESPONDENTS-RESPONDENTS-CROSS-APPELLANTS THE OFFICE OF COMMISSIONER OF BASEBALL AND THE COMMISSIONER OF MAJOR LEAGUE BASEBALL

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PRELIMINARY STATEMENT

More than a decade ago, TCR Sports Broadcasting Holding, LLP (which now does business as the Mid-Atlantic Sports Network ("MASN")) and its supermajority owner and managing partner, the Baltimore Orioles Baseball Club and the Baltimore Orioles Limited Partnership (collectively, the "Orioles"), agreed to arbitrate any disputes with the Washington Nationals Baseball Club, LLC (the "Nationals") over the fair market value of the Nationals' telecast rights fees before the Revenue Sharing Definitions Committee ("RSDC"). The RSDC, as all parties well understood, is a standing committee of the Office of the Commissioner of Baseball,[1] which does business as Major League Baseball ("MLB"). The RSDC is supported by MLB staff and specializes in assessing the fair market value of baseball Clubs' telecast rights. When a dispute over the Nationals' telecast rights fees ripened, that agreed-upon arbitration mechanism yielded a fair process and resolution: The RSDC considered both sides' evidence and arguments and issued a well-reasoned decision that, though accepting neither side's position *in toto*, substantially favored MASN and the Orioles. Nonetheless, MASN and the Orioles filed this lawsuit seeking to vacate the award on a host of grounds, ranging from

[1] MASN erroneously denominates the Commissioner of Baseball in the case caption as "the Commissioner of Major League Baseball."

complaints about various procedural rulings to allegations of fraud and corruption by MLB.

The New York County Supreme Court, Commercial Division (Marks, J.), considered and rejected all of MASN and the Orioles' arguments save one: It concluded that the RSDC's award must be vacated on "evident partiality" grounds because the outside law firm that represented the Nationals before the RSDC—Proskauer Rose LLP ("Proskauer")—has also represented Clubs or other entities with which the RSDC's three arbitrators were affiliated in a few "unrelated" litigation matters. R.37. The court found no merit in any of the other complaints that MASN and the Orioles raised (and continue to press) about the RSDC process and decision, including their objection to MLB's role in providing administrative support to the RSDC. Similarly, the court rejected MASN and the Orioles' *volte face* concern about an advance to the Nationals which they had supported and which allowed settlement negotiations to continue. Nonetheless, MASN and the Orioles now claim that, in addition to vacating the RSDC's award, the trial court should have ordered the parties to re-arbitrate their dispute before a different arbitral body than the expert industry body that the parties deliberately chose in their contract. This Court should do nothing of the sort.

Rather, the proper course is to reinstate and confirm the RSDC's award, as the trial court's evident partiality finding is unsustainable. An arbitration award

may be vacated for evident partiality only when the party challenging the award proves by *clear and convincing* evidence that a reasonable person *would have to conclude* that the *arbitrators* were partial. The trial court did not and could not make any such determination here. It identified no concrete actions by the arbitrators, in either their conduct of the arbitration or their ultimate decision, that manifested partiality in favor of the Nationals, and there were none. Moreover, the court never even tried to explain how the mere fact that entities associated with an arbitrator happened to share the same large law firm as a party to an arbitration in concededly "unrelated" matters could compel a reasonable person to conclude that the arbitrators were partial. Throughout the arbitration, Proskauer had no attorney-client relationship with any of the arbitrators. And the connections with the law firm were particularly attenuated here given that the arbitrators did not sit to represent the interests of their Clubs and instead exercised their independent judgment. In reality, the fact that the large law firm retained by the Nationals also represented other business interests associated with the arbitrators did not create any plausible basis for disqualifying the RSDC arbitrators, let alone satisfy the demanding standard for evident partiality under the Federal Arbitration Act.

On top of this, MASN and the Orioles never asked any of the arbitrators to recuse themselves from arbitrating the dispute—even though they knew at the time that the Nationals' counsel represented MLB and the RSDC arbitrators' Clubs in a

few unrelated matters. Instead, MASN and the Orioles confined their objections to trying to disqualify *Proskauer* from *representing the Nationals*, a step that, as they were correctly informed, the RSDC lacked the legal authority to take. That only underscores that there was no evident partiality of the RSDC arbitrators. Whatever their concerns about Proskauer representing the Nationals, MASN and the Orioles never contested the impartiality of the RSDC arbitrators until they sought to vacate the award. Rules of waiver and respect for arbitration do not allow such gamesmanship.

But even assuming the trial court's evident partiality determination could withstand scrutiny, it does not even begin to support MASN and the Orioles' extraordinary request to order arbitration before a different arbitral body, rather than simply allowing the parties to re-do the arbitration before a newly constituted RSDC without any involvement by Proskauer. Their contrary argument rests on the demonstrably false premise that the trial court found some impropriety in MLB's involvement in the RSDC proceeding. In reality, the only concern that the court identified related to Proskauer's involvement. Thus, a Proskauer-free arbitration before the RSDC is the only remedy that would follow the logic of the trial court's ruling. In fact, no such do-over is needed because there was no evident partiality (or any other problem) with the first RSDC arbitration. In all events, this Court should not allow MASN and the Orioles to escape their

contractual agreement to arbitrate any fair market value disputes with the Nationals before the expert industry body that the parties selected in the governing agreement.

QUESTIONS PRESENTED

1. Whether an intra-industry arbitration award may be vacated for evident partiality under the Federal Arbitration Act ("FAA") where (i) outside counsel to one of the parties represented the employer of, or a business associated with, the arbitrators, but not the arbitrators themselves, in unrelated matters, and the arbitrators did not sit to represent the interests of those associated businesses but to exercise independent judgment, and (ii) the representations were known to or easily discoverable by the opposing parties, which never objected to the arbitrators' continued service?

The trial court erroneously answered yes.

2. Did the trial court err in declining to order the dispute to be reheard in an arbitral forum different than the one specified by the parties' contract?

The trial court did not err.

STATEMENT OF FACTS

I. Major League Baseball and the Revenue Sharing Definitions Committee

MLB is an unincorporated, voluntary association composed of thirty Clubs. R.136 ¶ 31. The Clubs and Club owners are the ultimate owners of MLB. They

are bound by the Major League Constitution and, through the Constitution, the Clubs vest broad authority in the Commissioner to act in the best interests of Baseball. The owners of the thirty Clubs elect the Commissioner. R.1886. He and MLB staff, based at MLB headquarters in New York City, are responsible to the Clubs and their owners. R.3141–44 ¶¶ 16–24. MLB staff support various functions, including enforcing MLB's rules, providing support to league-wide committees, negotiating with the Major League Baseball Players Association ("MLBPA"), and providing legal advice and assistance to Clubs in a variety of contexts. *Id.* In all of these endeavors, MLB staff members are required to be strictly neutral in any dealings with Clubs. R.3142–43 ¶¶ 17, 21.

Given their involvement in a common enterprise, the Clubs, their owners, and their executives naturally interact regularly with one another. R.3141 ¶ 16. For example, Club owners and executives routinely participate in MLB committees, attend annual meetings, and engage in inter-Club transactions such as player trades. *Id.* Clubs collaborate in league-wide promotional initiatives and national broadcast rights deals, and they also collectively defend lawsuits affecting league-wide interests. *E.g.*, R.1873–74 ¶ 7. As part of their collective bargaining agreement with the MLBPA, Clubs also engage in revenue sharing pursuant to a Revenue Sharing Plan, in which certain types of revenue are redistributed between Clubs in order to foster competitive balance. R.1044–45 ¶ 10.

One of the sources of income subject to the Revenue Sharing Plan is the fees a Club receives for its local game broadcasting rights from what are commonly referred to as "regional sports networks" ("RSNs"). R.1045 ¶ 11. Under the Revenue Sharing Plan, revenues that a Club earns from granting an RSN the right to telecast its games *are* subject to revenue-sharing, but profits that a Club earns as a result of an *ownership* interest in an RSN are *not*. R.1045 ¶ 11; R.2050–51 ¶ 25. Accordingly, Clubs with an ownership stake in an RSN (which several Clubs have) may have an economic incentive to structure their telecast agreements to minimize the rights fees that the RSN pays them and maximize the profits that the RSN earns, as doing so will minimize the portion of the Club's television-related revenues that are subject to revenue sharing. R.2050–51 ¶ 25.

To respond to this potential market distortion, in 1997, the Commissioner established the RSDC. R.1762 ¶ 3. The principal role of the RSDC is to analyze transactions between Clubs and related parties that involve baseball-related revenue (including telecast agreements with RSNs) to ensure that revenue Clubs receive under those transactions faithfully represent fair market value for revenue sharing purposes. R.2922 ¶ 4. Since its inception, the RSDC has been a three-person MLB committee composed of owners or high-level executives from the Clubs. R.1762 ¶ 3. Its members are selected by the Commissioner and customarily reflect a mix from large- and small-market Clubs. R.1762 ¶¶ 3–4.

The RSDC's composition changes periodically. R.1762 ¶ 3. When serving on the committee, the RSDC's members do not sit to represent the interests of their respective Clubs; instead, they are expected to exercise their independent judgment on the issues before them. R.1763 ¶ 8; R.1845 ¶ 6; R.1855 ¶ 5; R.1864 ¶ 5. Over the nearly twenty years of its existence, the RSDC has issued numerous reports addressing billions of dollars of related-party transactions, including RSN rights fees, and it has developed significant expertise in valuing telecast and other rights. R.1762 ¶¶ 3, 7; R.2924 ¶ 9.

RSDC proceedings have always been informal. R.2923 ¶ 6. A Club may submit supporting materials, including briefs and expert reports. *Id.* Clubs often make oral presentations, and the RSDC members may ask questions. R.2923 ¶¶ 6, 8. There are no written rules of evidence, discovery rights, disclosure obligations for RSDC members or others, sworn testimony, or direct or cross-examination of witnesses. R.1773–74 ¶¶ 44–45; R.2923 ¶ 6; R.2929 ¶ 20d. Because the RSDC's members are Club owners or executives (and often non-attorneys) with other full-time commitments, and are exercising their own independent judgment rather than representing the interests of their Clubs, MLB staff provides the committee with administrative, legal, and organizational support. R.2922 ¶ 5; R.2924 ¶ 9. Among other things, MLB staff may organize the proceedings and address procedural matters that arise. R.2922 ¶ 5; R.2924 ¶ 9. MLB staff also regularly attends

RSDC hearings and asks questions, provides legal and other advice to the RSDC, analyzes financial information, and assists in preparing draft decisions in accordance with the instructions of the RSDC members. R.2922–23 ¶¶ 5, 8; R.3151–52 ¶ 6. At all times, however, the RSDC members themselves exercise the ultimate decision-making authority. R.1763 ¶ 8; R.1845 ¶ 6; R.1855 ¶ 5; R.1864 ¶ 5; R.2924 ¶ 10.

II. The Parties' Agreement

In December 2004, the Montreal Expos (then owned by MLB) relocated to Washington, DC to become the Washington Nationals. R.196. In connection with the move, MLB and the Orioles restructured the existing RSN owned by the Orioles so that it would have the right to telecast all Nationals and Orioles games not otherwise retained or reserved by MLB's national television rights agreements. R.200 § 2.A. This arrangement was memorialized in the March 28, 2005 Agreement among MLB, the Nationals (then still owned by MLB), the Orioles, and the Orioles' RSN (now known as MASN) (the "Agreement"). R.196.

Pursuant to the Agreement, MASN would pay the Orioles and Nationals telecast rights fees for the exclusive right to televise their games locally. R.200–01 § 2.D. At the same time, via a separate partnership agreement, the Orioles were granted a permanent supermajority stake in MASN and became its managing partner. R.204–05 §§ 2.N, 2.O. Initially, the Orioles owned 90 percent of MASN,

while the Nationals owned 10 percent. R.204 § 2.N. Starting in 2010, the Nationals' ownership stake would increase by 1 percent per year until the Orioles owned 67 percent and the Nationals owned 33 percent of the network, after which their respective ownership shares would remain fixed. R.204 § 2.N.

