To be Argued by:
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By Permission of the Court

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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 and WASHINGTON NATIONALS BASEBALL CLUB, LLC,

Respondents-Respondents-Cross-Appellants-Appellants,

(For Continuation of Caption See Inside Cover)

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– and –

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.

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PRELIMINARY STATEMENT

Contrary to cross-appellants' assertions, Justice Marks correctly vacated the award due to the evident partiality of Major League Baseball, or "MLB" (the institution) and its Revenue Sharing Definitions Committee, or "RSDC" (the arbitrators) after concluding they had "objectively demonstrate[d] an utter lack of concern for fairness of the proceeding" that was completely "inconsistent with basic principles of justice."[1] R.41.

The trial court correctly found that the fairness and neutrality of the arbitration were compromised by MLB and the RSDC, which improperly permitted MLB's primary outside counsel, Proskauer Rose LLP, to concurrently represent MLB, Commissioner Selig individually, the arbitrators or their business interests, *and* the Nationals in at least 30 matters during the arbitration.[2]

The lack of neutrality was further revealed by MLB's and the arbitrators' disregard of their duties to disclose the true extent of their attorney-client relationships with Proskauer. Not until the vacatur proceeding did MASN and the Orioles learn that, *during the arbitration*, Proskauer had: (i) represented Commissioner Selig in his $22 million 3-year contract extension; (ii) defended an arbitrator's

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[1] Capitalized terms not defined herein shall have the meaning ascribed to them in MASN's and the Orioles' Joint Opening Brief. ("Br.").

[2] In the order vacating the award, the trial court stated that the number of concurrent engagements was "nearly 30," but pointed to evidence demonstrating that the actual number is "nearly 50." *See* R.35.

family business and father in a class action related to the Madoff Ponzi scheme; and (iii) provided advice and counsel to MLB in scores of business transactions, corporate matters, immigration issues, and on the reorganization of the Commissioner's Office. R.2568-69 ¶¶ 3-4, R.2903-05.

MLB's partiality was punctuated by its total failure to act, despite MASN's and the Orioles' repeated objections—made at least 18 times—that the neutrality of the arbitration was fundamentally compromised by Proskauer's concurrent representations. As Justice Marks found, those objections were "timely raised and well-documented," R.36, but "fell on entirely deaf ears," R.41. MLB "did nothing, except assure [MASN and the Orioles] repeatedly that their concerns would be preserved and not waived by their participation" in the arbitration. R.39. And now, MLB asks the Court to disregard even those assurances with its meritless claim that MASN and the Orioles somehow waived their objections.

Having found "objective facts that are unquestionably inconsistent with impartiality," R.41, the trial court correctly vacated the award, emphasizing the primacy of neutrality in arbitrations:

> Evident partiality is no minor issue. Indeed, it may well be that its opposite, neutrality, is so fundamental to any adjudicative process that trust in the neutrality of the adjudicative process is the very bedrock of the FAA. It is upon that foundation, and in great reliance upon it, that courts can defer to processes decided upon and designed by private contract. But without neutrality, where partiality runs without even the semblance of a check, the alternative process created does not war-

> rant—and cannot be given—the great deference that arbitrators, and their awards, are bestowed by courts under the FAA. R.42.

Attempting to avoid the obvious correctness of Justice Marks' decision, MLB and the Nationals mischaracterize it, misrepresent record facts, and misstate applicable law. MLB's misdirection begins with a demonstrably false premise. Seeking to limit the reach of the trial court's findings, MLB says that the court concluded that MLB's conduct "was marked by fundamental fairness." MLB Br. 48. Not so. What the trial court *actually* found was that MLB "objectively demonstrate[d] an *utter lack of concern for fairness*." R.41.[3]

MLB also mischaracterizes the gravity of the pervasive conflicts that permeated the arbitration. MLB blithely says that it just so "happened to share the same large law firm" with the Nationals and the arbitrators, and criticizes Justice Marks for allegedly failing to explain how those concurrent representations in "unrelated matters" could compel a finding of partiality. MLB Br. 3. MLB's argument distorts the court's findings and entirely misses the point.

The attorney-client relationship is one of the most sensitive and confidential in our society, establishing special bonds of trust and reliance between the attorney and client. Here, as Justice Marks found, the *same four lawyers* from the *same law firm* represented "every participant in the arbitration *except for* MASN and the Orioles." R.37. And yet MLB and the arbitrators did absolutely nothing to address

[3] Unless otherwise noted, emphasis is added throughout.

those pervasive conflicts or otherwise protect the fairness of the arbitral process and, thus, "created a situation in which a reasonable person would have to conclude that the arbitrators were partial to the Nationals." R.37.

Equally disingenuous is MLB's attempt to recast itself as just "some third party" that had nothing to do with the arbitral decision. MLB Br. 28. The truth, as MLB elsewhere concedes, is that MLB intertwined itself in and controlled every aspect of the decision-making process. MLB officials (including the Commissioner) "organize[d] the proceedings and address[ed] procedural matters," "provide[d] legal and other advice to the RSDC," "analyze[d] financial information" for the panel, and even drafted the award. MLB Br. 8-9; *see also* R.2922 ¶ 5; Br. 20-23.

Regardless of their efforts, MLB and the Nationals cannot whitewash the evident partiality of the arbitration. Justice Marks correctly rejected those efforts. This Court should do the same.

MLB and the Nationals also cannot disguise the systemic ills that disqualify MLB and the RSDC from rehearing this dispute. Under Section 10 of the FAA and cases construing that section in light of bedrock principles of neutrality, where an award has been vacated because of partiality, bias, or misconduct by the arbitrators and the institution, the dispute must be remanded to an independent and neutral forum.

Indeed, MLB and the Nationals now concede that the *sole* basis upon which Justice Marks refused to remand to a new arbitral forum—that he purportedly lacked any power to do so—was wrong. As MASN and the Orioles have maintained all along, the FAA authorizes courts, in appropriate circumstances, to do so. The only question is whether such a remedy is warranted here—which it is.

Justice Marks' finding that MLB *and* the arbitrators were partial should alone be enough to disqualify MLB from conducting another arbitration, but here overwhelming record evidence provides further grounds for disqualification.

First and foremost, MLB has a disqualifying financial interest in the outcome of the dispute. It is uncontroverted that the Commissioner, acting on behalf of MLB, executed a private agreement with the Nationals wherein MLB advanced *$25 million* to the Nationals on a nonrecourse basis. The terms of that agreement—concealed at the time from MASN and the Orioles—provide that MLB can now recover that sum *only if* the RSDC rules against MASN in this dispute. Br. 23-25. That unpaid debt remains a corruptive influence that undermines the neutrality of any rehearing under MLB's auspices. MLB cannot be neutral in a proceeding that will determine whether it gains or loses $25 million.

Second, in stark contrast to established arbitration practice whereby institutions remain neutral when awards are challenged in court, MLB has vigorously advocated at every opportunity—including on appeal—to preserve and defend the

correctness of the award, even going so far as to threaten sanctions against MASN and the Orioles for seeking judicial review. See Br. 27-28.

Third, MLB's advocacy for the correctness of the award and its adversity to MASN and the Orioles has not been confined to court filings. The Commissioner, who personally oversaw every aspect of the prior arbitration and actively participated in the hearing, has declared in the press and, worse yet, to every MLB Club (from which the pool of RSDC arbitrators is drawn) that MASN should expect the same result in any future arbitration under MLB's auspices. R.3426. The Commissioner also publicly chastised MASN and the Orioles, disputing their positions and contractual understandings. R.3181 ¶ 40; R.3433; R.3702. It is inescapable that the MLB Clubs, and thus, the RSDC arbitrators, are aware of the Commissioner's pronouncements and, given the Commissioner's plenary power over the Clubs, would be influenced by MLB's partiality and prejudgment.

That partiality and prejudgment infects issues central to the rehearing, including the contractual methodology for determining telecast rights fees and the amount payable to the Nationals. The Commissioner and MLB advocate for reinstatement of an award that expressly deviated from the arbitrators' charge requiring the use of a specific and non-discretionary methodology applicable to "*all other related party telecast agreements in the industry.*" Disregarding that directive and the limitations expressed therein, the award determined the Nationals' telecast

rights fees like *no other* in the industry. As attested by MLB's former media consultant, who developed and for years applied that methodology for MLB, the RSDC's approach was so "*grossly different*" from the established methodology that it "*completely corrupt[ed]*" that methodology. R. 1180.

Although MASN and the Orioles agreed to arbitrate before a MLB committee, they expected—and had every right to expect—a fair and neutral proceeding and adherence to the mandate set forth in the arbitrators' charge. Instead, MASN and the Orioles were dealt a losing hand from a stacked deck by a biased, partial, and financially interested institution.

The time-honored principles of fairness, neutrality, and due process that underpin the FAA support affirmance of Justice Marks' vacatur decision and compel rehearing in an independent and neutral forum, outside of MLB, free from MLB's compromising influence.

COUNTERSTATEMENT OF CROSS-APPEAL QUESTIONS PRESENTED

1. Whether an arbitral award should be vacated for evident partiality where (i) over repeated objections, the same law firm (and the same lawyers) representing one of the parties in the arbitration also represented the arbitral institution, its officials, and the arbitrators, their businesses, or a family member during the arbitration; and (ii) the arbitral institution and arbitrators failed to disclose the full extent of those relationships or take any steps to address the conflicts.

The trial court correctly answered yes.

2. Whether an arbitral award should be vacated where the arbitrators exceeded the scope of their authority and manifestly disregarded the law by (i) refusing to apply the fixed and determinable methodology set forth in their mandate and the charging language of the arbitration clause; and (ii) ignoring express contractual limits on the scope of their power to resolve the dispute.

The trial court erroneously answered no.

3. Whether a trial court may exercise discretion to stay proceedings before it, including a motion to compel arbitration following vacatur, in light of a pending appeal addressing whether (i) the trial court correctly vacated the arbitral award, and (ii) the proper remedy in light of that vacatur order.

The trial court correctly answered yes.

ARGUMENT

I. THE TRIAL COURT CORRECTLY VACATED THE AWARD.

A. The Trial Court Correctly Found Evident Partiality.

1. MLB's And The Arbitrators' Concurrent Attorney-Client Relationships With The Same Law Firm, And Their "Complete Inaction" Despite MASN's And The Orioles "Well-Documented" Objections, Establish Evident Partiality.

The trial court correctly vacated the award because it found "*objective facts unquestionably inconsistent with impartiality*." R.41. Not only did Proskauer represent "virtually every participant in the arbitration *except for* MASN and the Orioles," but even after MASN and the Orioles timely and repeatedly objected, MLB and the arbitrators failed to take those "objections seriously, and actually [do] something about it." R.37-38. Rather, their response was "*complete inaction.*" R.41. This "utter lack of concern for fairness of the proceeding," was, in the trial court's words, "*so inconsistent with basic principles of justice that the award must be vacated*." R.41 (internal quotations and citations omitted).

Unable to dispute the uncontroverted facts and controlling law supporting the trial court's vacatur decision, MLB and the Nationals distort the court's holding and reasoning, attempt to diminish the nature of the pervasive conflicts created by their own conduct and relationships, and mischaracterize the gravity of those conflicts and relationships. But they cannot deny that those relationships existed, that

nearly 50 such relationships between MLB and Proskauer were concurrent with the arbitration, or that MLB and the arbitrators failed to fully disclose them.

They also do not dispute that MLB and the arbitrators completely failed to take any action to "protect the arbitral process against the utterly predictable charges of unfairness." R.38. Instead, MLB and the Nationals try to gloss over the taint caused by Proskauer's concurrent representations, asserting such conflicts were to be "expected," MLB Br. 48, because MASN and the Orioles agreed to an "inside baseball" arbitration, Nats. Br. 3. The trial court rejected this groundless argument, concluding that MASN and the Orioles "*did not* agree to" improper concurrent attorney representations merely by agreeing to arbitrate in an industry forum. R.36.

MLB's persistent refusal to recognize the seriousness of those conflicts speaks volumes about its disqualifying partiality. The trial court's vacatur decision should be upheld.

a. The Trial Court Properly Applied The Reasonable Person Standard.

MLB and the Nationals initially contend the trial court applied the wrong legal standard and "erroneously focused on the appearance of partiality" rather than "clear and convincing evidence of partiality." MLB Br. 49 (emphasis omitted); *see also* Nats. Br. 54. This argument is unfounded.

The trial court directly addressed this issue and specifically recognized that appearance of bias is "unquestionably *not* the standard used under the FAA." R.38. It instead stated, correctly, that the standard is whether "a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." R.41 (quoting *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust*, 729 F.3d 99, 104 (2d Cir. 2013)); *see also Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefits Fund*, 748 F.2d 79, 83-84 (2d Cir. 1984); *U.S. Elecs., Inc. v. Sirius Satellite Radio, Inc.*, 934 N.Y.S.2d 763, 764-65 (2011). It then expressly applied that "reasonable person" standard. R.40-41.

MLB cites no legal authority for its assertion that "evident partiality requires clear and convincing evidence *of objective misconduct by the arbitrators*." MLB Br. 29. And for good reason: there is none. MLB has cobbled together the standard of proof (clear and convincing evidence) with a made-up standard for what a party seeking vacatur for evident partiality must prove ("objective misconduct by the arbitrators").

Clear and convincing evidence simply means the showing of evident partiality must be direct, not remote or speculative. *Kolel*, 729 F.3d at 106. It does *not* mean the court must identify "concrete actions by the arbitrators, in either their conduct of the arbitration or their ultimate decision, that manifested partiality," as MLB contends. MLB Br. 3. Indeed, the Court of Appeals has held that, under the

FAA's reasonable person standard, it is *error* to require "clear and convincing evidence that any impropriety or misconduct of the arbitrator prejudiced [the petitioner's] rights." *U.S. Elecs., Inc.*, 934 N.Y.S.2d at 765.

MLB relies on inapposite cases where the evident partiality claim was based on an arbitrator's conduct, not on a disqualifying relationship. *E.g.*, *Kolel*, 729 F.3d at 105-06 (conversation between arbitrator and third party); *Amerisure Mut. Ins. Co. v. Everest Reins. Co.*, 109 F. Supp. 3d 969, 989 (E.D. Mich. 2015) (arbitrator's email expressing frustration with party). Unsurprisingly, where a partiality claim is based on *conduct* alone, the courts examine the particulars of the conduct to determine whether it actually evinces partiality.

But in a separate line of cases, the Second Circuit has clearly held that evident partiality can rest solely on the existence of "nontrivial" conflicting relationships, particularly where the arbitrators do not investigate or disclose them. *See, e.g.*, *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 137-38 (2d Cir. 2007) ("An arbitrator who knows of a material relationship with a party and fails to disclose it meets *Morelite*'s "evident partiality" standard …. [A]rbitrators must take steps to ensure that the parties are not misled into believing that no nontrivial conflict exists."); *Pitta v. Hotel Ass'n of N.Y.C., Inc.*, 806 F.2d 419, 423-24 (2d Cir. 1986) ("The relationship between a party and the arbitrator may, in some circumstances ... [require] that the arbitration award must be

automatically vacated"); *Morelite*, 748 F.2d at 84-85 (vacatur based on indirect father-son relationship between arbitrator and party "without knowing more").

Further, the Second Circuit and the Court of Appeals have *rejected* the notion that the reasonable-person standard requires evidence that the arbitrators "'actually favor[ed]' one party," MLB Br. 36. Rather, courts have uniformly held that "proof of actual bias" is *not* required, *Morelite*, 748 F.2d at 84; *U.S. Elecs., Inc.*, 934 N.Y.S.2d at 764-65; *Sun Ref. & Mktg. Co. v. Statheros Shipping Corp. of Monrovia, Liberia*, 761 F. Supp. 293, 302 (S.D.N.Y. 1991), and evident partiality "can be inferred from objective facts inconsistent with impartiality," *Kolel*, 729 F.3d at 104; *see also Scandinavian Reins. Co. v. St. Paul Fire & Marine Ins. Co.*, 688 F.3d 60, 72 (2d Cir. 2012); *Pitta*, 806 F.2d at 423; *Morelite*, 748 F.2d at 84. Courts thus examine "the totality of the circumstances," using a "case-by-case" approach, rather than "dogmatic rigidity." *Sun Ref.*, 761 F. Supp. at 298-301.

b. The Objective Facts are Uncontested and Demonstrate Evident Partiality.

In vacating the award, the trial court began with the question of "whether Proskauer's various simultaneous but unrelated representations of virtually every participant in the arbitration *except for MASN and the Orioles* created a situation in which a reasonable person would have to conclude the arbitrators were partial to the Nationals." R.37. But its analysis did not stop there, as MLB asserts. MLB Br. 35. The trial court also considered whether MLB and the arbitrators took

MASN's and the Orioles' objections seriously and took any steps "to protect the arbitral process against the utterly predictable charges of unfairness that are now before this Court." R.38. Because the answer to *this question* was no, the trial court held "there are objective facts that are unquestionably inconsistent with impartiality." R.41.

The court's findings were supported by the record and were undisputed:

- MLB's attorney-client relationship with Proskauer dates back at least 16 years. In the last decade, MLB and MLB entities retained Proskauer in at least *74* separate matters. R.2568-69 ¶ 4.

- During the arbitration, Proskauer represented "MLB, its executives and closely related entities" in nearly *50* separate matters, "as well as the individual arbitrators or their clubs or other interests." R.35-36; R.2568-69 ¶ 4.

- MLB did not just retain the same law firm as the Nationals. In *32* of these matters it retained the *same Proskauer attorneys*. Moreover, all but five of those engagements occurred *during* the arbitration. R.2568-69 ¶ 4; R.36.

- Instead of "tak[ing] reasonable steps to protect the arbitral process," R.38, MLB actually retained Proskauer for *33 additional matters* during the arbitration, R.2573-2760.

Uncontroverted evidence also demonstrates that during the arbitration, Proskauer represented all three arbitrators or their Clubs and interests. R.35.

- Arbitrator Francis Coonelly, President of the Pittsburgh Pirates (R.3122): the same Proskauer attorneys representing the Nationals also represented Coonelly's Club in *Senne v. Office of the Commissioner of Baseball*, No. 14-00608 (N.D. Cal.) (R.190-91 ¶ 15) and *Garber v. Office of the Com-*

missioner of Baseball, No. 12-03704 (S.D.N.Y.) (R.189 ¶ 9, R.523).[4] Proskauer previously represented Coonelly and Commissioner Manfred in *Phillips, et al. v. Selig*, No. 1966 EDA 2007 (Pa. Super. Ct.) (R.187-88 ¶ 7) and advised Coonelly's Club on Americans with Disability Act ("ADA") matters (R.2568-69 ¶ 4).

- Arbitrator Stuart Sternberg, Principal Owner of the Tampa Bay Rays (R.3127): Proskauer also represented Sternberg's Club in *Senne* (R.190-91 ¶ 15) and was counsel for Sternberg's Club in four separate salary arbitrations, one of which occurred during the arbitration (R.2568-69 ¶ 4).

- Arbitrator Jeffery Wilpon, Chief Operating Officer of the New York Mets (R.3132): Proskauer defended Wilpon's father and company (which owns his Club) in a class action arising out of the Madoff Ponzi scheme, which was ongoing during the arbitration. R.189-90 ¶ 12. Proskauer also represented Wilpon's Club in *Senne*. R.190-91 ¶ 15.

Virtually all of Proskauer's concurrent representations remained undisclosed. Early in the arbitration, MASN and the Orioles asked MLB's General Counsel (Tom Ostertag) for information about Proskauer's relationship with MLB and any MLB Clubs.[5] R.802 ¶ 29. Ostertag responded that Proskauer had been MLB's principal outside labor counsel for "a number of years," provided legal services in connection "with the Los Angeles Dodgers matter and other matters," and had conducted "seminars/conference calls for Club counsel about ADA and DOJ

[4] The Nationals assert Proskauer's representations in *Senne* and *Garber* are irrelevant because MASN knew about them. The Nationals omit that MASN and the Orioles timely objected to those representations. *See* R.164 n.18; R.162 n.18. In any event, *Senne* and *Garber* are just two of *many* concurrent representations.

[5] The request was not specific to the arbitrators' Clubs because at that time, MASN and the Orioles did not know the arbitrators' identities or their Club affiliations. *See* R.802-04 ¶¶ 29-34.

enforcement."[6] R.850. These disclosures were woefully incomplete. In fact, when Ostertag responded, Proskauer was representing MLB and MLB entities in nearly *20 separate engagements*. R.2903.

These facts alone are sufficient to establish evident partiality. As the trial court recognized, "[t]o the extent that 'there is no authority for a finding of evident partiality in such a relationship,' the Court suspects 'the simple reason for this lack of precedent is that arbitrators in similar situations have disqualified themselves rather than risk a charge of partiality.'" R.37 (quoting *Morelite*, 748 F.2d at 84).

MLB and the Nationals try to minimize the gravity of Proskauer's concurrent representations, suggesting they were "unrelated" and therefore "attenuated." This completely misses the point. MLB Br. 43-48; Nats. Br. 16. The reason Proskauer's representations were so obviously problematic is that the *same lawyers* in the *same firm* were representing MLB and the arbitrators *at the same time* they represented the Nationals in the arbitration. MLB's counsel conceded below that these concurrent representations of litigant and decisionmaker should have been remedied:

> THE COURT: … [W]hat if I am an arbitrator… and you represent me, you are my lawyer, and there is an arbitration proceeding before me[?] …

[6] Ostertag did not make any disclosures with respect to the arbitrators' Clubs. Shortly after Ostertag's email, Manfred provided MASN and the Orioles with the arbitrators' Club affiliations—but not their names—and mentioned that Proskauer "does salary arbitration for [T]ampa." R.803 ¶¶ 33-34.

> MR. BUCKLEY: The question you put to me, was … could you, as an arbitrator, instead, say, I voluntarily recuse myself, because I think I have a conflict. … You can do that, certainly. …
>
> THE COURT: *Not only could I do that, but I should do that*.
>
> MR. BUCKLEY: *You should. Absolutely you should do that, no question*.

R.2826-28.

The duty to disclose (and, if necessary, recuse) rests in the nature of the attorney-client relationship. Founded on "elements of trust and confidence," that relationship is "one of the most sensitive and confidential in our society." *Demov, Morris, Levin & Shein v. Glantz*, 444 N.Y.S.2d 55, 57 (1981). And because it is so important, an attorney-client relationship can support a finding of evident partiality even if "unrelated," and must be disclosed. *Scandinavian Reins. Co.*, 668 F.3d at 74; *Schmitt v. Kantor*, 442 N.Y.S.2d 65, 66 (2d Dep't 1981) (vacating award because arbitrator was represented in unrelated action by same firm as a party); *see also Sanko S.S. Co., Ltd. v. Cook Indus., Inc.*, 495 F.2d 1260, 1263-64 (2d Cir. 1973). That is why arbitral institutions routinely require arbitrators to disclose relationships with parties' counsel.[7]

[7] *See* AAA Commercial Arbitration Rules, Rule 17(a) (2013); JAMS Comprehensive Arbitration Rules and Procedures, Rule 15(h) (2014); *see also* Uniform Arbitration Act § 12 (2000).

2. The Trial Court Correctly Concluded That MLB's Attorney-Client Relationships With Proskauer Were A Basis For Evident Partiality.