The Agreement set the telecast rights fees payments from MASN to the Orioles and the Nationals at differing levels through 2006, but beginning in 2007, it requires MASN to pay both Clubs the same telecast rights fees. R.202–03 §§ 2.G, 2.J.3. As a consequence of their larger ownership stake in MASN and their status as a party to the Revenue Sharing Plan, however, the Orioles would have a double incentive to structure those telecast rights fees in a way that would minimize them. R.2050–51 ¶ 25. Specifically, the Orioles would have an incentive to decrease their own telecast rights fees from MASN (and, thus, the Nationals' fees as well), to (1) suppress what they might owe for revenue sharing purposes, and (2) thereby increase MASN's profits, a supermajority of which would be distributed to the Orioles. R.204 § 2.N; R.2050–51 ¶ 25. To protect both the Nationals and the other Clubs against any attempt by MASN and the Orioles to use below-market telecast rights fees to skirt the Revenue Sharing Plan in this manner, the Agreement obligates MASN to pay "fair market value" for both Clubs' telecast rights. R.202–03 §§ 2.I, 2.J.

The parties also agreed to a specific mechanism for resolving any disputes over the fair market value of the Clubs' rights fees. R.203 § 2.J. If, after a mandatory negotiation period and mediation process, MASN and the Nationals are still unable to agree on fair market value, they agreed to submit their dispute to the RSDC, which shall make a "final and binding" determination of the fair market value of future telecast rights "using the RSDC's established methodology for evaluating all other related party telecast agreements in the industry." R.203 § 2.J.3. That mechanism for resolving rights fees disputes stands in marked contrast to other dispute resolution provisions of the Agreement, which send other disputes to arbitration under the auspices of the AAA or JAMS. *Compare* R.203 § 2.J.3, *with* R.209 § 8.C. Carving out disputes over telecast rights fees for the RSDC allowed the parties to leverage the RSDC's unique expertise in valuing telecast rights fees. R.2922 ¶ 4; R.2924 ¶ 9. In addition, because the RSDC would eventually have to review related-party payments made by MASN to the Orioles and Nationals to ensure that they reflect fair market value for purposes of the Revenue Sharing Plan, the parties avoided duplication by receiving the RSDC's revenue-sharing determination in a single proceeding. R.2922 ¶ 4.

At the time they entered into the Agreement, MASN and the Orioles were well-acquainted with the RSDC, its composition, its procedures, its prior precedents, and MLB's support role. R.2924–25 ¶¶ 11–13. Just the prior year, in

2004, the Orioles had gone through an RSDC proceeding to determine the fair market value of the telecast rights fees the Orioles were receiving from their RSN. R.2924–25 ¶ 12. Moreover, in testimony before Congress in 2006, Orioles owner Peter G. Angelos touted the advantages of using the RSDC as a neutral body to determine the fair market value of the future rights fees under the Agreement:

> The benefits of that arrangement [that the RSDC would make a final and binding determination of fair market value] 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 Major League Baseball.

R.1987.

III. The Parties' Dispute and Arbitration

In the fall of 2011, MASN, the Orioles, and the Nationals began negotiations over the fair market value of the 2012-2016 rights fees. R.1923 ¶ 35. As their representatives in those negotiations, the parties naturally chose lawyers and consultants with the kinds of close and long-standing relationships with the RSDC, other Club owners and executives, and MLB that ensured they would have sufficient expertise dealing with the issues at stake. R.1921–22 ¶ 30; R.1923 ¶ 35; R.2997–98 ¶¶ 9–10; R.3142 ¶ 18; R.3144–45 ¶ 25.

The Orioles were represented by Alan M. Rifkin, who for many years regularly attended MLB owners' meetings as the Orioles representative in Mr. Angelos's stead, with full voting proxy. R.1921–22 ¶ 30; R.1923 ¶ 35; R.3142

¶ 18. MASN and the Orioles also used Bortz Media & Sports Group, Inc. ("Bortz"), a longtime MLB and RSDC consultant, to prepare analyses to support their position in the negotiations (and later in the RSDC arbitration). R.801 ¶ 25; R.1169 ¶ 7; R.3144–45 ¶ 25. MASN's primary expert, Mark Wyche, who is the Managing Director of Bortz, had served as a consultant to the RSDC for nearly a decade and a half.[2] R.1168–69 ¶¶ 2, 7.

The Nationals meanwhile were represented by Proskauer, the same firm that had represented the Lerner family, the owners of the Nationals, in their purchase of the Club in 2006. R.2190–91 ¶¶ 8–9. Proskauer has also represented MLB and a number of Clubs, including the Orioles, in various matters unrelated to MASN or the RSDC. R.1786 ¶ 13; R.3140 ¶ 12. For example, Proskauer had been litigation counsel to the Orioles in *Moran v. Selig*, a Title VII action brought against MLB and all thirty Clubs. R.2212 ¶ 71. And Proskauer was representing the Orioles in Americans with Disabilities Act compliance matters at the time of the negotiations with the Nationals. R.852; R.2195–96 ¶ 22; R.3407. MASN and the Orioles raised no objection to Proskauer's representation of the Nationals during the negotiations. R.2191 ¶ 9.

[2] MASN claims that "MLB ended its relationship with Wyche (and Bortz) after Wyche submitted evidence on MASN's behalf in the arbitration." MASN Br. at 26 n.16. This is false. Bortz continues to provide testimony and analysis on behalf of MLB and the other Joint Sports Claimants in ongoing proceedings before the Copyright Royalty Board. *See, e.g.*, Dkt. No. 2012-6 CRB CD 2004-2009 (Phase II).

By early 2012, MASN and the Nationals had reached an impasse as to the Nationals' future telecast rights fees and waived formal mediation in favor of submitting their dispute directly to the RSDC. R.2225. When the parties submitted their dispute to the RSDC, it was composed of Francis X. Coonelly, the President of the Pittsburgh Pirates; Stuart L. Sternberg, the principal owner of the Tampa Bay Rays; and Jeffrey S. Wilpon, the Chief Operating Officer of the New York Mets. R.19. Each of these RSDC arbitrators had been appointed by the Commissioner before the MASN dispute arose. R.1763 ¶ 10.

On January 23, 2012, Mr. Rifkin sent an email to MLB's then-Senior Vice President and General Counsel, Thomas J. Ostertag, and, subsequently on January 25, 2012, a separate email to then-Executive Vice President, Labor Relations and Human Resources, Robert D. Manfred, Jr., inquiring about Proskauer's representation of MLB and MLB Clubs, including any Clubs with representatives on the RSDC. R.850–51; R.858–59; R.1771 ¶¶ 35–36; R.1786 ¶ 13. Together, Mr. Ostertag and Mr. Manfred (accurately) advised Mr. Rifkin that Proskauer had been MLB's principal labor counsel for years and represented MLB in the Los Angeles Dodgers bankruptcy matter and other matters, and that Proskauer was understood to do salary arbitration work for the Rays. R.850–51; R.858–59; R.1771 ¶¶ 35–36; R.1786 ¶ 13. Mr. Ostertag also informed Mr. Rifkin that, for the sake of

completeness, accuracy, and Club confidentiality, Mr. Rifkin should inquire directly with the Clubs about any other representations by Proskauer. R.1786 ¶ 13.

On February 2, 2012, the Nationals, the Orioles, and MASN met with Mr. Manfred and other MLB staff for a pre-hearing organizational meeting. R.1772 ¶ 38. The RSDC arbitrators did not attend the organizational meeting. *Id.* Mr. Manfred previewed the RSDC process, including procedures regarding information exchange, pre-hearing submissions, briefing schedule, and the in-person hearing. R.1772 ¶ 38; R.2473.

During the meeting, MASN and the Orioles asked that Proskauer be disqualified from representing the Nationals in the RSDC proceeding on the ground that the firm had a conflict of interest based on its past and current representation of MLB in unrelated matters. R.1772 ¶ 40; R.2199–2200 ¶ 32. The Nationals opposed the request, arguing that there was no conflict of interest or other reason for disqualification of Proskauer. R.865–68. After considering the request, Mr. Manfred, an attorney, correctly advised MASN and the Orioles that the RSDC lacked the legal authority to disqualify counsel. R.1772 ¶ 40. At the same time, the RSDC refused to exclude the Orioles from participating in the RSDC proceeding, despite an objection by the Nationals that the Orioles were not a proper party to the arbitration under the terms of the Agreement. R.856; R.1765 ¶¶ 17–18.

In advance of the RSDC merits hearing, MASN, the Orioles, and the Nationals each submitted extensive opening and responsive briefs and expert reports. R.1766–67 ¶ 20. The submissions included arguments addressing each party's position on the meaning of the RSDC's "established methodology" in Section 2.J.3 of the Agreement, as well as their positions on the fair market value of the Nationals' future telecast rights. R.882–961; R.2232–78. The RSDC arbitrators received and reviewed all of these substantive submissions. R.3124 ¶¶ 7–8; R.3129 ¶¶ 7–8; R.3134 ¶¶ 7–8. The RSDC then held a one-day merits hearing on April 3, 2012. R.2926 ¶ 18. Counsel for the parties each presented oral argument, and the parties' experts made oral presentations. R.1846–47 ¶ 12; R.1856 ¶ 11; R.1865 ¶ 11. Counsel for each party and its experts then responded to each other's presentations. *See* R.1846–47 ¶ 12; R.1856 ¶ 11; R.1865 ¶ 11.

Although both MASN and the Orioles were well aware of Proskauer's past and ongoing representation of MLB and the RSDC arbitrators' Clubs, many of which also were matters of public record, at no point during the arbitration did either MASN or the Orioles ever move to recuse the RSDC arbitrators, or even suggest that Proskauer's participation (or anything else) rendered the RSDC arbitrators biased or warranted their recusal. R.420; R.1774–75 ¶ 47; R.1785 ¶ 8; R.1787–91 ¶¶ 16–27; R.1852–53 ¶¶ 37, 39; R.1862 ¶¶ 37, 39; R.1870–71 ¶¶ 34, 36; R.1873–75 ¶¶ 6–12; R.2784; R.2787. Nor did either party ever request further

disclosures regarding the extent or details of any legal relationships between Proskauer and the RSDC arbitrators' Clubs—even though MLB had specifically advised MASN and the Orioles to inquire directly with the Clubs for the sake of completeness. R.850–51; R.1773–74 ¶¶ 42–44; R.1786 ¶ 13; R.1851 ¶ 34; R.1861 ¶ 34; R.1869 ¶ 31. Instead, the only objections MASN or the Orioles ever raised were to *Proskauer*'s participation in the proceedings, not to the neutrality of the RDSC arbitrators. R.1772 ¶ 40; R.1774–75 ¶ 47.

Similarly, no party objected to MLB's participation at the hearing or to Mr. Manfred's role in particular. R.2926 ¶¶ 18–19. Nor did any party object to the hearing's procedures or complain that it had not been accorded a full and fair opportunity to be heard and to present its case. R.1767 ¶ 22; R.1846–47 ¶ 12; R.1856 ¶ 11; R.1865 ¶ 11; R.2926 ¶¶ 18–19.

IV. The RSDC's Arbitral Award

Between mid-April and May 2012, the RSDC internally deliberated and reached a decision concerning the fair market value of the Nationals' telecast rights for 2012 through 2016. R.1768 ¶ 26. By the early summer of 2012, MASN, the Orioles, and the Nationals all learned of the approximate amounts that the RSDC had set for 2012-2016. R.1768–69 ¶ 28. The rights fees fixed by the RSDC in its April and May 2012 deliberations did not subsequently change. R.1768 ¶ 26.

The amounts determined by the RSDC were significantly closer to the MASN/Orioles' proposal than to the Nationals' proposal. *Compare* R.234, *with* R.1190, *and* R.2071. For example, for 2012, MASN and the Orioles proposed rights fees of approximately $34 million and the Nationals proposed fees of approximately $109 million. R.1190; R.2071. The RSDC awarded fees of approximately $53 million—an amount nearly three times closer to the MASN/Orioles' proposal than the Nationals' proposal. R.234; R.1190; R.2071. Over the five-year period, the RSDC awarded rights fees that were approximately $292 million less than what the Nationals proposed. *See* R.234; R.1190; R.2071.