Unable to rebut the objective facts concerning its relationships with Proskauer, MLB resorts to obfuscation. MLB is *not* merely "some third party that is not even the decision-maker." MLB Br. 28. A swarm of MLB officials surrounded the arbitrators and permeated their decisional process. Nearly a dozen high-ranking MLB staff and consultants *participated in the arbitrators' deliberations*, including the current Commissioner, who *personally* gave legal advice to the panel, and (together with his staff) analyzed financial information, *instructed the arbitrators* as to the meaning of the Settlement Agreement, and actually drafted the award. MLB Br. 8-9; Br. 18-23, 48. The facts thus show that, from beginning to end, MLB framed the arbitrators' understanding of the dispute and how it should be resolved. All else is spin: the arbitrators *did not* decide the dispute independently.

Although MLB and the Nationals embrace the trial court's characterization (in dicta) of MLB's role as "generally akin to the support that a law clerk provides to a judge," MLB Br. 24; Nats. Br. 4, 24, 42, the analogy vastly understates MLB's actual involvement. And it does not improve their position. A law clerk's "duties and responsibilities are most intimately connected with the judge's own exercise of the judicial function," *People v. Suazo*, 120 A.D.3d 1270, 1273 (2d Dep't 2014),

which is why a partial law clerk has no business working on a case, *Williams v. N.Y.C. Hous. Auth.*, 287 F. Supp. 2d 247, 250 (S.D.N.Y. 2003). This analogy thus underscores the gravity of Proskauer's concurrent relationships and why MLB must be disqualified from conducting a rehearing.

Furthermore, the "law clerk" analogy entirely refutes MLB's unsupported assertion that the FAA applies only to the arbitrators and not to an arbitral institution like MLB. *See* MLB Br. 32. Indeed, "[w]here administering institutions perform functions which, in their absence, would otherwise be performed by arbitrators, the institutions should be treated as arbitrators for the purpose of vacating awards under FAA § 10." MACNEIL ET AL., FEDERAL ARBITRATION LAW § 24.2.3 (1999 Supp.). No other rule would be sensible.

MLB and the Nationals also wrongly suggest that because the trial court found that MLB's "support" role was not misconduct under 9 U.S.C. § 10(a)(3), MLB's role has no consequences for evident partiality or rehearing. *See* MLB Br. 24, 48; Nats. Br. 45. That does not follow. *First*, the trial court's findings were limited to "misconduct solely as to process" in the completed arbitration. R.30. Because the trial court erroneously believed it lacked authority to order rehearing outside of MLB's auspices, R.42 n.21, it never considered whether MLB's role would present a problem in a *future* arbitration. *Second*, because MLB had a substantive role in the arbitration, Proskauer's concurrent representations of MLB are

(as the trial court held) material irrespective of whether MLB's role would otherwise have been proper.

Finally, MLB and the Nationals invoke the arbitrators' affidavits insisting that the arbitrators acted independently of MLB. *E.g.*, MLB Br. 42; Nats. Br. 49. But when three witnesses parrot the same conclusory description of events, years after the fact, it shows just the opposite of independence. *Compare* R.1846 ¶ 10, *with* R.1856 ¶ 9, *and* R.1865 ¶ 9. These statements are also dubious because they cannot be assessed against a complete documentary record. MLB refused to produce its communications with the arbitrators, arguing they were protected by the decisional process and the attorney-client privilege, precisely on the ground that MLB was intertwined in that decision process. Br. 20. Regardless of MLB's gamesmanship, the point is clear. The arbitrators did not act independently.

3. The Arbitrators' Failure to Investigate And Disclose Their Relationships With Proskauer Further Establishes Evident Partiality.

The Court also should affirm vacatur because the arbitrators *never* conducted any investigation or made any disclosures regarding these concurrent relationships, even after their duty to do so was triggered. *See Applied Indus.*, 492 F.3d at 137-38.

MLB and the Nationals try to side-step the arbitrators' conflicting relationships, claiming first that the arbitrators cannot be partial "on the basis of relation-

ships [the arbitrators] did not know existed." MLB Br. 42; *see also* Nats. Br. 56. However, evident partiality does not require actual knowledge of a conflict. *See Applied Indus.*, 492 F.3d at 138 ("While the presence of actual knowledge of a conflict can be dispositive of the evident partiality test, *the absence of actual knowledge is not.*").

Next, MLB argues that "the mere failure to investigate" alone is not sufficient to vacate the award, MLB Br. 50 n.8, but this misstates the law and ignores uncontested facts. Although there is no "free-standing duty to investigate," the law is clear that where an arbitrator "has reason to believe that a nontrivial conflict of interest *might exist, he must* (1) *investigate* the conflict (which may reveal information that must be disclosed under [U.S. Supreme Court precedent]) or (2) *disclose* his reasons for believing there might be a conflict and his intentions not to investigate." *Applied Indus.*, 492 F.3d at 137-38. Once that duty is triggered, the failure to comply indicates partiality. *Id.*

Even accepting the unlikely premise that: (1) Wilpon did not know Proskauer was representing his father, family partnership, and Club; (2) Sternberg was unaware that Proskauer represented his Club; *and* (3) Coonelly forgot that Proskauer represented his Club and him personally (despite having been deposed in the matter), the arbitrators received at least four separate communications (three in writ-

ing) raising MASN's and the Orioles' objections to Proskauer. Their duty to investigate and disclose was unquestionably triggered.

In fact, those objections were raised on the *very first page* of MASN's and the Orioles' opening briefs to the arbitrators and on the *very first page* of the Orioles' reply brief. R.2404-05 ¶ 33. At the outset of the hearing, moreover, the Orioles' counsel renewed those objections orally. R.2405 ¶ 34. Notwithstanding those objections and countless more, as the trial court found, the arbitrators "did not make any effort at the time to inform themselves of such connections," R.39 n.16, and neither did MLB.[8]

MLB seeks to blame MASN and the Orioles for not making further efforts to raise their concerns with the arbitrators directly. But they had been instructed *by the Commissioner* to make all communications to the arbitrators through his office and not to communicate with the arbitrators directly. R.2949-53; Br. 18-21. Thus, on February 2, 2012, they presented the Commissioner with a letter objecting to the partiality caused by Proskauer's participation and requesting that Proskauer be disqualified. R.2401 ¶ 24. Because MLB had not revealed the arbitrators' identi-

[8] MLB and the Nationals attempt to dismiss Proskauer's representations of the arbitrators' Clubs and business interests, arguing they "were not sitting to represent the interests of their Clubs or other business" in the arbitration. MLB Br. 42; Nats. Br. 55-56. But they cite no authority for the notion that business or attorney-client relationships are relevant only if arbitrators sit as representatives of some outside interest, which they rarely do. And the cases are all to the contrary. *See, e.g.*, *Morelite*, 748 F.2d at 84 (vacating based on "a father-son relationship between an arbitrator and the President of an international labor union," without any suggestion that the father was sitting in some representative capacity).

ties at this time, *see* R.803 ¶¶ 33-34, and in any case had instructed the parties not to communicate with the arbitrators directly, R.807 ¶ 46; R.2401 ¶ 25, MASN and the Orioles asked the Commissioner to transmit their written objections to the arbitrators (who were shown as "cc, Members Revenue Sharing Definition Committee," R.873), R.2402 ¶ 26. Per the Commissioner's directive, they reasonably expected their objections to be transmitted. R.2402 ¶ 27. Only during the vacatur proceeding did MASN and the Orioles learn that the Commissioner never did so. Br. 19 n.8. Regardless, none of this excuses the arbitrators' disregarding the objections that *did* reach them.

4. MASN and the Orioles Agreed To A Fair And Neutral Arbitral Process, And Did Not Consent To An Arbitration Riddled With Conflicting Attorney-Client Relationships.

MLB and the Nationals argue that because MASN and the Orioles agreed to an "inside baseball" arbitration, the arbitrators could be expected to have experience with the firms representing the parties before them. *See* MLB Br. 44-48; Nats. Br. 55-56. This is wrong for a host of reasons. *First*, when MASN and the Orioles agreed to arbitrate before the RSDC, they expected it to decide the dispute as a "neutral third party." R.1987. *Second*, Proskauer was not merely "familiar" to the arbitrators and MLB. MLB Br. 46. *Proskauer was MLB's primary outside counsel and represented the arbitrators, their Clubs, families, or related businesses with respect to substantial matters.*

Third, these simultaneous attorney-client relationships are not inherent or inevitable because of the forum. Nor are they kind of professional associations that MASN and the Orioles consented to when they agreed to arbitration before the RSDC. *See, e.g.*, *In re Arbitration between Nat. Shipping Co. of Saudi Arabia, Transam. S.S. Corp.*, No. 92-0258, 1992 WL 380302, at *3-4 (S.D.N.Y. Dec. 10, 1992) (contrasting "professional connections," which "does not justify a finding of evident partiality," with "attorney-client or business relationship[s]," which do).[9]

The cases cited by MLB and the Nationals are inapposite. *See* MLB Br. 46. They involve situations where the arbitrator's allegedly conflicting relationship with a party or its counsel derived from participation in the same professional group. None involve a situation where, as here, counsel for one of the litigants was also counsel to the arbitrators, their businesses, *and* the arbitral institution. The trial court correctly rejected this argument, distinguishing the expected industry relationships from the *unexpected* attorney-client relationships:

> MLB's ongoing relationship with clubs and owners is inherent in the structure of the method of arbitration chosen by the parties .... By contrast, *what the parties did not agree to was that one party to the arbitration—and not the other—would have the opportunity to be represented in the arbitration by the same counsel that represented MLB and the arbitrators and/or their clubs.*

[9] *See also Pitta*, 806 F.2d at 423 (distinguishing "professional" and "business" relationships, only the latter of which warrants vacatur); *Sun Ref.*, 761 F. Supp. at 299 ("[C]ourts are more likely to find 'evident partiality' where the claim arises from a 'business relationship' between an arbitrator and a party rather than from a 'professional relationship.'").

R.37 n.13.

Finally, MLB relies heavily on *NFL Mgmt. Council v. NFL Players Ass'n*, 820 F.3d 527 (2d Cir. 2016) (the "*Brady*" decision), which is worlds apart from this case. *Brady* arose under—and is firmly grounded in—a collective bargaining agreement (CBA) applicable to all NFL players. The CBA grants the NFL Commissioner plenary authority to define "conduct detrimental to the integrity of and public confidence in the game of professional football." *Id.* at 534. In holding that the NFL Commissioner was not evidently partial, *Brady* rested on the NFL Commissioner's "especially broad" delegation of authority under the CBA. *Id.* at 532, 548 (Commissioner had the "sole power of determining what constitutes 'conduct detrimental'").

This case is nothing like *Brady*. This is not a labor dispute under a CBA concerning the Commissioner's authority to regulate on-the-field conduct. *See id.* at 531. It is a commercial dispute arising under a unique Settlement Agreement between these parties alone. And whereas a CBA erects a "framework of self-government," *i.e.*, "a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate," *id.* at 536, the contract here required the RSDC to apply a carefully defined "established methodology." *See infra* pp. 30-43. Neither the RSDC nor MLB enjoyed any discretion even approaching the latitude that was essential to the decision in *Brady*.

5. MASN And The Orioles Properly Preserved Their Evident Partiality Challenge.

During the arbitration, the Commissioner assured MASN and the Orioles that MLB "*would never assert that you have waived your objection* to [P]roskauer's involvement." R.2493. Disregarding that promise, MLB advances waiver as its lead argument, MLB Br. 32, but to no avail. As the trial court held, this argument is meritless. R.36, R.40.

Prior to discovery below, MASN and the Orioles did not know the full extent of Proskauer's relationships with MLB and the arbitrators—because MLB and the arbitrators refused to disclose them. *See* Br. 16-18; *supra* pp. 20-23. However, they knew enough to be concerned, and they made these concerns known. During the arbitration, MASN and the Orioles objected at least *18 separate times* that the neutrality of the proceedings was fundamentally compromised by Proskauer's involvement. *See* R.2397-2406 ¶¶ 10-38 (detailing objections and responses). Everyone involved in the arbitration knew *exactly* what MASN's and the Orioles' partiality concerns were and why they were objecting.

Thus, as the trial court correctly found, MASN and the Orioles "made every effort to reserve their rights, and received assurances that they would not waive their objections by proceeding with the arbitration," but their "well-documented concerns fell on entirely deaf ears." R.36, R.41. For example, MASN and the Orioles objected:

- "[Proskauer's] representation of MLB and various MLB Clubs also *raises questions of impartiality, prejudice, and unfair advantage before an MLB tribunal*. That conflict cannot be cured absent Proskauer's immediate withdrawal from these proceedings." R.853.

- "Proskauer's longstanding representations of litigant, ultimate decision-maker and participating RSDC member Club(s) raise, at a minimum, *serious questions of partiality, prejudice, and misuse of confidential and proprietary information*" and Proskauer's continued participation "*would be procedurally and substantively inappropriate and compromise the integrity of [the RSDC proceeding]*." R.873.

- "The Orioles and [MASN] have an absolute right to a *fair and objective hearing not tainted by the shadow of MLB's lawyers*, who, among other things, also represent a party in this proceeding." R.878.

These are just three examples of the *nearly two dozen* objections MASN and the Orioles raised. *See* R.2397-406 ¶¶ 10-38.

The record shows that MLB and the Nationals heard the message. The Commissioner acknowledged during the arbitration "the *fact* that the Orioles *have not waived their objection* to Proskauer's participation," R.2476. Likewise, the Nationals freely admit "[*t*]*he Nationals were aware of MASN's objections* and the possibility that they would be cited *as a basis for vacatur*," but chose to proceed with Proskauer anyway. Nats. Br. 57. Nobody remotely "sandbagg[ed]" MLB or the Nationals. *Contra* MLB Br. 34.

These undisputed facts render MLB's and the Nationals' authorities irrelevant. *See* MLB Br. 33-34; Nats. Br. 52. Those cases hold that a party who knows of facts indicating bias "cannot remain silent and later object to the award." *AAOT Foreign Econ. Ass'n (VO) Technostroyexport v. Int'l Dev. & Trade Servs., Inc.*,

139 F.3d 980, 982 (2d Cir. 1998); *accord In re Namdar (Mirzoeff)*, 555 N.Y.S.2d 101, 102 (1st Dep't 1990). Here, of course, MASN and the Orioles were anything but "silent." They objected early and often. R.41.

Nor is there any merit to the claim that MASN's and the Orioles' objections somehow do not count because they were focused on removing Proskauer, rather than on removing the arbitrators. *See* MLB Br. 32; Nats. Br. 52. *First*, the focus on Proskauer was entirely reasonable since MASN and the Orioles were trying to resolve the problem presented by *Proskauer's* overlapping representations of *MLB and the Nationals*, as well as the arbitrators. *See* R.871-74. *Second*, the assertion that MASN and the Orioles failed to object to the "composition of the arbitration panel," Nats. Br. 52, is simply wrong; they expressly preserved their challenge to "the regularity of [the RSDC's] procedures and the *constitution of its panel*." R.962.

Third, no authority supports MLB's and the Nationals' attempt to deconstruct these objections. What matters for waiver purposes is simply whether the objecting party put the other actors on notice of the basis for its complaint, *see AAOT*, 139 F.3d at 982,[10] which undisputedly occurred here. Eighteen different

[10] Neither *Brook v. Peak Int'l, Ltd.*, 294 F.3d 668 (5th Cir. 2002) nor *N.Y.C. Dist. Council of Carpenters Pension Fund v. Tadco Constr. Corp.*, No. 07- 2712, 2008 WL 540078 (S.D.N.Y. Feb. 28, 2008), support, a stricter standard. *Contra* MLB Br. 33. *Brook* found waiver because petitioner "never objected" that the selection of arbitrators did not conform to the contract during the arbitration; "condoned" the way they were selected in communications with the AAA, and did not raise the alleged impropriety "until prompted" *by the magistrate presiding over the sub-*

objections belie MLB's preposterous assertions that MASN and the Orioles "remain[ed] silent," "s[a]t on [their] partiality concerns," and made the "calculated decision not to object" during the arbitration. MLB Br. 34, 35.

Finally, whether MLB or the arbitrators had authority to disqualify Proskauer, MLB Br. 35 n.5; Nats. Br. 53-54, is irrelevant, and does not excuse MLB's "complete inaction" in face of the conflicts. At most, the cases cited by MLB and the Nationals establish that arbitrators generally lack power to disqualify counsel under the Code of Professional Responsibility. *E.g.*, *Merrill Lynch, Pierce, Fenner & Smith v. Benjamin*, 1 A.D.3d 39, 44 (1st Dep't 2003). These cases say nothing about waiver. They certainly do not hold (or even hint) that a party who timely and repeatedly objects to a conflict of interest is barred from later seeking vacatur on that ground.

It is no wonder, then, that the trial court found MASN's and the Orioles' "*timely raised and well-documented*" objections were "simply ignored and dismissed with repeated assurances that such objections [would] not be waived by participation in the arbitration." R.36, R.40. This Court should reach the same conclusion.

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sequent vacatur action. 294 F.3d at 673-74. In *Tadco*, the court held that a boilerplate "general disclaimer" in correspondence seeking to adjourn hearings did not preserve an arbitrability objection. 2008 WL 540078, at *5. These cases show only that petitioner must timely object, which MASN and the Orioles did.

B. Alternatively, The Award Is Invalid Because The RSDC Manifestly Disregarded The Contractually Mandated Methodology And Exceeded The Scope Of Its Authority.

This Court can also affirm vacatur on the grounds that the arbitrators exceeded the scope of their authority and manifestly disregarded the law.[11] Where an arbitral panel "strays from interpretation and application of the agreement" and imposes its own unanchored policy view, its "decision may be vacated under § 10(a)(4) of the FAA on the ground that the arbitrator[s] 'exceeded [their] powers,'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671-72 (2010), or manifestly disregarded the terms of the agreement, *Schwartz v. Merrill Lynch & Co.*, 665 F.3d 444, 452 (2d Cir. 2011); *see also Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471, 480 (2006) (manifest disregard consists of refusal to apply or ignoring a well defined, explicit, and clearly applicable legal principle).

The award is invalid on both grounds. Section 2.J.3 of the Settlement Agreement, which "serves not only to define, but to circumscribe, the [RSDC's] authority," *Local 1199 v. Brooks Drug Co.*, 956 F.2d 22, 25 (2d Cir. 1992), required it to use "*the RSDC's established methodology* for evaluating *all other* related party telecast agreements in the industry," R.203. The limits of this grant of authority were clearly defined. The arbitrators were required to use *the* RSDC's

[11] Any suggestion this argument is waived, *see* Nats. Br. 4, is wrong. An appellee is "entitled to raise … alternative grounds for sustaining the [trial court] judgment." *Town of Massena v. Niagara Mohawk Power Corp.*, 45 N.Y.2d 482, 488 (1978).

established methodology and evaluate the Nationals' telecast rights fees in the same manner as "*all other*" related-party telecast agreements in the industry. That mandate was clear and non-discretionary.

When the Settlement Agreement was executed in March 2005, the RSDC had *only one* accepted methodology for determining the fair market value of telecast rights fees, known as the "Bortz Methodology," for the media consulting firm that developed it for MLB. That methodology had been expressed in written precedent of the RSDC and the Commissioner's Rulings. It was so deeply engrained that Commissioner Selig declared he was "*unwilling to endorse any material variation from*" that "*objective and consistent*" methodology. R.675-76.

Notwithstanding the Agreement's clear directive to evaluate the Nationals' telecast rights fees using the "established methodology" applicable to "*all other*[*s*]," the RSDC expressly evaluated those fees like *no others*. In fact, the RSDC acted as though its task was to decide, in subjective terms, "what fair market operating margin is *appropriate for MASN*," based on an *ad hoc* list of factors that supposedly informed its conclusion but were not weighed according to any discernible methodology. *See* R.223-26. This departure was so extreme that the RSDC sought to assure other Clubs that the approach foisted upon MASN would never affect them, announcing "this decision shall not constitute precedent of the RSDC." R.217 n.2.

The RSDC's complete disregard of its mandate independently supports vacatur. It is not enough for an arbitrator to make "noises of contract interpretation," *In re Marine Pollution Serv., Inc.*, 857 F.2d 91, 94 (2d Cir. 1988), and a court cannot confine itself to asking, as the trial court did, whether the panel's explanation sounds "reasonable" in the abstract. R.29. The court's proper task was to ensure the panel "identif[ied] and appl[ied] a rule of decision derived from" controlling authority, *see Stolt-Nielsen*, 559 U.S. at 676, and complied with any "specifically enumerated limitation on [its] power," *In re Kowaleski (N.Y. State Dep't of Corr. Servs.)*, 16 N.Y.3d 85, 90 (2010). And contrary to the trial court's conclusion, *see* R.29, it is perfectly appropriate for a petitioner to "show by … extrinsic evidence that the arbitrators exceeded their powers," *Overseas Distributors Exch., Inc. v. Benedict Bros. & Co.*, 5 A.D.2d 498, 500 (1st Dep't 1958); *accord* 23A Carmody-Wait 2d, N.Y. Prac., § 141:254 (2014 update). Under the proper standards, it is clear that the RSDC exceeded the scope of its authority and manifestly disregarded its contractual mandate.

1. The Settlement Agreement Unequivocally Required The RSDC To Apply A Fixed And Determinable Methodology To Resolve The MASN-Nationals Telecast Rights Fee Dispute.

It is undisputed that the contractual directive to apply the "established methodology for evaluating all other related party telecast agreements in the industry" was carefully bargained for. Br. 11-14. But its primary purpose was *not* to "lever-

age the RSDC's unique expertise in valuing telecast rights fees," MLB Br. 11, and MLB's evidence does not show that the RSDC has any such expertise. As MLB elsewhere concedes, "[t]he RSDC's composition changes periodically," and its members are "Club owners or executives … with other full-time commitments." *Id.* at 8. Section 2.J.3's primary purpose is the one stated in its text: to direct the RSDC to use for MASN the same methodology it uses for "all other" related-party RSNs.

This limitation was critical because the Major League Constitution, a contractual "agreement among the Major League Baseball Clubs," R.1947, generally empowers the Commissioner to resolve "all disputes and controversies related [in] any way to professional baseball between a club or clubs [and] any [MLB] entity," R.484. Thus, if the Settlement Agreement had not established any contrary rule, any telecast rights fee dispute between MASN and the Nationals might have been subject to the Commissioner's broad authority. But the Settlement Agreement *did* establish a contrary rule.[12] It gave the Commissioner *no power* to resolve such a dispute, instead authorizing the RSDC to do so—but *only* by "using the RSDC's established methodology for evaluating all other related party telecast agreements in the industry." R.203.

[12] The Nationals' attempt to distort Mr. Angelos's congressional testimony, Nats. Br. 11, should not be credited. He in no way implied that MLB would have free rein to set telecast rights fees. Rather, he described, in general terms, the Settlement Agreement's fee-setting process. R.1977.

2. The Text And Context Of The Agreement Unequivocally Demonstrate The Parties' Intent To Have The RSDC Resolve Any Telecast Rights Fee Dispute Using The Carefully Circumscribed Bortz Methodology.

The panel's *ad hoc* approach and open refusal to adhere to its contractual mandate to use "the RSDC's established methodology for evaluating all other related party telecast rights agreements in the industry" powerfully reveals that the RSDC manifestly disregarded the scope of its authority. That mandate provides three mutually reinforcing directives about the scope of the RSDC's authority.

First, the RSDC was required to apply a methodology that was *established.* Under Maryland law (which the RSDC was bound to apply, *see* R.210 §11.A), the word "established" refers to something "permanently settled and confirmed." *Dixon v. Bd. of Sup'rs of Elections*, 222 A.2d 371, 373 (Md. 1966); *see also* BLACK'S LAW DICTIONARY (9th ed. 2009) ("establish" means to "settle, make, or fix firmly; to enact permanently").