After the RSDC arrived at its decision on the fair market value of the Nationals' telecast rights fees, but before the award actually issued, then-Commissioner Selig asked the RSDC to hold its decision in abeyance pending his attempts to mediate the dispute and reach an amicable resolution. R.1769 ¶ 29. The RSDC therefore deferred issuing its award. *Id.* The RSDC arbitrators did not participate in the settlement discussions facilitated by MLB. R.1770 ¶ 32; R.1847 ¶ 15; R.1857 ¶ 15; R.1866 ¶ 14. No party objected to MLB's role in facilitating the settlement discussions. R.1769 ¶ 30.

During the negotiations, MASN and the Orioles refused to adjust the Nationals' telecast rights fees above the yearly amounts that they had proposed as acceptable during the RSDC arbitration. R.1770 ¶ 33; R.3513 ¶ 8. Accordingly,

by August 2013, the Nationals were receiving far less than the amounts the RSDC had determined to be fair market value, and of which the parties already knew. R.1769–70 ¶¶ 31, 33. To avoid tilting the negotiations in favor of either party, MLB (as the trial court put it) "stepped into MASN's shoes and advanced funds to the Nationals, in order to allow Commissioner Selig to continue his efforts to 'settle' the parties' dispute by selling MASN to Comcast." R.32. The advance payments of $25 million, which amounted to a payment by MLB on behalf of MASN, reflected the difference (net of revenue sharing) between what MASN was then paying and what the RSDC had decided the Nationals should be paid under the Agreement. R.1769–70 ¶¶ 31, 33.

MASN and the Orioles were advised of the advance payments and were supportive of MLB's action, as the advance payments avoided possible litigation by the Nationals over the RSDC's holding back the issuance of its award, further postponed the date when MASN itself would have to pay the additional telecast fee amounts ordered by the RSDC, and allowed the settlement discussions to continue. R.1770 ¶ 33; R.3173 ¶ 19; R.3178–80 ¶¶ 30–38. As MASN's counsel conceded before the trial court: "On this $25 million loan, . . . the record is clear, Your Honor, yes, we knew about it, we knew Major League Baseball was going to make this advance." R.2866. The advance payments were to be repaid to MLB from the telecast rights fees to be paid by MASN to the Nationals once the rights fee issue

was finally resolved. R.3174 ¶ 21. Because all parties were proposing aggregate rights fees well in excess of the $25 million amount for the five-year period, MLB was sure to be repaid. R.33–34. Therefore, as the trial court found, the arrangement afforded MLB no economic stake in the RSDC's decision. R.32. The RSDC arbitrators were not informed of the advance. R.3125 ¶ 10; R.3130 ¶ 10; R.3135 ¶ 10.

After settlement efforts failed, and without further deliberations or any adjustment of the rights fee amounts that had been fixed in the early summer of 2012, the RSDC issued its award on June 30, 2014. R.1847 ¶ 16; R.1857–58 ¶ 16; R.1866 ¶ 15. Although the Agreement does not require the RSDC to issue a written decision with its determination of the fair market value of telecast rights fees, the RSDC issued a twenty-page decision, R.216–35, and in it "set forth an extensive explanation of their determination of the appropriate methodology to apply," R.28. In explaining that methodology, the RSDC included significant discussion of both sides' interpretations of the methodology prescribed by the Agreement and concluded that neither should apply. R.219–23. Instead, the RSDC concluded that the Agreement required application of *the RSDC*'s "established methodology," which consisted of an objective analysis of MASN's projected revenue and expenses, a consideration of only truly comparable local rights fee agreements, and other factors raised by the parties during the proceeding

that may impact the value of the local broadcasting rights. R.223. After explaining its methodology and considering the parties' arguments as to each factor in the analysis, the RSDC set forth its determination of the fair market value of the Nationals' telecast rights fees. R.223–35.

V. Lower Court Vacatur Proceedings

Notwithstanding the fact that the RSDC's award came out much closer to what MASN sought than what the Nationals sought, MASN and the Orioles filed the present lawsuit seeking to vacate the award on four grounds: (1) that the award exceeded the arbitrators' authority and constituted manifest disregard of law; (2) that the arbitration involved prejudicial misconduct and procedural unfairness; (3) that MLB procured the award through corruption, fraud, or undue means; and (4) that the arbitrators exhibited evident partiality. R.25.

Although MASN and the Orioles continued to complain in the trial court about Proskauer's representation of the Nationals before the RSDC, they no longer claimed that Proskauer should have been disqualified from representing the Nationals. Instead, for the first time, they claimed that *the RSDC arbitrators* should not have heard the dispute because Proskauer's involvement somehow made them "evidently partial." MASN and the Orioles also named MLB as a defendant to the lawsuit and, for the first time, raised numerous complaints about its involvement in the proceedings, ranging from claims about procedural

unfairness to allegations that the entire proceeding was the product of a conspiracy between MLB and the Nationals to defraud the Orioles. R.26; R.29–31.

MASN and the Orioles succeeded in convincing the trial court to grant a temporary restraining order and preliminary injunction (in part by encouraging the court to rely on inapplicable state law concerning arbitral partiality rather than the federal law that they now concede actually governs this case). *See* R.427; R.513–14. The case then proceeded to a hearing on their petition to vacate and the Nationals' cross-petition to confirm the RSDC award. R.23. After considering all of the evidence on a non-emergency basis, the trial court rejected every argument advanced by MASN and the Orioles save one. R.24–43.

First, the trial court rejected MASN and the Orioles' claim that the RSDC exceeded its powers or manifestly disregarded the law or the contract. R.26–29. According to them, the RSDC failed to follow its "established methodology" because it should have accepted MASN's argument that the Bortz methodology guaranteed it an operating margin of at least 20 percent. R.28. But the trial court found that MASN and the Orioles failed to identify any "well-defined, explicit, and clearly applicable authority" that unequivocally defined the RSDC's established methodology in the manner they had urged. R.28. Indeed, the trial court found that the parties made no effort in the Agreement "even to offer the slightest hint that a specific operating margin might be required." R.28. It further found that the

RSDC award gave an "extensive explanation" of the appropriate methodology that was "reasonable on its face" and thus "more than sufficient" to satisfy the FAA's requirement that the arbitrator offer at least "a barely colorable justification for the outcome." R.28–29.

Second, the trial court rejected MASN and the Orioles' "prejudicial misconduct" claim that "MLB improperly controlled or influenced the arbitration process, or usurped the arbitrators' decision-making function," thereby rendering the proceedings fundamentally unfair. R.29–30. As for MASN's allegations that MLB staff "improperly drafted the award and decided the arbitration in the RSDC's stead," the trial court concluded that MLB in fact simply "provided the sort of support that the parties must necessarily have expected when they entered into the Agreement," and found "no evidence that MASN and the Orioles had any expectation that the three Club representatives, when acting in their capacity as members of MLB's standing committee [the RSDC], would eschew assistance from MLB's support staff to the extent customary and appropriate." R.30.

The trial court likewise concluded that "MLB's ongoing relationship with clubs and owners is inherent in the structure of the method of arbitration chosen by the parties; the parties necessarily contemplated and must be deemed to have consented to that sort of relationship between and among the MLB [staff], the

arbitrators and the parties to the dispute." R.37.[3] And the trial court was "persuaded by MLB's characterization that Manfred and his staff provided certain procedural support to the arbitrators that is generally akin to the support that a law clerk provides to a judge, or that the staff of an established arbitration organization may provide to its arbitral panels." R.30. In short, the court concluded that "very little was establish[ed] by those seeking to vacate the award, who have the burden of proof," to support their claim of "denial of fundamental fairness based on MLB's support role or the informality of the procedures used." R.30–31.

The trial court also rejected the claim that the $25 million advance to the Nationals to facilitate ongoing settlement negotiations before the RSDC issued its award gave MLB "an impermissible interest in the award." R.32. It found that "the advance was not undertaken in secret," and that "MASN and the Orioles have not demonstrated that the circumstances of the advance raise any serious questions about the fairness of the arbitration process." R.34.

Notwithstanding its findings that the RSDC arbitration was consistent with the contract, involved no prejudicial misconduct, was fundamentally fair, and produced a "reasonable" decision, the trial court nonetheless vacated the RSDC's award on "evident partiality" grounds because "MASN's arbitration opponent, the

[3] The trial court likewise rejected MASN and the Orioles' argument that the RSDC award was the product of a conspiracy between MLB and the Nationals. R.26.

Nationals, was represented in the arbitration by the same law firm that was concurrently representing MLB and one or more of the arbitrators and/or arbitrators' clubs in other matters." R.36. The trial court did not explain how those "various simultaneous but unrelated representations," R.37, actually made any of the RSDC arbitrators evidently partial. That would have been difficult to do because each arbitrator supplied affidavits explaining that he was not even aware of most of the representations about which MASN and the Orioles complained and was not influenced by these representations in any way. *See* R.1848–53 ¶¶ 19–39; R.1858–62 ¶¶ 19–39; R.1867–71 ¶¶ 17–36. Instead, the trial court complained that MLB (and others) did not take various steps to try to address the concern, such as "encouraging the Nationals to retain other counsel" or "instructing Proskauer" to screen attorneys on this matter from other MLB-related work. R.38–39. "Had MLB, the arbitrators, the Nationals and/or Proskauer taken some reasonable step to address petitioners' concerns about the Nationals' choice of counsel in the arbitration," the court noted that it "might well have been compelled to uphold the arbitral award under the FAA." R.41. But because it believed that none of them did so, the court vacated the award. R.41.

The trial court went on, however, to deny MASN and the Orioles' request to remand the dispute to an arbitral forum other than the RSDC. R.42. The court explained "that re-writing the parties' Agreement is outside of its authority." R.42.

And the court noted that the parties—assuming the Nationals are willing to "retain counsel who do not concurrently represent MLB or the individual arbitrators and their clubs"—could "return to arbitration by the RSDC, however currently constituted, pursuant to the parties' Agreement." R.42–43. The court thus suggested that the parties meet and confer about "whether the Nationals are willing and able to retain counsel" who do not have concurrent representations with other arbitral participants. R.42–43.

VI. Post-Vacatur Proceedings

After the vacatur decision, the Nationals followed the trial court's advice and retained a law firm that does not concurrently represent MLB, any of the RSDC members, or their Clubs to represent the Nationals in a new RSDC proceeding. R.3489; R.3485 ¶ 13; R.3682 ¶¶ 4–5. The membership of the RSDC also turned over entirely, and now consists of Mark Attanasio, the Chairman and Principal Owner of the Milwaukee Brewers; Kevin Mather, the President and Chief Operating Officer of the Seattle Mariners; and Mark Shapiro, the President and Chief Executive Officer of the Toronto Blue Jays. R.3666 ¶ 17; R.3670; R.3685–86 ¶ 2. Yet MASN and the Orioles still refused to participate in a new RSDC arbitration, and instead insisted on pursuing an appeal seeking an order that would relieve them of their contractual obligation to arbitrate the telecast rights dispute before the RSDC. The Nationals accordingly moved for an order to

compel the parties to engage in a new RSDC arbitration; MASN responded by cross-moving to stay any new RSDC arbitration pending resolution of this appeal. R.121.14. The trial court denied the Nationals' motion to compel and granted MASN the stay it requested, citing concern for efficiency and resource allocation. R.121.19–121.20.

STANDARD OF REVIEW

All parties agree that the Federal Arbitration Act governs this dispute because the contract affects interstate commerce. *See* Joint Brief for Appellants ("MASN Br.") at 27.

Whether to vacate an arbitral award is a legal question that this Court reviews *de novo*. *Milliken & Co. v. Tiffany Loungewear, Inc.*, 99 A.D.2d 993, 993 (1st Dep't 1984); *Aviles v. Allstate Ins. Co.*, 47 A.D.3d 710, 710 (2d Dep't 2008); *see also Scandinavian Reinsurance Co. v. St. Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 71 n.16 (2d Cir. 2012) (concluding that district court's application of the evident partiality standard was "legal error" and required reversal).

ARGUMENT

Although MASN and the Orioles devote much of their briefs to complaining about various aspects of the RSDC arbitration that they believe were unfair, the trial court actually vacated the decision below on one, and only one, ground: that Proskauer's representation of the Nationals somehow resulted in an "evident

partiality" problem. As for the myriad other complaints that MASN and the Orioles continue to press—including *all* of their criticisms of MLB's role in the proceedings—the trial court considered and thoroughly rejected *all* of those arguments, and neither MASN nor the Orioles has asked this Court to reconsider those rulings. Accordingly, the central premise on which their brief rests—*i.e.*, that the trial court found some sort of problem with the arbitration *process* that these sophisticated parties contractually selected—is simply incorrect.

That alone is reason enough to reject their last-ditch effort to escape the specific dispute resolution mechanism to which they agreed. But their request to order arbitration before a different arbitral body should be rejected for the more basic reason that the RSDC's award never should have been vacated in the first place. As the trial court itself acknowledged, the FAA requires *evident* partiality, not just a mere "*appearance* of" partiality. R.38. Moreover, the partiality must be on the part of the *arbitrators*, not some third party that is not even the decision-maker, and must be evidenced by concrete actions. The trial court did not and could not explain how the bare fact that one of the parties to the arbitration was represented by a law firm that has represented MLB and some of the Clubs with which the arbitrators were associated in concededly "unrelated" matters meant that a reasonable person would have had no choice but to conclude that the arbitrators (who granted an award far more favorable to MASN and the Orioles) were partial

toward the Nationals. Instead, the court just faulted MLB for being insufficiently sensitive to the concerns about Proskauer.

That does not remotely suffice to support a finding that a reasonable person would be compelled to conclude that the RSDC was partial toward the Nationals. The trial court itself implicitly recognized as much when it noted that it may well have affirmed the award notwithstanding Proskauer's involvement had MLB or the RSDC just "encourage[ed]" the Nationals to retain different counsel. R.38. That fundamental disconnect only underscores that there was no evident partiality problem in the first place. Failure to provide encouragement to resolve a purported problem that does not actually exist or provide grounds for recusal cannot plausibly give rise to an objective finding of evident partiality. Accordingly, there was no reason to vacate the award at all, but in all events, there is no need to send the dispute to another arbitral forum now that the sole ground on which the trial court based its vacatur decision has been fully remedied.

I. The Trial Court's Evident Partiality Ruling Should Be Reversed.

A. Evident Partiality Requires Clear and Convincing Evidence Of Objective Misconduct by the Arbitrators.

Under Section 10 of the FAA, which all parties agree applies here, an arbitral award may be vacated "where there was evident partiality or corruption in *the arbitrators*." 9 U.S.C. § 10(a)(2) (emphasis added). Like all aspects of Section 10, that provision is meant to address only "egregious departures from the parties'

agreed-upon arbitration," and therefore demands "extreme arbitral conduct" before a court may disrupt an arbitral award. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008). The standard for proving evident partiality is therefore quite high: "The party seeking vacatur must prove . . . by *clear and convincing evidence*," *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527, 548 (2d Cir. 2016) (emphasis added), that a "reasonable person would *have to conclude* that an *arbitrator* was partial to one party to the arbitration." *Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984) (emphases added).

The FAA does not permit vacatur based on the mere "appearance of partiality." Although under CPLR 75 the "appearance of impropriety or partiality is sufficient to warrant vacatur," *Matter of Kern (303 E. 57th St. Corp.-Excelsior 57th St.)*, 204 A.D.2d 152, 153 (1st Dep't 1994), the FAA, which preempts contrary state law, "requir[es] a showing of something more than the mere 'appearance of bias' to vacate an arbitration award," *Morelite*, 748 F.2d at 83–84. *See also U.S. Elecs., Inc. v. Sirius Satellite Radio, Inc.*, 17 N.Y.3d 912, 914 (2011) ("[W]e adopt the Second Circuit's reasonable person standard and apply it when we are asked, as in this case, to consider the federal evident partiality standard of 9 USC § 10."). Thus, when applying the FAA, courts cannot "equat[e] the mere 'appearance of bias' with the express statutory requirement of 'evident partiality.'"

Milliken, 99 A.D.2d at 995. Instead, the question must remain whether a reasonable person would *have to conclude* that the arbitrators were partial towards one side or the other. Moreover, "[a] showing of evident partiality must be direct and not speculative," "remote," or "uncertain." *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr.*, 729 F.3d 99, 104, 106 (2d Cir. 2013). Finally, an evident partiality analysis must take into account the entire context of the parties' relationship and industry, remaining "cognizant of peculiar commercial practices and factual variances." *Morelite*, 748 F.2d at 84.

B. The RSDC Arbitrators Were Not Evidently Partial.

The trial court based its vacatur decision solely on the ground that Proskauer's representation of the Nationals before the RSDC caused an "evident partiality" problem. The court considered and rejected every other ground on which MASN and the Orioles sought to vacate the award. Although the trial court never explained how Proskauer's involvement made any of the arbitrators evidently partial, governing precedent confirms what the court needed to find to reach such a conclusion: The court needed to find that MASN and the Orioles proved by "clear and convincing" evidence that any "reasonable person would have to conclude that [the] arbitrator[s] w[ere] partial" on account of Proskauer's representation of the Nationals. *See Nat'l Football League Mgmt. Council*, 820 F.3d at 548.

Critically, the relevant question under the evident partiality inquiry is whether a reasonable person would have had to conclude that Proskauer's involvement made the *arbitrators* partial towards the Nationals—not whether it made *MLB* partial (which it did not), or created a conflict of interest between any of the parties (which it did not), or otherwise gave rise to concern that the process was infused with some more generic appearance of impropriety (which it did not). *See* 9 U.S.C. § 10(a)(2) (allowing for vacatur "where there was evident partiality or corruption *in the arbitrators*" (emphasis added)). Not only does that doom MASN and the Orioles' arguments on the merits; it also creates a fatal waiver problem for them.

1. MASN and the Orioles Waived Any Evident Partiality Claim by Failing To Ask Any of the Arbitrators To Recuse.

During the arbitration, neither MASN nor the Orioles ever suggested that Proskauer's representations somehow impaired the neutrality of any of the *arbitrators*—let alone asked any of the arbitrators to recuse themselves from the proceeding. R.1774–75 ¶ 47; R.1852–53 ¶ 39; R.1862 ¶ 39; R.1870–71 ¶ 36. Instead, they confined their objections to the participation of *Proskauer*, and the only remedy they ever requested was disqualification of *Proskauer* (a remedy that

MLB correctly advised them it lacked the power to grant, *see infra* note 5).[4] R.1772 ¶ 40; R.2190 ¶ 7.

The trial court nonetheless deemed those objections sufficient to preserve an evident partiality claim. *See* R.36. This was error. Courts have long required parties to preserve the precise grounds for *all* of their objections during the arbitration and will find waiver if a party fails "to make plain and timely his exact objection." *Brook v. Peak Int'l, Ltd.*, 294 F.3d 668, 673–74 (5th Cir. 2002) (finding party's written objection to AAA's failure to follow its own selection rules insufficient to preserve objection to failure to follow the selection provisions in the parties' agreement); *see also N.Y.C. Dist. Council of Carpenters Pension Fund v. TADCO Constr. Corp.*, 2008 WL 540078, at *2–3, *5 (S.D.N.Y. Feb. 28, 2008) (finding waiver after a party did not make "specific objections" to the arbitrability of the dispute, even though the party serially requested an adjournment of proceedings on various other grounds and purported to reserve all rights in doing so).

[4] MASN and the Orioles' written submissions also included boilerplate language about their "continuing objection," and purported to "reserve[ ] and preserve[ ] all rights" related to Proskauer's participation. *E.g.*, R.952–53. But none of that is legally sufficient to preserve a fundamentally different objection to *the arbitrators'* evident partiality. *See In re Arbitration between Halcot Navigation Ltd. P'ship & Stolt-Nielsen Transp. Grp., BV*, 491 F. Supp. 2d 413, 419 (S.D.N.Y. 2007) ("a general reservation of rights . . . without in any way specifically objecting" does not preserve a party's right to object in post-award review).

That rule applies with particular force where evident partiality is concerned. "Where a party has knowledge of facts possibly indicating bias or partiality on the part of an arbitrator he cannot remain silent and later object to the award of the arbitrators on that ground. His silence constitutes a waiver of the objection." *AAOT Foreign Econ. Ass'n (VO) Technostroyexport v. Int'l Dev. & Trade Servs., Inc.*, 139 F.3d 980, 982 (2d Cir. 1998); *see also, e.g.*, *Matter of Namdar (Mirzoeff)*, 161 A.D.2d 348, 349 (1st Dep't 1990). This rule makes good sense: Just as a litigant may not sit on its recusal request until it sees whether the court issues a favorable ruling, a party to arbitration cannot sit on its partiality concerns until it sees whether it likes the arbitral award. *See, e.g.*, *Dean v. Sullivan*, 118 F.3d 1170, 1172 (7th Cir. 1997) ("A disputant cannot stand by during arbitration, withholding certain arguments, then, upon losing the arbitration, raise such arguments in federal court. We will not tolerate such sandbagging."); *cf. Puckett v. United States*, 556 U.S. 129, 134 (2009) ("[T]he contemporaneous-objection rule prevents a litigant from 'sandbagging' the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor.").

The record is replete with evidence that MASN and the Orioles contemporaneously knew about Proskauer's representations of MLB Clubs in unrelated litigation matters, *e.g.*, R.420; R.493; R.1771 ¶¶ 35–36; R.1785 ¶ 8; R.1787–91 ¶¶ 16–27; R.1873–75 ¶¶ 6–12, yet MASN and the Orioles never argued

that the RSDC arbitrators lacked impartiality, never objected to the arbitrators' continued participation in the proceedings, never requested the arbitrators to make disclosures, and never sought to disqualify them or request recusal. R.1774–75 ¶ 47; R.1851–53 ¶¶ 34, 37, 39; R.1861–62 ¶¶ 34, 37, 39; R.1869–71 ¶¶ 31, 34, 36; R.2190 ¶ 7. Accordingly, MASN and the Orioles must live with their "calculated decision not to object to the alleged bias of" the arbitrators and give them an opportunity to consider and address their alleged partiality. *Swift Indep. Packing Co. v. District Union Local One, United Food & Commercial Workers Int'l Union*, 575 F. Supp. 912, 916 (N.D.N.Y. 1983).[5]

2. The Objective Facts of the Arbitration Demonstrate that the Arbitrators Were Not Evidently Partial Towards the Nationals.

On the merits, the trial court erroneously concluded that Proskauer's involvement was sufficient to vacate the award on evident partiality grounds. As the court rightly observed, the "key question" was whether Proskauer's involvement "created a situation in which a reasonable person would have to

[5] MASN and the Orioles did not even meaningfully pursue their request to disqualify *Proskauer*. Under New York law, arbitrators have no authority to "disqualif[y] . . . an attorney from representing a client"; only a court may do so. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Benjamin*, 1 A.D.3d 39, 44 (1st Dep't 2003); *see also, e.g.*, *Matter of Essex Equity Holdings USA, LLC (Lehman Bros. Inc.)*, 29 Misc. 3d 371, 374 (Sup. Ct. N.Y. Cty. 2010); *New Eng. Sec. Corp. v. Stone*, 2011 WL 6411555, at *2 (Sup. Ct. Kings Cty. Dec. 12, 2011). Yet neither MASN nor the Orioles took the step of instituting a special proceeding before the Supreme Court to disqualify Proskauer—even after MLB specifically advised them that it lacked the power to disqualify the Nationals' counsel. R.1772 ¶ 40; R.2190 ¶ 7; *see also* R.38.

conclude that the arbitrators were partial to the Nationals." R. 37. But nothing about Proskauer's involvement required that conclusion here, and the court's speculative inferences fell far short of the clear and convincing evidence necessary to vacate the award. *Nat'l Football League Mgmt. Council*, 820 F.3d at 548.