Second, the RSDC was required to apply the *same* established methodology used to "evaluat[e] *all other* related party telecast rights agreements in the industry." R.203. The obvious import of that phrase was to ensure that MASN would not be disfavored by the RSDC, but would receive the same "objective and consistent" treatment as "all other" related-party RSNs. R.675-76.

Third, the RSDC was obligated to apply a "*methodology*"—an approach designed to "produce the same result each time it is applied to the same thing" and

characterized by "consistency or reproducibility." *Chesson v. Montgomery Mut. Ins. Co.*, 75 A.3d 932, 936 (Md. 2013).

At the time of the Settlement Agreement, the RSDC had only *one* methodology: the "Bortz" methodology. It was "established" and "consistent." *See* R.1169-70 ¶¶ 10-11; Br. 12. The established nature of the Bortz methodology and its consistent application were confirmed by the RSDC and the Commissioner in published reports and Rulings contemporaneous with the Settlement Agreement negotiations.

The RSDC's Sixteenth Report (December 2004) expressly embraced "the time-tested Bortz-style analysis" for determining the fair market value of telecast rights fees. R.655. The RSDC's Eighteenth Report (January 2005) lauded "the so-called Bortz analysis," emphasizing that it produced results that are "constrained and predictable and thus better-suited to produce fair results across Clubs and transactions over time." R.664. Then-Commissioner Selig not only reconfirmed the singularity and established acceptance of that methodology in his January 2005 Ruling to the Eighteenth Report, but also advised the Clubs that he would not "*endorse any material variation from the objective and consistent Bortz methodology that has served the industry so well*." R.675-76.

These precedents informed the Settlement Agreement negotiations. It is undisputed that MLB provided copies of the RSDC's Sixteenth and Eighteenth Re-

ports and the Commissioner's Ruling on the Eighteenth Report to confirm the meaning and application of "the RSDC's established methodology." *See* R.800-01 ¶¶ 21-23; Br. 11-13. It is also undisputed that MLB proposed using that language in the Agreement.[13] *See* R.841 (MLB draft). And critically, it is undisputed that prior to the award here, on at least 19 occasions spanning a decade and a half, the RSDC used the Bortz methodology to determine the fair market value of "*all other*" related-party telecast agreements. R.147 ¶ 66; R.1169-70 ¶¶ 7, 11. In the RSDC's own words, it "relied for years" on, and "routinely accepted," the Bortz analysis. R.891. The express language of the Settlement Agreement plainly requires the RSDC to apply this same methodology to MASN.

The Bortz methodology's parameters are well-defined. It is an accounting-based profit margin analysis that relies on the RSN's revenues and expenses in its market. R.1170 ¶ 11. It first allocates those revenues and expenses in an historically accepted fashion between the RSN's baseball and non-baseball programming. *Id.* It then provides for at least a 20% operating profit attributable to baseball programming. *Id.* ¶ 12. The remaining amount constitutes the fair market value of the Club's telecast rights fees, *i.e.*, the "value assuming a competitive bidding process

[13] That MLB promoted the established methodology as the device for ensuring the Orioles' compensation belies MLB's current claim, MLB Br. 10, that the Agreement was designed to protect *the Nationals* from the Orioles' supposed "double incentive" to divert revenue. Moreover, the Bortz methodology was developed to determine telecast rights fees reflective of arm's length transactions, and thus avoids diversion of revenues. *See* R.1170 ¶ 12; R.664.

in an arm's length negotiation for the telecast rights fees of an MLB Club." *Id.*; *see* R.1174 ¶ 26.

The contemporaneous reports and the Commissioner's Ruling express these understandings. As the RSDC's Eighteenth Report confirms, the "'Bortz analysis' … collects estimated or actual revenue and expense data from the [RSN] … assumes a market-driven operating margin … and then calculates back to a rights fee that should be available to the Club." R.662; *see also* R.664. Commissioner Selig reaffirmed in his Ruling to the Eighteenth Report that at least a "20% operating margin" from baseball programming is the norm. R.669; *see also* R.675. The current Commissioner has similarly acknowledged that no related-party RSN that had actually achieved at least a 20% profit margin from its cable baseball programming had ever been forced by the RSDC to operate at less than 20%. R.2412 ¶ 58. The RSDC's mandate was thus well known to it and perfectly clear.

3. The RSDC Ignored The Express Limitations Of Its Mandate And Impermissibly Erased Negotiated Constraints On Its Powers.

Although the RSDC paid lip service to its contractual mandate, it expressly deviated from it, appearing to work backwards from its desired result. According to MLB's former media consultant who developed and applied the methodology for MLB for many years, the award deployed so many "outside the norm assumptions" and "cherry picked data," and was so "grossly different" from the estab-

lished methodology, that it "completely corrupt[ed]" it.[14] R.1180 ¶ 38. And a noted economist attested that the award "employs assumptions and approaches that are so outside the norms of accepted economic standards that the resulting valuation of the Nationals' telecast rights is illegitimate and unreliable." R.1212 ¶ 5.

The RSDC thus "exceeded [its] powers," 9 U.S.C. § 10(a)(4), by "clearly exceed[ing] a specifically enumerated [contractual] limitation," *In re Kowaleski*, 16 N.Y.3d at 90, and by "impos[ing] its own policy choice" instead of "identifying and applying a rule of decision" derived from the Agreement, *Stolt-Nielsen*, 559 U.S. at 676-77. The RSDC plainly did not apply the same methodology to MASN that it had applied to "all other" related-party RSNs, and it did not even pretend to do so, instead proffering a series of excuses. The first excuse was that it did not need to apply "the so-called Bortz approach" because "the Agreement specifies that the Committee should apply *the Committee's* established methodology … not Bortz Media's preferred methodology." R.221. But the RSDC has never claimed to have any methodology *other than* the Bortz methodology, and its precedents directly confirm that there is no other. *E.g.*, R.676.

Second, the RSDC said it did not need to use the Bortz methodology because its contours are not detailed in the Settlement Agreement. R.226 n.7. Not so. The

[14] MLB's suggestion, MLB Br. 13 n.2, that it did not stop using Bortz for fair market value assessments after Bortz supported MASN at the hearing is false. MLB's reliance on a residual matter involving a consortium of sports organizations involving a copyright dispute is irrelevant.

RSDC's feigned ignorance of its methodology is belied by its written precedent and that of the Commissioner, which express the contours of that methodology with particularity. Moreover, insofar as the RSDC believed its mandate was ambiguous, Maryland law, *see* R.210 §11.A, dictated the next step: "If [a] contract is ambiguous, the court *must consider any extrinsic evidence* which sheds light on the intentions of the parties at the time of the execution of the contract." *Sy-Lene of Wash., Inc. v. Starwood Urban Retail II, LLC*, 829 A.2d 540, 547 (Md. 2003).

MASN and the Orioles provided the RSDC overwhelming and unrefuted evidence that the contracting parties intended the RSDC to use the Bortz methodology to resolve any telecast rights fee dispute. *See* R.889-94, R.909-13 (submission statements); R.1173-75 ¶¶ 21-22, 27 (describing Bortz *pro forma*). But the RSDC did not address any of that evidence. The trial court likewise declined to do so, *see* R.28 & n.10; R.29, despite the established rule that a petitioner may "show by … extrinsic evidence that the arbitrators exceeded their powers," *Benedict Bros.*, 5 A.D.2d at 500.

The invalidity of the RSDC's *ad hoc* approach is further confirmed by its incompatibility with Section 2.J.3's plain text. The RSDC did not even attempt to show that the "methodology" it applied was "established"—"permanently settled and confirmed," *Dixon*, 222 A.2d at 373. Nor did it suggest that the "methodology" it described had *ever* been applied in evaluating *any* other related-party trans-

action, let alone "*all other*[*s*]." The most the RSDC was able to claim was that in other circumstances, it had "considered … a myriad of factors that may influence the value of the Club's rights." R.222. But that does not even begin to justify the RSDC's deviation from the central pillar of its established methodology, a 20% or greater operating margin from baseball programming, or the RSDC's imposition of a 5% operating margin on MASN alone. *See* R.1170 ¶ 12; *see also* R.669; R.675.

The RSDC's efforts to explain away this departure further demonstrates that the RSDC did not evaluate MASN like "*all other*[*s*]." The RSDC asserted that the 20% operating profit margin applies only "[i]n the context of a *retrospective* review of the operating results under a related party agreement," and thus could not be applied to *prospectively* set telecast rights fees. R.225-26. Similarly, the RSDC claimed that its established methodology is inapplicable to a two-Club RSN. R.226.

But the RSDC had no authority to make those distinctions. Under the Settlement Agreement, no other approach was permissible. Moreover, the RSDC's excuses are contrivances. Bortz "developed the [established methodology] *specifically* for the purpose of determining the fair market value of rights … *on a prospective basis*," R.2384 ¶ 2.d.i, and had applied the established methodology to two-Club RSNs *on behalf of the RSDC*, R.1179 ¶ 35. And the Settlement Agreement clearly contemplated that the Bortz methodology would be applied to MASN

in these precise conditions: the Settlement Agreement *created* MASN as a two-club RSN, R.200 § 2.A, and called for a *prospective* fair market value assessment, R.203 § 2.J.3.

Two points further confirm the RSDC's willful disregard of its mandate. *First,* it is undisputed that during the arbitration hearing, the RSDC Chair improperly proclaimed that the panel had "thrown Bortz out." R.1233 ¶ 14.[15] *Second,* the RSDC's award declares that its "decision shall not constitute precedent of the RSDC." R.217 n.2. The Nationals' attempt to explain away this statement as an acknowledgement that the RSDC does not typically sit as an arbitration panel, Nats. Br. 18 n.6, falls flat. The obvious inference is that the RSDC was *not* treating MASN like "*all other*[*s*]" in the industry, and felt a need to assure "*all other*[*s*]" that the award would not compromise *their* settled expectation of at least a 20% profit margin. Only MASN would be relegated to a 5% profit margin—a margin that is "unheard of, entirely unrealistic and immediately threatens MASN's operations and continued vitality." R.1055 ¶ 48.

The RSDC's impermissible approach severely undermined Section 2.J.3 *and* its compensatory propose. Contrary to the Nationals' inexplicable assertion, Nats. Br. 8, that the Settlement Agreement is not a settlement, or lacks a compensatory purpose, the Agreement settled a roiling dispute between the parties over the relo-

[15] Rather than contest the issue, the RSDC Chair declined to "get[] into the specifics of the comments that have been attributed to me." R.1857 ¶ 12.

cation of the Montreal Expos to Washington, D.C., into the heart of the Orioles' exclusive Television Territory. This is obvious from the Settlement Agreement itself, which contains a sweeping cross-release of "*any and all claims, obligations and liabilities … relat*[*ing*] *to the relocation of the Montreal Expos Baseball Club to Washington*." R.211. And the MASN Amended Partnership Agreement, to which the Nationals are a party, describes the Agreement as "*a settlement agreement*" that "resol[ved] … various issues relating to the relocation of" the Nationals. R.902.[16]

The Settlement Agreement's compensatory purpose is also established by contemporaneous evidence. Two days before the Settlement Agreement was executed, MLB and the Orioles memorialized their "*agreement with regard to compensation for the location of the Montreal Expos.*" R.1029. Commissioner Selig agreed that "the Orioles were being damaged by the relocation of the Expos" and "it was indeed his job to focus on the damage to the Orioles." R.1033 (MLB Executive Council's March 28, 2005 meeting minutes, ratifying "Agreement with Orioles for Compensation").

MASN and the Orioles were thus deprived of key elements of their bargain. In 2005, they agreed that MASN would be evaluated under the very same "estab-

[16] The Nationals similarly err in claiming the Orioles "received a $150 million capital account credit" as part of MASN's formation. Nats. Br. 8. To the contrary, the Orioles *contributed* $150 million of value to the partnership—i.e., they *paid* $150 million. R.205 § 2.P.1.

lished methodology" that applied to "all other" RSNs in the industry. Instead, they were treated like *no other* RSN, and subjected to a panel that "dispense[d] [its] own brand of industrial justice," *Stolt-Nielsen*, 559 U.S. at 671, through a subjective assessment of "appropriate" value, R.226. That is a textbook example of manifest disregard, and of a panel that far exceeded the scope of its authority by "impos[ing] its own policy choice." *Stolt-Nielsen*, 559 U.S. at 676-77. The award cannot be sustained.

II. TO ENSURE A FAIR AND IMPARTIAL REHEARING, THIS DISPUTE SHOULD BE REMANDED TO A NEUTRAL TRIBUNAL OUTSIDE OF MLB'S INFLUENCE.

The opening brief demonstrated that FAA Section 10 grants broad remedial power to courts that have vacated an award, including the power to disqualify biased actors whose partiality tainted the prior arbitration. It also showed that, in light of MLB's clear bias, its direct financial interest in the outcome of the dispute, and its pervasive influence over every aspect of the RSDC process, the Court should exercise its Section 10 power to disqualify MLB and the RSDC or, alternatively, reform the parties' arbitration clause to achieve the same end. Br. 34-57.

MLB and the Nationals have no meaningful response. Most notably, they do not defend the trial court's opinion that it lacked any authority to disqualify partial actors from playing key roles on rehearing. Rather, they contend that the trial court's remedial power extends only to replacing a biased individual arbitrator, but

not a biased arbitral *institution* that appoints the arbitrators and is intertwined in every aspect of the arbitration and the decision-making process. And they contend that in any event, the circumstances of this case do not warrant disqualifying MLB and the RSDC from the rehearing.

In all respects, MLB and the Nationals are wrong, in part because their arguments rest on flagrant mischaracterizations of the record—most prominently, MLB's private agreement with the Nationals and the resulting clearly disqualifying $25 million stake in the outcome of this dispute. They also seek to paper over the Commissioner's expressions of prejudgment.

This Court should hold that MLB and the RSDC are disqualified from rehearing this dispute. Alternatively, the Court should confirm the trial court's power to disqualify partial actors from the rehearing and remand the case to the trial court for further proceedings on whether disqualification is warranted.

A. The FAA Grants Vacating Courts Broad Remedial Authority That Cannot Be Constrained By Private Contract.

As the opening brief described, Br. 34-36, it is firmly established—and this Court has held—that Section 10(b) of the FAA empowers a court that has vacated an arbitral award "to remand a matter to the same arbitration panel *or a new one*." *Sawtelle v. Waddell & Reed, Inc.*, 304 A.D.2d 103, 117 (1st Dep't 2003). Neither MLB nor the Nationals seriously disputes the existence of this remedial authority. Both insist, however, that Section 10(b) does not give the courts any power to rem-

edy the rare circumstance where the parties' chosen "arbitral forum" engages in partial conduct. *E.g.*, MLB Br. 51; Nats. Br. 32-36. The Court should reject that claim.

MLB and the Nationals begin by emphasizing cases reciting the general proposition that under FAA Section 2, arbitral agreements generally are enforced according to their terms, subject to broadly applicable contract defenses. MLB Br. 52-53; Nats. Br. 30-31. True enough, but MLB and the Nationals overlook that Section 2's "deference to private agreements to arbitrate" is limited by the "confirmation-and-vacatur safety net" set out in FAA Section 10. *See Hoeft v. MVL Grp., Inc.*, 343 F.3d 57, 63 (2d Cir. 2003), *overruled on other grounds by Hall St. Assocs. v. Mattel Inc.*, 552 U.S. 576 (2008). And, as MLB and the Nationals concede, courts have repeatedly "replace[ed] … *particular arbitrators*" after vacatur. MLB Br. 55; *see also* Nats. Br. 32-36.

Likewise, the Nationals concede that "an arbitrator's qualifications to serve" *can* be challenged "in a proceeding to … vacate an award." Nats. Br. 31. There is thus no real dispute that Section 10 gives the courts considerable remedial power; the only dispute is whether the Section 10 safety net is robust enough to allow courts to remedy abuses committed by arbitral *institutions* that, like MLB and the

RSDC, "have shown themselves to be unfit to be judges" of a particular dispute. *Hyman v. Potterberg's Ex'rs*, 101 F.2d 262, 266 (2d Cir. 1939).[17]

The answer to that question has been properly stated in many cases: A court can and should disqualify an arbitral actor that has demonstrated bias or partiality in a prior proceeding. Br. 34-39. Though MLB and the Nationals resist this conclusion, they have not managed to find a *single* court or commentator that expresses disagreement with this established understanding of FAA Section 10, let alone a single decision that has declined to replace an arbitrator, panel, or institution that has been found partial. MLB and the Nationals stand alone in claiming that an arbitral institution selected in an agreement to arbitrate should be permitted to continue in its role *even after* its partiality has been demonstrated. Section 10 protects parties from just that intolerable result.[18]

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[17] None of the cases MLB and the Nationals cite address the scope of the courts' Section 10 authority. In *In re Cullman Ventures, Inc.*, 252 A.D.2d 222, 228 (1st Dep't 1998), the trial court improperly consolidated two separate arbitrations arising under different contracts, and in *Gulf Underwriters Ins. Co. v. Verizon Commc'ns, Inc.*, 32 A.D.3d 709, 710 (1st Dep't 2006), the court erred by compelling a party to arbitrate who had no such obligation under the contract. These cases are inapposite. *Contra* Nats. Br. 31-32.

[18] The Nationals incorrectly contend that *In re Excelsior 57th Corp. (Kern)*, 218 A.D.2d 528 (1st Dep't 1995), is not an example of this remedial power, Nats. Br. 34. Although the contract there permitted each party to select an arbitrator, this Court disqualified one of the party-selected arbitrators before rehearing because his conduct in the prior arbitration "demonstrate[d] 'evident partiality.'" 218 A.D.2d at 531. The Court thus disqualified an arbitrator who had been selected in precisely the manner contemplated by the parties' contract, to ensure a fair rehearing. And while *Excelsior* "arose under *state* law, not the FAA," Nats. Br. 34, it is well established that federal courts applying the FAA look to "[c]ases applying New York arbitration law analogous to the FAA" both in general, Br. 35 n.18, and on this issue, *see In re Arbitration Between Tempo Shain Corp. v. Bertek, Inc.*, No. 96-3354, 1997 WL 580775, at *2 & n.3 (S.D.N.Y. Sept. 17, 1997).

Forced to concede that a court may replace biased *arbitrators* who were selected in conformity with an arbitration agreement, Nats. Br. 34 & n.10, the Nationals assert that courts nonetheless are powerless to order rehearing in a different arbitral forum. Nats. Br. 33.[19] But they cannot offer any rational explanation for why Section 10 should be read as leaving courts powerless to act in the rare circumstances where an arbitral forum is partial.

The text of Section 10(b) does not support the Nationals' position. They contend that "'the arbitrators' referenced in Section 10(b) are plainly arbitrators chosen pursuant to the governing arbitration agreement," and thus courts lack authority to remand a dispute to anyone else.[20] Nats Br. 32 (emphasis omitted). But this Court (like many others) has already rejected that position, explaining: "*Although not made explicit in the statute*, courts have discretion" under Section 10(b)'s language to replace the existing "arbitration panel" with "a new one." *Sawtelle*, 304 A.D.2d at 117; *accord Tempo Shain Corp.*, 1997 WL 580775, at *2; *see also Kashner Davidson Sec. Corp. v. Mscisz*, 601 F.3d 19, 25 (1st Cir. 2010) (whether "a new arbitration panel should be constituted … lies within the sound discretion of the district court"). As one federal court explained, even though Sec-

[19] In contrast, MLB correctly concedes that courts *can* "order parties to proceed before a different forum following vacatur," provided that "bias" is demonstrated; it simply argues that this is very "rare." MLB Br. 56. This is that rare case.

[20] Section 10(b) provides: "If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators." 9 U.S.C. § 10(b).

tion 10(b) refers to "'the arbitrators' and not a 'new' arbitrator," courts hold that "a new arbitrator is necessary" where "the arbitrator in question acted, or failed to act, in a manner from which one might infer bias against one of the parties." *In re A.H. Robins Co., Inc.*, 230 B.R. 82, 86 (E.D. Va. 1999) (collecting cases).

The U.S. Supreme Court's recent decision in *Stolt-Nielsen*, 559 U.S. 662, further illustrates the breadth of courts' Section 10(b) remedial powers. After vacating an award because the panel exceeded the scope of its authority, the Court expressly exercised the remedial "discretion" conferred by Section 10(b) by refusing to remand the case to *any* arbitrator. Instead, it decided *itself* "the question that was originally referred to the panel." *Id.* at 677. As that decision demonstrates, Section 10(b) gives the courts broad discretion after vacating an award to decide the next appropriate steps. And as the Nationals ultimately concede, "parties cannot contract around" that power. Nats. Br. 36 (emphasis omitted).

The Nationals' remaining arguments are even weaker. The notion that due process principles are irrelevant to the interpretation of the FAA, *id.* at 39, is frivolous. It is beyond debate that courts should interpret statutes to avoid constitutional doubt. *E.g.*, *In re Jacob*, 86 N.Y.2d 651, 667 (1995). And while it is true that the FAA deals with "private arbitration agreements," Nats. Br. 39, it is also well established that "[t]hrough § 10 of the FAA, Congress attempted to preserve due process" in arbitration, *In re Wal-Mart Wage & Hour Employment Practices Litig.*,

737 F.3d 1262, 1268 (9th Cir. 2013), by "provid[ing] not merely for any arbitration but for an impartial one," *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 147 (1968). It is thus entirely appropriate for the Court to consider and avoid due process concerns that would be raised if the FAA were construed to require parties to arbitrate before decision-makers whose awards have already been vacated for partiality. *See Wal-Mart*, 737 F.3d at 1268; Br. 39-40.

It is equally absurd to argue that "'[f]undamental fairness' is not a necessity in arbitration." Nats. Br. 36 (emphasis omitted). Again, the purpose of Section 10 was to "preserve due process" in arbitration, *In re Wal-Mart*, 737 F.3d at 1268, just as New York "established procedural requirements to safeguard the integrity of the arbitration process," *Marracino v. Alexander*, 73 A.D.3d 22, 26 (4th Dep't 2010). And indeed, many courts have held precisely that arbitrators *must* "grant the parties a fundamentally fair hearing." *Bell Aerospace Co. Div. of Textron v. Local 516, Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. (UAW)*, 500 F.2d 921, 923 (2d Cir. 1974); *accord Bowles Fin. Grp., Inc. v. Stifel, Nicolaus & Co.*, 22 F.3d 1010, 1012-13 (10th Cir. 1994); *see also U.S. Elecs., Inc.*, 934 N.Y.S.2d at 765 (courts must "ensure that fair treatment is afforded" to arbitral parties); THOMAS OEHMKE, COMMERCIAL ARBITRATION § 36:01 (Revised Ed., Cumulative Supp. 2001) ("The notion of decision-making by *neutrals who are independent* is central" to arbitration; parties "have a right to be judged *impartially and*

independently"). The cases holding that arbitrators whose awards have been vacated for evident partiality should be replaced, precisely because they cannot be trusted to be impartial, are perfectly consistent with that premise. *See* Br. 34-35.

The Nationals and MLB likewise assert that a lack of impartiality does not matter because MASN and the Orioles somehow contracted out of these basic guarantees. *See* Nats. Br. 36-38; MLB Br. 44-47. These arguments are doubly flawed. *First*, the requirement of fundamental fairness is so basic that even where the parties knowingly agree in advance to "non-neutral" arbitrators, those arbitrators are still "obligat[ed] to participate in the arbitration process in a fair, honest and good-faith manner." *Excelsior*, 218 A.D.2d at 531. *Second*, the parties made no such agreement here. As the Nationals concede, any contractual "trade-off" between expertise and neutrality must be "voluntary." Nats. Br. 38; *see id.* at 43 ("material facts [must be] known and accepted by all parties"). Yet, the Nationals and MLB cannot point to anything indicating that MASN and the Orioles made such a knowing and voluntary choice here. *See infra* pp. 66-68. Rather, MASN and the Orioles expected, and were entitled to, fair and neutral decision-makers. *See, e.g.*, R.1987 (Orioles owner Peter G. Angelos testifying before Congress in 2006 that the Settlement Agreement "guarantees each team a market rate as evaluated and set by a *neutral third party*").