As a threshold matter, the arbitrators' conduct in the arbitration, and their ultimate decision, demonstrate that they were not evidently partial in favor of the Nationals. "[A] claim of evident partiality requires . . . concrete actions in which [the arbitrator] appeared to actually favor" one party. *Amerisure Mut. Ins. Co. v. Everest Reinsurance Co.*, 109 F. Supp. 3d 969, 988 (E.D. Mich. 2015); *see also Ecoline, Inc. v. Local Union No. 12, Int'l Ass'n of Heat & Frost Insulators*, 271 F. App'x 70, 73 (2d Cir. 2008) (finding no evident partiality where arbitrators "resolved the dispute in what seems an unbiased and fair manner"). "A showing of evident partiality must be direct," moreover, "not speculative," "remote," or "uncertain." *Kolel*, 729 F.3d at 104, 106. MASN and the Orioles have not come close to making such a showing here, let alone the required showing of "clear and convincing" evidence. *Nat'l Football League Mgmt. Council*, 820 F.3d at 548.

The arbitrators' award was, if anything, more favorable to MASN and the Orioles, not the Nationals. The RSDC *rejected* the Nationals' proffered methodology and rights fee figures and instead set the rights fees nearly three times closer to the figure that MASN and the Orioles advocated. R.22–23; *compare*

R.234, *with* R.1190, *and* R.2071. The award, in the trial court's words, "set forth an extensive explanation of [the arbitrators'] determination of the appropriate methodology to apply" that was "reasonable on its face." R.28. A reasonable person reading the award would hardly feel compelled to conclude that the RSDC was partial in favor of the Nationals, who received nowhere close to the fair market value they proposed. *Compare* R.234, *with* R.2071.

Furthermore, the RSDC's procedural rulings were more than just evenhanded. The RSDC overruled the Nationals' objection to the Orioles' participation, and permitted the Orioles—with separate counsel (Mr. Rifkin, who has extensive ties to the arbitrators, *e.g.*, R.1921 ¶ 30; R.2997–98 ¶¶ 9–10; R.3142 ¶ 18)—to appear and submit additional and separate briefs, advocating alongside MASN for its position. R.1846–47 ¶ 12; R.1765 ¶¶ 17–18; R.1766 ¶ 20. MASN was likewise permitted to retain and offer expert testimony from Mark Wyche of Bortz, whom MASN describes as "MLB's principal consultant . . . for over a decade and a half prior to the award." MASN Br. at 26 n.16; *see also* R.3144–45 ¶ 25. Before the RSDC, MASN trumpeted Bortz's experience and history, arguing in essence that Bortz knew the governing contractual standard (the "RSDC's established methodology") better than the RSDC itself. *See, e.g.*, R.889–92. The RSDC also permitted MASN to submit additional information after the hearing from Mr. Wyche, R.2204 ¶ 49, but did not permit the Nationals to submit post-

hearing materials, R.2204 ¶ 48; R.2283. In short, as the trial court concluded, there were no procedural irregularities that would suggest the proceedings were unfairly tilted in favor of the Nationals. R.30. These objective facts, which go to the heart of the dispute being arbitrated, bear strongly on the question of whether the arbitrators were partial in favor of the Nationals and demonstrate unequivocally that they were not.

Simply put, there were no "concrete actions in which [the RSDC arbitrators] appeared to actually favor" the Nationals over MASN and the Orioles and justify a finding of evident partiality. *See Amerisure*, 109 F. Supp. 3d at 988; *see also Ecoline*, 271 F. App'x at 73. That alone is fatal to any claim of evident partiality on the part of the arbitrators.

3. Proskauer's Representations In Unrelated Matters Do Not Support an Evident Partiality Finding.

The trial court nonetheless vacated the RSDC's award based on Proskauer's representation of the Nationals. In the court's view, this created an evident partiality problem because the firm was "concurrently representing interests associated with all three arbitrators during" the arbitration. R.35. But the trial court did not and could not explain how these attenuated matters created even the potential for partiality, let alone would compel a reasonable person to conclude that any of the arbitrators was partial. Although evident partiality might exist if an arbitrator has a direct relationship with *a party*, or otherwise stands to benefit

financially from a ruling in one party's favor, *see, e.g.*, *Pitta v. Hotel Ass'n of N.Y.C., Inc.*, 806 F.2d 419, 424 (2d Cir. 1986), that is not remotely the situation here.

Moreover, to take the hypothetical example of a situation of an arbitrator who was represented by the same law firm as a party in a wholly unrelated matter—which, once again, is not the situation here—neither MASN, nor the Orioles, nor the trial court have been able to identify any case in which an arbitrator was deemed evidently partial based on such an attenuated relationship. Indeed, it is not even clear how such a relationship *could* compromise an arbitrator's partiality. After all, it is not as if one client stands to benefit if his counsel successfully represents another client in a completely unrelated matter. And even under the stricter standard that governs the recusal of federal judges, 28 U.S.C. § 455(a), the Second Circuit has held that "[t]he prior representation of a party by a judge or his firm with regard to a matter unrelated to litigation before him does not automatically require recusal," *Nat'l Auto Brokers Corp. v. General Motors Corp.*, 572 F.2d 953, 958 (2d Cir. 1978); *cf. Nat'l Football League Mgmt. Council*, 820 F.3d at 533, 549 (confirming an arbitral decision where one party's counsel had prepared the independent report underlying the disciplinary proceedings); *Williams v. Nat'l Football League*, 582 F.3d 863, 885–86 (8th Cir.

2009) (finding no evident partiality where the arbitrator had previously provided legal counsel on the matter at issue in the arbitration).

That said, whether shared outside counsel in an unrelated matter could compel a reasonable person to conclude that an arbitrator was partial to a party is a question that this Court need not decide, as the facts of this case are miles away even from that highly attenuated situation. It is undisputed that Proskauer has never represented the RSDC itself or any RSDC member in his individual capacity; nor did Proskauer represent any of the RSDC members in *any* capacity during the arbitration. R.1848 ¶¶ 19–20; R.1858 ¶¶ 19–20; R.1867 ¶¶ 17–18; R.2206 ¶ 57. Thus, at no time during the arbitration was there ever any attorney-client relationship between Proskauer and any of the arbitrators.[6] R.1848 ¶ 20; R.1858 ¶ 20; R.1867 ¶ 18. Instead, the trial court based its evident partiality finding on four concededly "unrelated" matters involving the arbitrators' Clubs or, in one instance, one arbitrator's separate business. R.35; R.37.

As for the first two—(1) an antitrust lawsuit in which Proskauer represented MLB and eight Clubs, including the Pirates; and (2) a wage-and-hour case in

[6] Years earlier, Proskauer had represented Mr. Coonelly in his capacity as an MLB employee in a league-wide matter in which MLB and several of its executives were sued. R.1849 ¶ 24. The trial court correctly did not even mention this stale representation in its decision, *see* R.35, as the case had been closed for years, R.1849 ¶ 24. Mr. Coonelly did not choose to retain Proskauer in that matter, did not sign any engagement letter with the firm, did not pay Proskauer anything for its work, and was indemnified by MLB. R.1849 ¶ 24.

which all thirty Clubs and MLB were named as defendants and Proskauer represented everyone but the Orioles, R.35—both representations *post-dated* the RSDC hearing. R.1787–88 ¶ 16; R.1873–74 ¶ 7; R.2207–09 ¶¶ 62–65.[7] And it is undisputed that the arbitrators were not parties to those cases, had no involvement in retaining Proskauer, and had no communications with Proskauer about either matter (or any other matter) throughout the course of the RSDC arbitration. R.1848–50 ¶¶ 21, 25–26, 28–29; R.1858–59 ¶¶ 21, 24–25; R.1867–68 ¶¶ 19, 22–23. Moreover, each matter had league-wide implications, so the interests of all Clubs and MLB were aligned, making it impossible to see how the representation would make the arbitrators partial towards anyone. R.1787–88 ¶ 16; R.1873–74 ¶ 7; R.2207–09 ¶¶ 62, 65.

As for the remaining two representations that the trial court identified—(3) a player salary arbitration in which Proskauer represented the Rays; and (4) an ERISA action in which Proskauer represented Sterling Equities, a company in which Mr. Wilpon is a partner, R.35—they too cannot possibly have created any evident partiality because the relevant arbitrators (Messrs. Sternberg and Wilpon)

[7] That said, neither MASN nor the Orioles can plausibly claim that they were unaware of these representations once they began, as the Orioles were regularly kept apprised of developments in both. Between May 2012 and May 2014, MLB or Proskauer itself updated the Orioles on the antitrust case no fewer than *eleven times*. R.1787–91 ¶¶ 16–27. Similarly, the Orioles were named as a defendant in the wage-and-hour case and were aware of Proskauer's representation of MLB and the twenty-nine other Clubs from the very beginning. R.1873–75 ¶¶ 6–12.

did not even know about the representations before this vacatur proceeding. R.1860 ¶ 31; R.1869 ¶ 30; *see Univ. Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331, 1341 (11th Cir. 2002) (finding of evident partiality requires the arbitrator to be "aware of the facts comprising a potential conflict"). Simply put, an arbitrator cannot be partial "on the basis of relationships he did not know existed." *CRC Inc. v. Computer Sciences Corp.*, 2010 WL 4058152, at *4 (S.D.N.Y. Oct. 14, 2010); *see also Ometto v. ASA Bioenergy Holding, A.G.*, 2013 WL 174259, at *4 (S.D.N.Y. Jan 9, 2013) (finding no evident partiality when arbitrator was unaware of his law firm's participation in transactions involving a party to the arbitration), *aff'd*, 549 F. App'x 41 (2d Cir. 2014).

In all four of these representations, the relationship between the arbitrators and Proskauer was at least three steps removed. First, the attorney-client relationship was between Proskauer and the RSDC arbitrators' Clubs or separate business, not the arbitrators themselves. Second, none of the relationships had anything to do with the matters pending before the arbitrators. Third, the RSDC arbitrators were not sitting to represent the interests of their Clubs or other business, but rather to exercise independent judgment as experts on the valuation issues before them, which they indisputably did. R.1845–46 ¶¶ 6, 10; R.1855–56 ¶¶ 5, 9; R.1864–65 ¶¶ 5, 9. These connections to Proskauer are far too attenuated

to render the arbitrators "evidently partial" within the meaning of the FAA. *U.S. Elecs.*, 17 N.Y.3d at 915 ("[C]laims of bias, premised on attenuated matters and relationships, are not sufficient.").

Indeed, courts have rejected evident partiality challenges in cases with much stronger connections between arbitrators and parties or their attorneys than those at issue here. For example, in *CRC Inc.*, the chairman of a AAA arbitral panel shared significant connections with a party to the arbitration and its counsel. 2010 WL 4058152, at *4. The arbitrator's law firm (where he was in charge of the litigation practice) had previously represented the party; the party's counsel had hired the arbitrator's firm to represent it in unrelated proceedings; the two firms had served as co-counsel in at least four cases, including one with a client who had a long-term relationship with the party involving billions of dollars in investments and revenue; the arbitrator personally supervised at least nine attorneys working at the party's counsel's firm when serving together as co-counsel; and as an equity partner, the arbitrator presumably had earned substantial fees as a result of these common representations. *Id.* The court nonetheless declined to vacate the award for evident partiality, ruling that "the relationships here are simply too attenuated to constitute more than 'mere speculation of bias,' rather than 'evident partiality.'" *Id.* (quoting *Ecoline*, 271 F. App'x at 72).

And that is just one of the legion cases in which courts have declined to find evident partiality based on connections between arbitrators and parties or their attorneys. *See, e.g.*, *Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 280, 284 (5th Cir. 2007) (en banc) (finding no evident partiality when the arbitrator and an attorney for one of the parties had been co-counsel in other litigation); *Montez v. Prudential Sec., Inc.*, 260 F.3d 980, 982 (8th Cir. 2001) (finding no evident partiality when the arbitrator had previously employed 68 attorneys from, and paid over $2.8 million in fees to, the law firm representing a party); *Ormsbee Dev. Co. v. Grace*, 668 F.2d 1140, 1149–51 (10th Cir. 1982) (finding no evident partiality when the arbitrator and the law firm representing the prevailing party in the arbitration had clients in common); *Transportes Coal Sea de Venezuela C.A. v. SMT Shipmanagement & Transp. Ltd.*, 2007 WL 62715, at *8–10 (S.D.N.Y. Jan. 9, 2007) (finding no evident partiality when the arbitrator's son was a partner in a law firm representing a party to the proceeding in a separate arbitration); *see also Fleury v. Amedore Homes, Inc.*, 107 A.D.3d 1088, 1088–89 (3d Dep't 2013) (no evident partiality when the arbitrator was previously employed by the attorney of one of the parties to the arbitration).