Finally, MLB and the Nationals contend that recognizing the courts' authority to replace a designated arbitral institution on remand "would become a precedent for undermining agreements to arbitrate before expert inside-industry panels." Nats. Br. 5; *see* MLB Br. 53-54. But the sky will not fall if this Court confirms the established, common-sense principle that parties should not be forced to arbitrate in a demonstrably partial setting.[21] *See* Br. 34-36.

Indeed, this issue is rarely even presented, in part because it arises only *after* an arbitral award has been vacated, which all parties agree is rare. Even then, a dispute generally should be remanded to the same panel unless (as here) the award was vacated for partiality, misconduct, or manifest disregard. *See Sawtelle*, 304 A.D.2d at 117. And even where individual arbitrators are biased, there is rarely any basis to question the arbitral *institution*'s neutrality, because such institutions do none of the things MLB did here. *See* Br. 40-41. But where institutional bias both exists and is likely to affect the merits, it is both necessary and appropriate to disqualify the biased institution. Br. 34-41; *cf. Rabinowitz v. Olewski*, 100 A.D.2d 539, 540 (2d Dep't 1984) (disqualifying industry arbitral organization where the prospect of bias "permeate[d] the entire" group).

[21] Indeed, the New York courts have for decades recognized a broader "power to disqualify an arbitrator *before* an award has been rendered." *Astoria Med. Grp. v. Health Ins. Plan of Greater N.Y.*, 11 N.Y.2d 128, 132 (1962). Yet this has not undermined the viability of arbitration in New York, because the courts properly exercise it only in appropriate circumstances. *Bronx-Lebanon Hosp. Ctr. v. Signature Med. Mgmt. Grp., L.L.C.*, 6 A.D.3d 261, 262 (1st Dep't 2004).

This fundamental safety-net affirmatively *strengthens* arbitration as a means of dispute resolution by assuring parties that bedrock principles of fairness will govern. MLB's and the Nationals' position, on the other hand, would absurdly force parties to arbitrate, again and again, in a setting that a court has *already found partial*. To uphold such an "aberrational scheme under the heading of arbitration would undermine, not advance, the federal policy favoring alternative dispute resolution." *See Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 941 (4th Cir. 1999).[22] For these reasons, MASN and the Orioles should not be forced to arbitrate in a biased forum.

B. The Court Should Exercise The Remedial Discretion Conferred By The FAA To Replace MLB And The RSDC With A Neutral Forum.

MASN and the Orioles also showed that MLB is pervasively biased and inextricably intertwined with the RSDC. *See* Br. 43-52. The Court should therefore exercise its discretion to replace MLB and the RSDC,[23] or at least remand for the trial court to consider doing so under the standards described above.

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[22] MASN and the Orioles believe that arbitration in a different forum is more consistent with the parties' original agreement, but if the Court concludes otherwise, it should follow *Stolt-Nielsen* and direct the dispute to the trial court for resolution. *Cf. In re Salomon Inc. S'holders' Derivative Litig.*, 68 F.3d 554, 560-61 (2d Cir. 1995).

[23] MLB's suggestion, MLB Br. 53 n.10, that this Court cannot substitute its discretion for the trial court's is meritless. That power stems from the fact that this Court is "vested with the same power and discretion" as the trial court, and is not cabined to any particular type of case. *See Brady v. Ottaway Newspapers, Inc.*, 63 N.Y.2d 1031, 1032 (1984); Br. 32.

1. MLB and the RSDC Should Be Disqualified Because MLB's Conduct Objectively Demonstrated An Utter Lack Of Concern For Fairness.

Vacatur for evident partiality is sufficient to warrant replacing the partial actors on rehearing. Br. 34-35, 43. Seeking to avoid that principle, MLB and the Nationals insist that the trial court made no finding about MLB's partiality. MLB Br. 51-52; Nats. Br. 42, 46. Indeed, MLB devotes an entire section of its brief to the claim that "the trial court did not find MLB 'evidently partial.'" MLB Br. 48 (capitalization omitted). But of course it did: the court found that "*MLB*, as administrator of the arbitration," failed to "take[] MASN's objections seriously, and actually do[] something about it." R.38; *see* R.39 ("*MLB* did nothing" to address the conflicts of interest); R.40.

MLB's "complete inaction objectively demonstrate[d] an utter lack of concern for fairness of the proceeding that [was] 'so inconsistent with basic principles of justice' that the award [had to] be vacated.'" R.41. That holding alone provides a clear and sufficient basis for disqualifying MLB and the RSDC. Br. 34-35.

2. MLB's Direct, $25 Million Stake In The Outcome Of The Current Dispute Is Independently Disqualifying.

Before the award was issued, MLB paid the Nationals $25 million under a private written agreement with the Nationals that tied repayment to an award in the Nationals' favor. *See* Br. 23-25, 43-45. MASN and the Orioles were *not parties* to that private agreement and *were not* made aware of it until over six months later.

And they were not provided a copy of the agreement until discovery in the vacatur action. Because that $25 million debt remains outstanding, it is indisputable that MLB has a continuing—and clearly disqualifying—financial stake in the outcome of this dispute.

MLB and the Nationals accept that an arbitrator can never have a "direct financial interest" in an arbitration's outcome. *E.g.*, *Coty Inc. v. Anchor Const., Inc.*, 7 A.D.3d 438, 439 (1st Dep't 2004). Attempting to circumvent that proscription, they invoke the trial court's opinion that, because of the timing of the $25 million payment, the payment did not independently warrant vacatur. MLB Br. 24; Nats. Br. 4. But the trial court's reasoning actually *supports* MASN and the Orioles: the court held only that because the payment came *after* MLB allegedly fixed the amount of the prior award internally, it did not prejudice the outcome of *that proceeding*. Justice Marks *never considered* whether the $25 million payment would compromise a *future* arbitration, as to which plainly no determination has yet been made. *See* R.33; Br. 44-45.

MLB also ignores its concessions below and misrepresents the record. *First*, it is uncontroverted that MLB and the Nationals entered into a *private agreement* pursuant to which repayment of the $25 million was made *nonrecourse* to the Nationals. MLB admitted that it can recoup those funds *only* through an award in the Nationals' favor:

> THE COURT: And *what would have happened if the award was less favorable to the Nationals, more favorable to the Orioles*. What would have happened to that money?
>
> MR. BUCKLEY: … [T]hen, the Nationals would not be required to refund any of the money, *because the advance was made on a non-recourse basis.* So, *Major League Baseball would have been out the money*.

R.3651-52.

MLB disingenuously claims that it has no stake in the outcome *now* because MLB would be repaid "whether the RSDC awarded MASN's or the Nationals' preferred figure." MLB Br. 59. That is false. Because MASN has already paid the Nationals the full amount of telecast rights fees as calculated under the Bortz methodology, and because the Nationals are not obligated to repay the $25 million under the private agreement with MLB, the *only way* MLB can recoup its funds is through an award in excess of the Bortz-calculated fees—that is, an award in the Nationals' favor. *See* Br. 43-44; R.2917-19 (private agreement providing for re-payment through additional "payments from MASN otherwise due to the Nationals" under an "RSDC … decision that covers 2012 and/or 2013"). It is therefore indisputable that MLB has a direct financial interest in an outcome favorable to the Nationals and an equally direct incentive to guide the RSDC to that outcome.

Second, MLB overreads the trial court's statement that the payment "was not undertaken in secret." R.34. It was. At the time that MLB and the Nationals executed their private agreement, MASN and the Orioles were *not informed* of the

amount of the payment or that MLB could recoup those funds through an award in the Nationals' favor. The record demonstrates that the amount of the payment and its repayment terms were actively concealed from MASN and the Orioles. R.2989 ¶ 30. MLB's and the Nationals' contrary arguments are simply fabrications. *See* MLB Br. 19, 58; Nats. Br. 19-20, 46.

MLB tries to mask these facts by quoting a comment from counsel, taken out of context and quoted only in part. MLB Br. 19, 58. MLB fails to inform the Court that MASN's counsel expressly stated (consistent with the uncontroverted record evidence) that MLB had concealed the amount of the payment and its repayment terms. R.2408 ¶ 44; R.2866-67. MLB also omits that MLB's $25 million payment was non-recourse to the Nationals and per the private agreement with that Club, had been *made expressly dependent on an RSDC award favorable to the Nationals*, making *MASN* the payor. *See* R.2408-10 ¶¶ 44-45, 48-49; R.2917-19.

The actual exchange between MASN's counsel and the trial court made this clear:

> MR. HALL: … *We did not know it was a loan. And we did not know that Baseball was going to be reimbursed out of the award*.
>
> THE COURT: … [Y]*ou thought they* [*MLB*] *were just giving them* [*the Nationals*] *the money?*
>
> MR. HALL: *Yes, we did. …* [*T*]*here is an e-mail from Mr. Manfred, saying just that. "We will fund the entire cost of resolution." Yes, we thought they were giving them the money*.

R.2866-67; *see* R.2496 (email); Br. 24.

The reason for that understanding is clear in the record. In the context of discussions to resolve the dispute, the Commissioner approached MASN and the Orioles and asked them to consider paying the Nationals some amount of additional telecast rights fees for 2012. R.2988-89 ¶ 29; R.2495. That proposal was emphatically rejected. R.2407 ¶ 40, R.2495, R.2988-89 ¶ 29. MASN and the Orioles did not believe the Nationals had a contractual right to be paid anything more than the amounts calculated under the Bortz methodology (which MASN had already paid). They also cautioned MLB against making any additional payments to the Nationals, warning that such payments would be unnecessary and counterproductive to settlement. R.2408 ¶ 43.

Nevertheless, the Commissioner informed MASN and the Orioles that *MLB* would "fund the entire cost of the resolution," and that "[*MLB*] *would not ask* [*the Orioles*] *for anything*." R.2496. But even that was deceptive. The Commissioner did not disclose the amount of MLB's payment to the Nationals; that there was a private written agreement with the Nationals; or that there were repayment terms tied directly to an award in the Nationals' favor. MASN and the Orioles were only made aware of these facts over half a year later.

No amount of linguistic gymnastics or revisionist history from MLB and the Nationals can alter the fact that MLB paid the Nationals $25 million under a pri-

vate agreement providing that MLB can now recoup that money *only* through an award in the Nationals' favor. MLB's $25 million stake in the outcome and its repayment terms obviously create a disqualifying "direct financial interest." *Coty Inc.*, 7 A.D.3d at 439.

3. MLB's Adversarial Conduct And Predetermination Of The Outcome Underscore Its Disqualifying Bias.

It is also undisputed that after the award was issued, MLB threatened to sanction the Orioles and MASN for seeking judicial review and then litigated vigorously against them, while the Commissioner made statements to the press denouncing MASN's conduct and supporting the award. *See* Br. 45-51. This conduct poisoned the well of potential RSDC arbitrators and further demonstrates MLB's continuing partiality.

MLB and the Nationals try to brush aside Commissioner Selig's repeated threats of punitive sanctions, *see* Br. 27-28, 45-46, on the basis that MLB threatened "sanctions against *both parties* for instituting litigation," Nats. Br. 21, 48; MLB Br. 60. That is like saying a trial judge is impartial because, after dismissing the plaintiff's complaint, the judge threatened to sanction any party who appealed the dismissal. It is clear who benefits in that scenario.