Moreover, the RSDC process is the very last context in which relationships as attenuated as those identified by the trial court would require a reasonable person to conclude that the arbitrators were partial, as some degree of preexisting

relationships was inevitable given the dispute resolution mechanism that the parties chose. After all, the parties could have chosen to arbitrate fair market value disputes through an independent organization such as AAA or JAMS, as they did with other disputes. *See* R.209 § 8.C. Instead, they chose to arbitrate fair market value disputes before the RSDC, an expert internal MLB committee composed of other Club owners and executives. R.203 § 2.J.3. That decision had the obvious benefit of tapping into the expertise of a committee that exists for the express purpose of determining the fair market value of Clubs' telecast rights. But it also brought with it an increased potential (if not an outright expectation) for preexisting business and other relationships. Indeed, MLB is the quintessential example of a "tightly knit professional communit[y]" in which "[k]ey members are known to one another, and in fact may work with, or for, one another, from time to time." *Morelite*, 748 F.2d at 83. Surely that was not lost on the parties when they selected the RSDC to resolve their disputes. The Orioles had appeared before the RSDC on this very issue the year before signing the Agreement. R.2924–25 ¶ 12. And both MASN and the Orioles were comfortable hiring counsel and a consultant with longstanding relationships with MLB and the RSDC to represent them in the arbitration. R.1169 ¶ 7; R.1921–22 ¶ 30; R.2997–98 ¶ 9–10; R.3142 ¶ 18; R.3144–45 ¶ 25.

Of course, there is nothing unusual about any of that. Parties are not required to arbitrate before strangers; to the contrary, one of the chief benefits of arbitration is the ability to select familiar decision-makers with industry expertise. *See, e.g.*, *Garfield & Co. v. Wiest*, 432 F.2d 849, 853–54 (2d Cir. 1970) (NYSE); *Carboni v. Lake*, 562 F. Supp. 2d 585, 587–89 (S.D.N.Y. 2008) (NYMEX); *Manny Pollak & Co. v. Shelgem Ltd.*, 1993 WL 248804, at *2 (S.D.N.Y. June 30, 1993) (diamond industry); *Nat'l Hockey League Players' Ass'n v. Bettman*, 1994 WL 738835, at *14 (S.D.N.Y. Nov. 9, 1994) (NHL); *see also Aviall, Inc. v. Ryder Sys., Inc.*, 110 F.3d 892, 896–97 (2d Cir. 1997) ("The parties to an arbitration choose their method of dispute resolution, and can ask no more impartiality than inheres in the method they have chosen." (quoting *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 679 (7th Cir.1983)).

Industry participants thus regularly choose, and courts regularly approve, this type of peer- and expert-driven arbitration—particularly among sports leagues and other professional associations. *E.g.*, *Nat'l Football League Mgmt. Council*, 820 F.3d at 548 (rejecting an evident partiality argument where parties agreed to arbitrate before the Commissioner, knowing he "would have a stake both in the underlying discipline and in every arbitration brought" under the contract); *Williams*, 582 F.3d at 885–86 (no evident partiality in an arbitration between a team and players union where the arbitrator (in his role as NFL General Counsel)

had communications with the team about potential litigation that might arise from the matter, as the union "cannot reasonably claim to be surprised" that the NFL General Counsel would have such communications when the agreement selected him as arbitrator). And courts routinely decline to second-guess the internal procedures and decisions of sophisticated professional sports leagues, especially where the parties have selected individuals associated with the league to resolve their disputes. *See, e.g.*, *Nat'l Football League Mgmt. Council*, 820 F.3d at 537 n.5 (NFL); *Crouch v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 845 F.2d 397, 403 (2d Cir. 1988) (NASCAR); *Charles O. Finley & Co., Inc. v. Kuhn*, 569 F.2d 527, 536–38 (7th Cir. 1978) (MLB). To allow parties to claim "evident partiality" based on relationships even more attenuated than those expressly contemplated by their intra-industry arbitration agreements would deprive the FAA's demanding "evident partiality" standard of all meaning.

In sum, "[a] showing of evident partiality must be direct and not speculative"; it cannot turn on a showing that is "too remote" or "uncertain." *Kolel*, 729 F.3d at 104, 106. Yet speculation is all that MASN and the Orioles offered below. The minor "concurrent" representations on which the trial court's decision turned—two league-wide representations that resulted in no conflict of interest, and two unrelated matters about which the arbitrators had *no* contemporaneous knowledge—cannot amount to clear and convincing evidence

that would force a reasonable person to conclude that the arbitrators were partial in favor of the Nationals. That is even more the case considering the overall record, the evenhanded conduct of the RSDC during the arbitration, the lack of any evidence of concrete actions by the arbitrators that were partial to the Nationals, the arbitrators' rendering of an award that was leaps and bounds closer to MASN and the Orioles' proposed figure than the Nationals', and the fact that the parties agreed to an arbitration procedure in which preexisting relationships and dealings among the principals and the arbitrators were not only inevitable, but expected.

C. The Trial Court Did Not Find MLB "Evidently Partial."

Rather than defend the trial court's decision, MASN and the Orioles attempt to re-cast it as an indictment of MLB's role in the arbitration. They claim that "the trial court vacated the award because *MLB* was evidently partial." MASN Br. at 37; *see also id.* at 1 (same), 30 (same), 32 (same). But that is not at all what the trial court concluded. In fact, it held precisely the opposite: The court concluded that MLB's involvement in the arbitration was marked by fundamental fairness and precisely the sort of activities that the parties contemplated when they agreed to arbitrate telecast rights fee disputes before the RSDC. R.30–31. And the trial court squarely rejected MASN and the Orioles' theory that MLB somehow "usurped the arbitrators' decision-making function" "or influenced the arbitration

process." R.30–31. MASN's many complaints about MLB and Commissioner Manfred were and are irrelevant to the analysis.

To the extent that the trial court criticized MLB, it did so based on what it believed MLB should have done in response to MASN and the Orioles' objections about Proskauer's involvement. *See* R.38–39. But the trial court's suggested remedies only further underscore that the *arbitrators* were not evidently partial, as they cannot fairly be faulted for "steps" that *MLB* did or did not take to address MASN and the Orioles' Proskauer-based concerns. More fundamentally, the court's admission that it may well have confirmed the award had MLB just *tried* (even if unsuccessfully) to persuade the Nationals to retain other counsel, R.38; R.41, serves only to confirm that the court erroneously focused on the *appearance* of partiality, which is not the correct legal standard, *see Morelite*, 748 F.2d at 83–84 ("[W]e read Section 10(b) as requiring a showing of something more than the mere 'appearance of bias' to vacate an arbitration award."). Rather, *clear and convincing evidence of partiality*—and partiality *by the arbitrators*—is required. 9 U.S.C. § 10(a)(2); *Nat'l Football League Mgmt. Council*, 820 F.3d at 548. Whatever steps the trial court, with the benefit of hindsight, believes *MLB* should have taken are therefore beside the point.

In all events, even if MLB had somehow been able to foresee the trial court's concerns during the arbitration and voiced those concerns to Proskauer or

the Nationals, it would not have changed anything. Neither MLB nor the RSDC could disqualify Proskauer or order the Nationals to proceed with different counsel; only a court could remove the law firm from the case. *Merrill Lynch*, 1 A.D.3d at 44; *see also supra* note 5. Moreover, MASN and the Orioles did not even ask MLB or the arbitrators to take *any* of the court's "steps" during the arbitration. The trial court invented these suggested "steps" in its *post hoc* reimagining of how the MLB staff could possibly have responded differently. (Indeed, the arbitrators did not even remember anything about Proskauer even coming up during the arbitration. R.1851–53 ¶¶ 34–39; R.1861–62 ¶¶ 34–39; R.1869–71 ¶¶ 31–36.) The alleged omission by MLB in failing to take "steps" nobody requested it to take cannot be a basis for finding the *arbitrators*, let alone MLB itself, evidently partial. The "steps" have no legal basis,[8] are entirely *ad hoc*, and in any event cannot be invoked by MASN and the Orioles to escape their contractual bargain.[9]

[8] By way of example, the trial court's suggestion that the MLB support staff should have asked the arbitrators to "investigate," R.39, contradicts the governing law, which holds "[t]he mere failure to investigate is not, by itself, sufficient to vacate an arbitration award." *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 138 (2d Cir. 2007).

[9] The trial court elected to announce these concerns—including the criticism that MLB could have kept the parties advised of MLB's own various retentions of Proskauer during the relevant period, *see* R.39—for the first time in its decision, after the record had closed. Yet the record showed ample evidence that MLB kept the parties advised of Proskauer's work for MLB, disclosed Proskauer's work for the Rays *before* the RSDC arbitration began (a point that the Orioles conceded below, R.420), and demonstrated that all parties received regular updates about the ongoing unrelated matters. R.850–51; R.858–59; R.1771 ¶¶ 34–36; R.1785 ¶ 8; R.1787–91

Because there was and is no clear and convincing evidence from which a reasonable person would have to conclude that any of the three arbitrators were partial towards the Nationals, the trial court's evident partiality decision should be reversed, with instructions to confirm the RSDC award.

II. The Trial Court Correctly Declined To Rewrite the Parties' Agreement To Send the Dispute to a Different Forum.

In the event this Court reverses the trial court's evident partiality decision, then the RSDC award must be confirmed. If, on the other hand, this Court were to affirm the trial court's evident partiality decision, it should also affirm the trial court's decision to honor the parties' agreement to have the RSDC arbitrate this dispute rather than rewriting the agreement and sending this dispute to a different arbitral forum. The parties agreed to have the RSDC resolve their disputes, and there is no reason at all to think it is incapable of doing so. Indeed, given that the only even arguable problem was Proskauer's role, arbitration before the newly constituted RSDC without any involvement from Proskauer is the only remedy that could make any sense.

A. Remand to a Different Arbitral Forum Is Not Warranted Here.

The trial court found nothing in the record to justify the extraordinary relief that MASN and the Orioles are requesting. *See* R.42–43. Assuming the trial court

¶¶ 16–27; R.1873–75 ¶¶ 6–12. Even by the trial court's new standard, MLB did not "d[o] nothing," R.39, to disclose Proskauer's well-known work for MLB; it took significant steps.

was correct that Proskauer's participation warranted vacatur, the obvious solution is for the RSDC to convene a new arbitration that does not entail Proskauer's participation—*not* to rewrite the parties' contract. *See* R.2870 (MASN counsel arguing to the trial court that if MLB had "told Proskauer, no, it's unseemly for you to be here representing the Nationals. Then none of us would have been here today."); R.3377–78 (The Court: "Because if you take Proskauer out of the mix, there is nothing wrong with the panel."). The Nationals have advised all the other parties that they are willing to proceed before the RSDC without Proskauer, and the Nationals' replacement counsel has certified that it does not represent the current RSDC members, any of the RSDC members' Clubs, or MLB. R.3489; R.3485 ¶ 13; R.3682 ¶¶ 4–5. No further relief is necessary or appropriate.

Under the FAA, arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Courts are required to "rigorously enforce" arbitration agreements according to their terms. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013). That extends to terms specifying the "rules under which any arbitration will proceed" and "who will resolve specific disputes." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010). Accordingly, "an agreement to arbitrate before a particular arbitrator may not be

disturbed, unless the agreement is subject to attack under general contract principles." *Aviall*, 110 F.3d at 895.[10]

In their Agreement, the parties chose the RSDC to resolve any dispute about future telecast rights fees, R.203 § 2.J.3, and they did so for good reason. The RSDC is an expert industry body with substantial experience resolving comparable disputes in the unique context of MLB. And the parties chose the RSDC with full knowledge that it is composed of MLB Club owners and executives, and supported by MLB staff. R.1762 ¶ 3; R.2922 ¶ 5; R.3138 ¶ 6.