The Nationals and MLB also attempt to explain away MLB's vigorous litigation against MASN and the Orioles as purely defensive. *E.g.*, Nats. Br. 46-47; MLB Br. 59-60. But they cannot dispute that MASN named MLB as a respondent

because it correctly anticipated that MLB would go to extreme lengths to prevent MASN and the Orioles from obtaining judicial review. Sure enough, Commissioner Selig asserted from day one that *he* was the only one properly authorized to review the RSDC award. *See, e.g.*, R.484, R.576. It was therefore necessary to bring MLB into the case to litigate the question of the trial court's jurisdiction—which was resolved against MLB, and which MLB did not appeal—and to prevent MLB from driving the case back out of court through extrajudicial sanctions.

That is also why the trial court twice enjoined MLB's attempts to circumvent judicial review. Br. 46. The Nationals deny that the court's preliminary injunction "was also *against MLB*," Nats. Br. 21 n.7, but as MLB conceded below, the injunction bound "not just Nationals but all the respondents," including MLB, and the trial court rejected MLB's argument that there was "no basis for any order that would bind" it, R.623-24. And the trial court plainly enjoined MLB when it attempted to reconvene the RSDC before this Court could hear these appeals. The trial court stayed that effort, explaining what should have been obvious to any truly neutral party: "the parties should not be arbitrating, again, without a final determination on the arbitral process or forum." R.121.19; *see* Br. 47.

Further, MLB's conduct was anything but purely defensive. If MLB believed it was not a proper respondent, it could have sought dismissal. Instead, it joined with the Nationals to *affirmatively seek confirmation of the award*. *See*

R.1758. In doing so, it staked out firm positions on key issues, including the proper interpretation of the Settlement Agreement. *See* Br. 28. In particular, the current Commissioner personally attested below that MASN's and the Orioles' interpretation of the Settlement Agreement "did not conform to the text." R.3181 ¶ 40. The Nationals claim this statement is "simply accurate as a matter of fact," Nats. Br. 47, but that assertion (which is wrong, *see supra* Part I.B) perfectly illustrates the problem with sending this dispute back to an institution that has spent two years fighting as a partisan in litigation: The Commissioner—who appoints the RSDC members and will oversee a future RSDC arbitration—has adopted *the Nationals'* view of the central issue in the dispute.

The Commissioner's comments to the press confirm the point. *See* Br. 29, 48-49. MLB and the Nationals labor to defang these remarks, without success. MLB Br. 59; Nats. Br. 22, 28. The Commissioner's words speak for themselves: "I think the agreement is clear, in MASN [*sic*]. I think the RSDC was empowered to set rights fees. That's what they did. And I think *sooner or later MASN is going to be required to pay those rights fees*." R.3426. And: "The fundamentals are that the Orioles agreed the RSDC would set the rights fees for MASN and the Orioles every five years. *The Orioles have engaged in a pattern of conduct designed to avoid that agreement being effectuated*." R.3702. The Court can judge for itself whether the Commissioner has an open mind.

4. MLB's Pervasive Involvement In Every Aspect Of The RSDC Process Gives It Ample Means To Influence The Outcome Of A Future Arbitration.

It is beyond dispute that MLB was intertwined in virtually every aspect of the arbitration and the decision-making process. *See* Br. 18-23. MLB has not disputed that the same high-ranking MLB officials, including the Commissioner, who conducted legal and financial analyses and advised the RSDC in the prior tainted proceeding, would play key roles in a rehearing before the RSDC. Those people are in the "precarious position of having already heard the evidence" in a proceeding tainted by partiality, and their employer, MLB, has "displayed extreme partisanship" and made clear (through the Commissioner himself) that it "does not agree with [MASN's and the Orioles'] … method" of calculating telecast rights fees under the Agreement. *See Excelsior*, 218 A.D.2d at 530-31. Even if those actors are not *personally* biased—which is doubtful—there is a clear danger that they will simply stick to their prior conclusions to "avoid the appearance of having erred or changed position." *See Williams v. Pennsylvania*, 136 S. Ct. 1899, 1906 (2016).

Attempting to distract from these undisputed facts, MLB and the Nationals invoke the trial court's finding that MLB's role in the arbitration was not by itself grounds for *vacatur*. *See* MLB Br. 24, 48; Nats. Br. 45. But because the court erroneously believed that it had no authority to disqualify MLB going forward, R.42

n.21, it considered only whether MLB's involvement established "misconduct solely as to process" in the completed arbitration. R.30. It never considered whether MLB's role, even if permissible standing alone, would present a problem in a *future* arbitration because of MLB's partiality. In any event, the court did *not* find that MLB's conduct was "marked by fundamental fairness," MLB Br. 48—it found the opposite. *Supra* p. 53.

MLB and the Nationals also assert that MASN knew in advance of MLB's involvement in the RSDC process. *E.g.*, Nats. Br. 13-14; MLB Br. 11-12. In truth, MLB's involvement in the RSDC's decisional process was far more extensive than MASN or the Orioles knew. *See* Br. 18-23, 52-53. Regardless, the extent of that knowledge is irrelevant to the remedial question, which simply asks whether MLB would have sufficient influence over a future RSDC arbitration that its partiality and financial interest is a problem. And the undisputed facts of the prior arbitration establish that MLB would have virtually unlimited scope to dictate procedure and influence the arbitrators' decision on rehearing. *See* Br. 20-23. It should not have that opportunity. This Court should exercise its clear power under Section 10(b) to disqualify MLB and the RSDC from the rehearing, or it should remand this case to the trial court to consider whether that relief is warranted here, and to resolve any factual disputes material to that determination.

C. In The Alternative, The Court Should Reform The Contract Because MLB's Unforeseeable Conduct Frustrated The Parties' Intent.

MASN and the Orioles also demonstrated that, alternatively, the Court should reform the Settlement Agreement to remove the dispute from MLB's auspices because the parties' intent for a neutral arbitration has been frustrated. Br. 52-57. MLB and the Nationals respond by arguing reformation is available only if the general New York law standard for reformation of contracts is met. That position is clearly refuted by controlling precedent.

Aviall, Inc. v. Ryder Sys. Inc., which MLB and the Nationals admit is controlling on this issue, *see* MLB Br. 62; Nats. Br. 35 n.11, 43, did not even mention the state-law inquiry they insist is required, *see* 110 F.3d 892, 895-96 (2d Cir. 1997). Nor was that standard applied in *any* case cited in *Aviall*. *See, e.g.*, *Erving v. Va. Squires Basketball Club*, 468 F.2d 1064, 1068-69 & n.2 (2d Cir. 1972) (appointment of "a neutral arbitrator" was appropriate "to insure a fair and impartial hearing"). Rather, a different standard governs in arbitration: reformation is appropriate if unforeseen events have "result[ed] in frustration of the parties' contractual intent to submit their dispute to a neutral expert." *Aviall*, 110 F.3d at 896; *see also Fleming Cos., Inc. v. FS Kids, L.L.C.*, No. 02-CV-0059E(F), 2003 WL 21382895, at *4 (W.D.N.Y. May 14, 2003) ("[A] court has the power to remove an arbitrator" where "unforeseen intervening events have frustrated the intent of the

parties"); *Morris v. N.Y. Football Giants, Inc.*, 150 Misc. 2d 271, 276-78 (Sup. Ct. N.Y. Cnty. 1991) (asking whether post-contracting events established that "a neutral arbitrator should be substituted … in order to insure a fair and impartial hearing"). As these cases confirm, the relevant question is simply whether the parties' intent to submit their dispute to a neutral decision-maker has been frustrated. *See Aviall*, 110 F.3d at 896; *Fleming*, 2003 WL 21382895, at *4.[24]

The Nationals respond that there is "no evidence" that the parties intended to submit their dispute to a neutral decision-maker. Nats. Br. 41. This argument is not only backwards but nonsensical. Arbitration is *inherently* "a system whereby disputes are fairly resolved by an impartial third party," *see Hooters of Am.*, 173 F.3d at 939-40, and thus, as the trial court rightly said, "trust in the neutrality of the adjudicative process is the very bedrock of the FAA," R.42; *see supra* p. 49. Thus, it is *the Nationals and MLB* who bear the burden of showing that MASN and the

[24] It is thus "general contract principles" applicable to the FAA that govern, *see Aviall*, 110 F.3d at 895-96, rather than state law. But if state law *were* controlling, the law of Maryland would govern, as the parties agreed. *See* R.210 § 11.A. And as the Nationals concede, Nats. Br. 41 n.13, Maryland law similarly permits "a court of equity [to] reform a written contract" if there is "mutual mistake" or "inequitable conduct." *Md. Port Admin. v. John W. Brawner Contracting Co., Inc.*, 492 A.2d 281, 288 (Md. 1985); *cf. Cheek v. United Healthcare of Mid-Atl., Inc.*, 835 A.2d 656, 662 (Md. 2003) (employer's unilateral control of terms of arbitration policy rendered arbitration clause unenforceable).

Orioles knowingly intended to sacrifice basic principles of neutrality. *Supra* p. 50.[25]

The Nationals invoke the trial court's finding that MASN and the Orioles must have known that "the parties and arbitrators would all be industry insiders" with "many connections." Nats. Br. 42. But the court also found (in the very next sentence) that MASN and the Orioles "did not agree to" the pervasive conflicts of interest that MLB allowed, R.36, and it vacated the award because "partiality [ran] without even the semblance of a check," R.42. The trial court thus correctly recognized that even in this "inside baseball" arbitration, MASN and the Orioles had a right to expect the neutrality that is "fundamental to any adjudicative process." *Id.*

Likewise, the notion that "parties to an arbitration agreement 'can ask for no more impartiality than *inheres* in the method they have chosen,'" Nats. Br. 37; *accord* MLB Br. 46, 54, does not help MLB or the Nationals here. Neither Proskauer's concurrent representations, nor MLB's "utter lack of concern for fairness," R.41, nor MLB's adoption of a direct financial stake in the outcome via a private agreement with one party, was in any way "inhere[nt]" in the parties' selection of the RSDC, and it demeans the long tradition of industry arbitration to imply otherwise. MLB simply failed to live up to basic arbitral standards. That stark failing

[25] Notably, in *Erving* and *Morris*, the courts did not call for specific evidence of intent to hold a neutral arbitration; they inferred that intent from the parties' agreement to arbitrate. *Contra* Nats. Br. 43.

was both unforeseen and unforeseeable. *See* Br. 52-53. Similarly, MASN and the Orioles had no way of knowing in 2005 that by 2012 MLB would be "precommitted to a particular substantive position," Nats. Br. 37. The Agreement should therefore be reformed to disqualify MLB and the RSDC.

III. THE NATIONALS' APPEAL OF THE TRIAL COURT'S STAY ORDER IS BOTH MERITLESS AND MOOT.

Finally, the Nationals argue that the trial court erred by denying the Nationals' motion to compel arbitration and staying any further arbitration "until the final determination of the appeals." R.121.20; *see* Nats. Br. 29, 49-51. But the Nationals do not even try to show that the trial court abused its discretion, *see Belopolsky v. Renew Data Corp.*, 41 A.D.3d 322, 322 (1st Dep't 2007), in reaching the common-sense conclusion that "the parties should not be arbitrating, again, without a final determination on the arbitral process or forum" from this Court, R.121.19. Regardless, the trial court was entirely correct that "efficiency and resource allocation," and the need to avoid "potentially inconsistent results," all counseled in favor of a brief stay pending appeal. *See id.*

There is also no practical need for this Court to consider this question. Justice Marks provided that the stay will run only "until the final determination of the appeals." R.121.20. By deciding the merits, this Court will dissolve the stay.

CONCLUSION

The trial court's carefully reasoned decision to vacate the RSDC award should be affirmed upon the trial court's evident partiality finding or, alternatively, on the ground that the RSDC exceeded the scope of its powers under the Settlement Agreement and manifestly disregarded its contractual mandate.

The Court should order rehearing in an independent and neutral forum beyond the reach of MLB and any arbitrators under its influence, or, alternatively, make clear that the trial court has such authority and remand for further proceedings.

Finally, the Court should affirm the Order staying trial court proceedings pending appeal or deny that portion of the Nationals' appeal as moot.

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