The Orioles and MASN, in particular, knew the RSDC and how it operated and how it was constituted. R.2924–25 ¶¶ 11–13. The Orioles had even gone through the RSDC process in 2004 to determine the fair market value of its RSN's telecast rights—just before signing the governing contract. R.2924–25 ¶ 12. In the trial court, MASN's counsel conceded: "Sure, we bought into whatever the structure [of the RSDC] was, whatever Major League Baseball's role was; we agreed to that, we had to live with that." R.3286. And the Orioles' counsel similarly acknowledged that the Club "bargained for the RSDC process." R.2787.

[10] MASN and the Orioles suggest that in considering this question, this Court may "substitute its own discretion for the trial court's even in the absence of abuse." MASN Br. at 32. But that overlooks the threshold question of whether they have met the high standard for reformation (which they did not), and in any event the cases that they cite for this proposition have no relationship to the FAA or arbitration. *See Brady v. Ottaway Newspapers, Inc.*, 63 N.Y.2d 1031, 1032 (1984) (addressing a discovery question); *Ackerson v. Stragmaglia*, 176 A.D.2d 602, 605 (1st Dep't 1991) (setting aside a default judgment).

The trial court thus correctly concluded, "MLB's ongoing relationship with clubs and owners is inherent in the structure of the method of arbitration chosen by the parties; the parties necessarily contemplated and must be deemed to have consented to that sort of relationship between and among the MLB, the arbitrators, and the parties to the dispute." R.37.

"Had the parties wished" to select an arbitral forum outside of MLB to resolve telecast rights fees disputes, "they could have fashioned a different agreement." *Nat'l Football League Mgmt. Council*, 820 F.3d at 548. And indeed, they specifically bargained for different dispute resolution processes, in different arbitral forums, for resolving different categories of disputes. *See* R.208–09 § 8. Given their deliberate choice of the RSDC to resolve telecast rights fees disputes, MASN and the Orioles cannot walk away from their agreement because they now believe they will fare better in a different forum that lacks arbitrators (*i.e.*, Club owners and executives) with the expertise of the RSDC in determining the fair market value of telecast rights fees and deep knowledge of its established methodology. *See Aviall*, 110 F.3d at 896–97 ("The parties to an arbitration choose their method of dispute resolution, and can ask no more impartiality than inheres in the method they have chosen."). Thus, even if they are disappointed with the outcome of a single RSDC arbitration, MASN and the Orioles still must "live with" the contract that they signed. R.3286.

Moreover, any concern that the original RSDC members would suffer some continuing taint from Proskauer's role is now irrelevant. Since the arbitral award was delivered in this case, the membership of the RSDC has changed in the ordinary course. R.3670. As MASN and the Orioles acknowledge, therefore, the original arbitrators, Messrs. Coonelly, Sternberg, and Wilpon, will not hear this dispute if it returns to the RSDC. MASN Br. at 51. Thus, even if those arbitrators were actually biased—which they were not—remanding to the RSDC would result in three different arbitrators deciding the dispute. *See Sawtelle v. Waddell & Reed, Inc.*, 304 A.D.2d 103, 117 (1st Dep't 2003) ("[A]bsent a showing that the original panel is incapable of carrying out its duties impartially, courts will generally remand the matter to the original panel."). And there is no basis in the record to contend that the current RSDC members (the principal owner of the Brewers and executives of the Blue Jays and the Mariners, R.3685–86 ¶ 2) have any bias against MASN or the Orioles—much less the explicit bias courts require to consider re-writing a valid arbitration provision. *See, e.g.*, *Bettman*, 1994 WL 738835, at *19 (rejecting plaintiffs' argument that the NHL commissioner was "so unforeseeably and inherently biased as to justify replacing him as the arbitrator").

B. MASN and the Orioles Have Provided No Basis To Depart from the Parties' Agreement.

MASN and the Orioles have no answers to these facts and precedents. The cases on which they heavily rely all involve replacement of particular *arbitrators*,

not the choice of an entirely different arbitral forum. *See, e.g.*, *Matter of Excelsior 57th Corp. (Kern)*, 218 A.D.2d 528, 530 (1st Dep't 1995) (holding, under CPLR Section 75, that the arbitrator appeared biased by submitting "three . . . affidavits which evidence his bias and display facts which have the potential to impugn the integrity of the second arbitration");[11] *Pitta*, 806 F.2d at 420 (contractually assigned arbitrator removed from presiding over a labor arbitration to "resolve a grievance that requires him to interpret his own contract of employment to decide if he has been validly dismissed"); *Morris v. N.Y. Football Giants, Inc.*, 150 Misc. 2d 271, 277 (Sup. Ct. N.Y. Cty. 1991) (holding that the NFL Commissioner could not again serve as arbitrator between former players and their teams after he had personally advocated the teams' position on the underlying dispute concerning the amounts of compensation owed for preseason games). Those cases do not even address the right question.

Aside from demonstration of actual bias of particular arbitrators, it is extraordinarily rare for a court to order parties to proceed before a different forum following vacatur. Where it occurs, it is typically because the parties' contractually designated arbitrator or arbitral tribunal is no longer available. *See, e.g.*, *Options on Shares, Inc. v. Edwards & Hanly*, 42 A.D.2d 932, 932 (1st Dep't

[11] Although the RSDC arbitrators' affidavits submitted in this matter did not touch on the underlying merits, which the trial court recognized, *see* R.2780–82, the arbitrators who will actually hear this case if it returns to the RSDC have not submitted any sworn statements at all.

1973) (contractually designated arbitral forum had "discontinued its arbitration service"); *Kingsbrook Jewish Med. Ctr. v. Katz, Waisman, Weber, Strauss, Blumenkrans, Bernhard*, 37 A.D.2d 518, 519–20 (1st Dep't) (contractual forum no longer conducted arbitrations and the parties had selected the AAA to administer future arbitrations), *aff'd*, 29 N.Y.2d 854 (1971); *Klines v. Green*, 2 A.D.2d 373, 374–75 (2d Dep't 1956) (in arbitration governed by New York law, a contractually selected arbitrator resigned and was replaced pursuant to N.Y. Civil Practice Act § 1452), *aff'd*, 3 N.Y.2d 816 (1957). But that sort of extraordinary factual situation is not present here. The RSDC still exists and is able to hear the dispute. R.3670. Although the membership of the RSDC has changed in the ordinary course, the parties' Agreement appointed the RSDC, not specific past or future members of the Committee, as the arbitrators of any telecast rights fee disputes. R.203 § 2.J.3; *see also* R.43. And there is no reason to believe that the RSDC's current members are partial in any way.

C. The Record and the Trial Court's Decision Disprove the Irresponsible Attacks on MLB and Commissioner Manfred.

Without any support in the actual record, MASN and the Orioles attempt to invent a new record on appeal, the primary purpose of which is to paint MLB as hopelessly biased against MASN and the Orioles. But this mudslinging is false and beside the point. The current Commissioner of Baseball did not, and in any remand for a new RSDC proceeding would not, serve as the arbitrator of this

dispute. The parties instead vested the *RSDC* with "final and binding" decision-making authority over this dispute. R.203 § 2.J.3.

And these attacks are not only irrelevant, but also meritless. First, MASN and the Orioles argue that MLB "wrote the award, which the arbitrators merely rubber-stamped." MASN Br. at 2. But that is false: All of the arbitrators and the MLB support staff testified—without contradiction—that the RSDC arbitrators reviewed all of the evidence and arguments submitted by the parties, seriously deliberated on the matters before them, advised MLB support staff of the specific decision they intended to render, directed the support staff to prepare a draft that reflected the ruling, and then reviewed, commented upon, and edited the draft substantively to ensure that it confirmed with their direction and reasoning. R.3124 ¶ 7; R.3129 ¶ 7; R.3134 ¶ 7; R.3138–39 ¶ 7; R.3170 ¶ 11. Given this undisputed and overwhelming evidence, the trial court squarely rejected this argument. R.30.

Second, MASN and the Orioles contend that MLB's $25 million advance to the Nationals gave it an improper "stake in the outcome." MASN Br. at 43–45. But they conceded in the trial court that they knew of the advance at the time it was made. R.2866 ("On this $25 million loan, . . . the record is clear, Your Honor, yes, we knew about it, we knew Major League Baseball was going to make this advance."). In fact, they encouraged MLB to advance the money (in effect, on

behalf of MASN) to keep the Nationals in settlement talks and avoid litigation, further defer issuance of the RSDC award, and postpone the date when MASN would have to begin paying the additional telecast rights fee amounts the parties knew the RSDC was about to order. R.1770 ¶ 33; R.3173 ¶ 18; R.3178 ¶ 31. In any case, as the trial court correctly found, the advance did not give MLB a stake in the outcome because the advance could be repaid irrespective of whether the RSDC awarded MASN's or the Nationals' preferred figure. R.33–34.

Third, MASN and the Orioles contend that the Commissioner "has already declared publicly that any rehearing before MLB's RSDC would be a *fait accompli* because 'sooner or later' MASN will be required to pay the amounts reflected in the vacated award." MASN Br. at 2; *see also id.* at 29 (same), 49 (same), 51 (same). Putting aside that this mischaracterizes the actual comments Commissioner Manfred made while the petition to vacate was pending, his public comments unsurprisingly reflect his belief that MLB's litigation position is correct. *See* R.3433–37. And after considering this statement and the many other complaints that MASN and the Orioles made about Commissioner Manfred and MLB, the trial court's decision rejected any suggestion that he or anyone else at MLB had "improperly controlled or influenced the arbitration process, or usurped the arbitrators' decision-making function," or "decided the arbitration in the RSDC's stead." R.30. The trial court also had no concern that the parties could

"return to arbitration by the RSDC, however currently constituted, pursuant to the parties' Agreement." R.43. Commissioner Manfred's public comments therefore are irrelevant to the issues before this Court. And in any event, Commissioner Manfred has taken no position on the amount of telecast rights fees the Nationals should be awarded; rather, he has simply urged both Clubs to comply with their contractual obligations in the event they cannot resolve this dispute amicably. R.3433.

Fourth, MASN and the Orioles claim that MLB—and by extension, the RSDC—is biased because former Commissioner Selig threatened to sanction the Orioles for violating the Major League Constitution's ban on litigation against MLB. MASN Br. at 3, 27, 28, 45, 46, 52. But Commissioner Selig's position was that *neither* the Nationals *nor* the Orioles *nor* MASN should be violating the Major League Constitution. R.568–69; R.575–77. The Orioles acknowledge that the Major League Constitution is a binding contract, R.1895, and the Constitution expressly prohibits Clubs and other MLB entities (such as MASN) from suing MLB, R.575–77. Nevertheless, MASN and the Orioles proceeded with their case against MLB and Commissioner Selig.

Fifth, MASN and the Orioles renew various complaints that MLB staff played too big a part in the arbitration. *See* MASN Br. at 4, *see also id.* at 20–21. But the trial court considered and rejected these arguments as well. R.30–31.

MLB's involvement in the arbitration here is precisely what the parties bargained for. For example, with respect to the supposedly "critical procedural rulings" that were not shared with the arbitrators, that claim is baseless, as are the aspersions cast on MLB's supposed "gatekeeper" role, which MASN and the Orioles suggest was employed to hide submissions from the arbitrators. *See* MASN Br. at 4; R.2926–31 ¶¶ 20a–20i (addressing each supposed "ruling" or "binding decision" alleged by MASN and the Orioles and explaining why it was not). All of the arbitrators testified that they received and reviewed all of the parties' substantive submissions. R.3124 ¶¶ 7–8; R.3129 ¶¶ 7–8; R.3134 ¶¶ 7–8.[12] MLB provided an early and broad disclosure in response to MASN and the Orioles' informal Proskauer inquiry, and nothing further was required. R.850–51; R.858–59; R.1771 ¶¶ 35–36; R.1786 ¶ 13. As the trial court held, "MLB's ongoing relationship with clubs and owners is inherent in the structure of the method of arbitration chosen by the parties," and thus "the parties necessarily contemplated and must be deemed to have consented to that sort of relationship between and among the MLB [staff], the arbitrators and the parties to the dispute." R.37.

[12] What MLB did not agree to do was re-send the RSDC every email or letter the parties' lawyers sent to one another or MLB. R.2927 ¶ 20a. That Mr. Rifkin omitted sending his Proskauer disqualification demand letter to the RSDC (despite indicating a "cc" to them), was his decision or oversight, not MLB's. R.871–73; R.1852 ¶ 35; R.1861 ¶ 35; R.1870 ¶ 32. And as already demonstrated, it would not have mattered if the arbitrators had received it; they could not disqualify Proskauer. *See supra* note 5.

Finally, MASN and the Orioles oddly blame MLB for defending itself, the Commissioner, MLB staff, and the RSDC in this proceeding. MASN Br. at 3, 28, 41, 56. But MASN and Orioles chose to name MLB and Commissioner Selig as defendants in this litigation. There is nothing at all unusual about a defendant to a lawsuit—as well as a signatory to a contract—denying and disproving meritless claims that it breached a contract or acted improperly.[13] And cases in which the actual decision-maker took a public position on the result of the proceeding are very different from simply defending against litigation. *Cf. Excelsior 57th Corp. (Kern)*, 218 A.D.2d at 530–31; *Morris*, 150 Misc. 2d at 277.

D. MASN and the Orioles Have Not Established Any Basis for Contract Reformation.

MASN's last-ditch argument—asking the Court explicitly for reformation of the Agreement, MASN Br. at 52–57—is equally groundless. An agreement to arbitrate will be enforced unless it would be "invalid under general contract principles." *Aviall*, 110 F.3d at 896. Contract reformation is an "extraordinary remedy," 16 N.Y. Jur. 2d *Cancellation of Instruments* § 56, intended to "restate the intended terms of an agreement when the writing that memorializes that agreement

[13] MASN and the Orioles are again mistaken when they tell the Court that MLB intended to convene a new RSDC arbitration "*regardless* of the trial court's ruling" on the Nationals' motion to compel. MASN Br. at 47 (emphasis in original). To the contrary, MLB advised the parties that the RSDC would hold a new arbitration "absent a judicial order preventing MLB from convening such proceedings." R.3683. And MLB has complied with all of the trial court's orders.

is at variance with the intent of both parties," *Warberg Opportunistic Trading Fund, L.P. v. GeoResources, Inc.*, 112 A.D.3d 78, 86 (1st Dep't 2013). A party must establish its right to reformation by "clear, positive and convincing evidence," *id.* at 85, including by showing "in no uncertain terms . . . exactly what was really agreed upon between the parties," *Chimart Assocs. v. Paul*, 66 N.Y.2d 570, 574 (1986). In support of its reformation argument, MASN Br. at 52–57, MASN merely rehashes the arguments made earlier in its brief and previously rejected by the trial court.

In the end, MASN and the Orioles do not identify any case that would justify re-writing the parties' agreement here. MASN and the Orioles point to no factual or legal support for reforming the parties' carefully negotiated, fully integrated contract, *see* R.210 § 11.B, just because they were disappointed by the arbitral award and want instead to arbitrate before strangers who lack the knowledge and expertise of the owners and high-level Club executives who sit on the RSDC.

In fact, their cases support the opposite conclusion. In *Aviall*, for example, the Second Circuit declined to reform the contract to remove KPMG as the parties' designated arbitrator—even though KPMG had an ongoing business relationship with one of the parties—because "Aviall was fully aware of KPMG's relationship with Ryder when the [governing contract] was executed." 110 F.3d at 896. Here, MASN and the Orioles "bought into whatever the structure [of the RSDC] was,

whatever Major League Baseball's role was; we agreed to that, we had to live with that." R.3286. In *Fleming Companies*, the court *declined* to rewrite the parties' agreement, even though the preferred panel of food industry experts suggested in the parties' contract—the AAA Food Industry panel—no longer existed. *Fleming Cos. v. FS Kids, L.L.C.*, 2003 WL 21382895, at *5 (W.D.N.Y. May 14, 2003). Instead, the court found that the "dominant intent of the parties was to have any potential disputes resolved by arbitration in accordance with the Commercial Arbitration Rules of the AAA," *id.*, and noted that the agreement expressed a preference for the Food Industry panel "[t]o the extent they are available," *id.* at *5 & n.14. Accordingly, the court declined to reform the contract and held that the parties were to go to the AAA. *Id.* at *6. In doing so, the court contrasted the facts before it with the small set of cases in which arbitration provisions are rewritten: "[I]n such cases the arbitration agreement itself was found to be invalid because the arbitrator—who had been specifically designated and mutually designated by the agreement—had a relationship to one party that was undisclosed, or unanticipated and unintended." *Id.* at *4. The RSDC, especially as currently constituted, has no "undisclosed" relationship, much less an "unanticipated and unintended" one.

The parties chose the RSDC to resolve their dispute. Under the FAA, that decision must be respected. 9 U.S.C. § 2. MASN and the Orioles have offered no

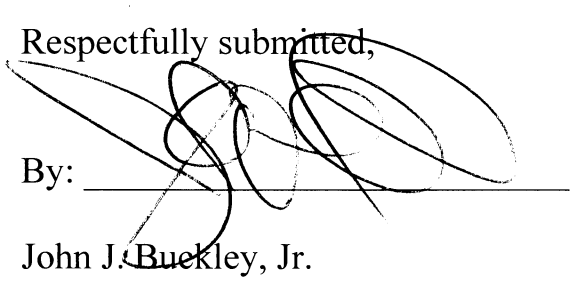
basis for this Court to conclude otherwise. Thus, even if this Court does not confirm the original arbitration award, the RSDC can and should fulfill its contractual mandate to determine the fair market value of the Nationals' telecast rights fees.

CONCLUSION

For the foregoing reasons, the trial court's vacatur order should be reversed and the case should be remanded with instructions to enter an order confirming the RSDC award. In the event that the Court agrees that the RSDC award should be vacated, the trial court's order should be affirmed insofar as it declines to order that the instant telecast rights fee dispute should be heard anywhere other than the RSDC, as mandated in the parties' contract.

September 12, 2016

Respectfully submitted,



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PRINTING SPECIFICATIONS STATEMENT

This computer-generated brief was prepared with Microsoft Word 2013 using the proportionally spaced typeface Times New Roman, in 14-point font, with double spacing. The total number of words in the brief, inclusive of headings and footnotes and exclusive of the cover and pages containing the table of contents, table of authorities, and this Statement, is 16,137.

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

TCR SPORTS BROADCASTING HOLDING, LLP,

Petitioner-Appellant-Cross-Respondent,

-against-

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

Respondents-Respondents-Cross-Appellants,

-and-

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

Nominal Respondents-Appellants-Cross-Respondents.

Index No. 652044/2014
(IAS Part 41)

PRE-ARGUMENT STATEMENT

Respondents-Respondents-Cross-Appellants the Office of Commissioner of Baseball, d/b/a Major League Baseball ("MLB") and the Commissioner of Baseball[1] hereby submit this Pre-Argument Statement pursuant to Section 600.17(a) of the Rules of the Appellate Division, First Department.

[1] Allan H. "Bud" Selig is no longer the Commissioner of Baseball; Robert D. Manfred, Jr. became Commissioner on January 25, 2015. MASN erroneously describes the Commissioner of Baseball as "the Commissioner of Major League Baseball."

1. Title of the Action

The title of the action is set forth in the caption above.

1. Full Names of the Parties

The full names of the parties are set forth in the caption above.

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[2] On November 30, 2015, Jonathan D. Lupkin, moved to a new firm, Lupkin & Associates PLLC. Prior to that time, Mr. Lupkin practiced with the firm of Rakower Lupkin PLLC, which is currently known as Rakower Law PLLC. Although Mr. Lupkin's prior firm has not yet been formally substituted out as counsel of record, Lupkin & Associates PLLC has filed a Notice of Appearance as additional counsel for The Office of Commissioner of Baseball and The Commissioner of Baseball.

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4. Order Below

This cross-appeal is taken from the Decision and Order of the Honorable Lawrence K. Marks, IAS Part 41, of the Supreme Court of the State of New York, County of New York, dated November 4, 2015, duly entered in the Office of the New York County Clerk on November 4, 2015 (the "Decision and Order"). The Decision and Order is attached hereto as Exhibit 1.

5. Nature and Object of the Case

On June 30, 2014, MLB's Revenue Sharing Definitions Committee ("RSDC") issued an award that determined the amount of the telecast rights fees that Petitioner-Appellant TCR Sports Broadcasting Holding LLP, d/b/a Mid-Atlantic Sports Network ("MASN"), would pay to both Respondent-Cross-Appellant Washington Nationals Baseball Club, LLC (the "Nationals") and Nominal Respondents-Appellants Baltimore Orioles Baseball Club and Baltimore Orioles Limited Partnership (collectively, the "Orioles"). The dispute was heard by the RSDC pursuant to a March 28, 2005 agreement between MASN, the Orioles, the Nationals, and MLB, which named the RSDC as the exclusive body to determine the amount of telecast rights fees in the event the other parties were unable to agree upon that amount.

MASN filed the action below seeking vacatur of the award pursuant to section 10 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10, and CPLR 7511(b)(1).[3] MASN's Amended Petition to Vacate was filed on September 23, 2014. The Nationals cross-moved to confirm the RSDC award on October 20, 2014.

In support of its Amended Petition to Vacate, MASN argued that the RSDC members had displayed "evident partiality" on the grounds that the Nationals were represented in the arbitration by the law firm Proskauer Rose LLP ("Proskauer"), while Proskauer allegedly

[3] MASN was joined by the Orioles. The Orioles are the controlling partner of MASN.

concurrently represented MLB and the Clubs and other entities associated with the RSDC members. MASN also argued that MLB and the RSDC members had an improper financial stake in the award; that the RSDC exceeded the scope of its authority and manifestly disregarded the law by not following MASN's preferred methodology in reaching the telecast rights fee amount; that the RSDC members committed procedural misconduct in the administration of the arbitral proceedings; and that the award was procured on the basis of fraud, corruption, or undue means. Finally, MASN requested that the Supreme Court order a rehearing of the rights fee dispute to take place in an arbitral forum other than the RSDC.

6. Result Reached Below

The Supreme Court granted in part MASN's Amended Petition to Vacate the RSDC award on the sole ground that Proskauer's participation in the RSDC proceeding constituted evident partiality under the FAA. The Supreme Court rejected all other grounds for vacatur raised by MASN, including its request to order a rehearing in a forum other than the RSDC.

7. Grounds for Appeal

The Supreme Court erred as a matter of law in vacating the arbitration award on the grounds of evident partiality. The Supreme Court did not err in rejecting the other grounds for vacatur raised by MASN, nor did it err in refusing to order a rehearing in a forum other than the RSDC.

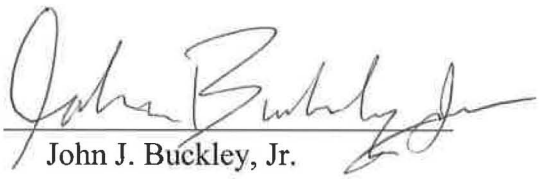
8. Related Actions or Proceedings

Petitioner-Appellant-Cross-Respondent MASN noticed an appeal from the Supreme Court's Decision and Order on December 11, 2015. MASN's Notice of Appeal and Pre-Argument Statement (without exhibits) are attached hereto as Exhibits 2 and 3, respectively. Nominal Respondents-Appellants-Cross-Respondents the Orioles noticed a separate appeal on

December 11, 2015. The Orioles's Notice of Appeal and Pre-Argument Statement (without exhibits) are attached hereto as Exhibits 4 and 5, respectively. Respondents-Respondents-Cross-Appellants the Nationals noticed a cross-appeal on December 21, 2015. The Nationals's Notice of Cross-Appeal and Pre-Argument Statement (without exhibits) are attached hereto as Exhibits 6 and 7, respectively. There are no other actions pending in any court.

Dated: December 21, 2015
Washington, DC

WILLIAMS & CONNOLLY LLP

By: 
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