To be Argued by:
STEPHEN R. NEUWIRTH

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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,
– 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.

REPLY BRIEF FOR RESPONDENT-RESPONDENT-CROSS-APPELLANT-APPELLANT WASHINGTON NATIONALS BASEBALL CLUB, LLC

STEPHEN R. NEUWIRTH
SANFORD I. WEISBURST
JULIA J. PECK
CLELAND B. WELTON II
QUINN EMANUEL URQUHART & SULLIVAN, LLP
Attorneys for Respondent-Respondent-Cross-Appellant-Appellant Washington Nationals Baseball Club, LLC
51 Madison Avenue, 22nd Floor
New York, New York 10010
(212) 849-7000
stephenneuwirth@quinnemanuel.com
sandyweisburst@quinnemanuel.com
juliapeck@quinnemanuel.com
clelandwelton@quinnemanuel.com

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INTRODUCTION

On MASN's appeal, the Nationals seek affirmance of Supreme Court's denial of MASN's request for an order requiring that any new arbitration of the television rights fees for 2012-2016 be held in some forum other than the RSDC—the forum to which the parties expressly agreed in their Agreement. The Nationals addressed MASN's appeal in their prior brief (Nationals Br. 5, 30-49), and the Nationals' position remains that the Court should affirm on that issue.

The Nationals respectfully submit this reply to address (a) the Nationals' separate appeal of Supreme Court's July 2016 order denying the Nationals' motion for an order compelling MASN to arbitrate before the RSDC, and (b) the Nationals' cross-appeal of Supreme Court's November 2015 determination to vacate the RSDC's original arbitration award.

MASN's response on these issues is notable for both MASN's disregard of Supreme Court's rulings below, and MASN's mischaracterizations of the factual record.

Supreme Court's November 2015 Vacatur Order actually *rejected* all but one of MASN's asserted grounds for vacating the RSDC's arbitration award—thus rejecting (among other things) MASN's arguments that MLB had engaged in prejudicial misconduct, and that the RSDC had exceeded its authority or manifestly disregarded the parties' Agreement. R.26-34. And Supreme Court

rejected those arguments having been fully apprised of the same shrill assertions and insinuations that infect MASN's response brief here. The *sole* ground for Supreme Court's vacatur of the RSDC's award was its view that the Nationals' representation by the club's long-time counsel Proskauer gave rise to evident partiality, because Proskauer was concurrently representing MLB, as well as certain interests associated with the RSDC members. R.34-42.

Against this backdrop, it is ironic that MASN accuses the Nationals of seeking to put a "spin" on the underlying facts (Response 18). The true "spin" comes from MASN's repeated and unsubstantiated claims that Supreme Court's findings somehow compel the conclusion that the parties' contractually chosen forum—the RSDC—has been rendered unfit to address the parties' television rights fee dispute. No such conclusion can be derived legitimately from the facts or Supreme Court's order—which expressly stated that if the Nationals were willing to select new counsel that do not concurrently represent MLB, or the RSDC members and their clubs, the parties could "thereby return to arbitration by the RSDC, however currently constituted, pursuant to the parties' Agreement." R.42-43 n.21. The Nationals have complied with that suggestion by selecting new arbitration counsel. In addition, the RSDC now is composed of three new members who did not participate in the original arbitration and who come from different teams than the original arbitrators. At bottom, MASN should not be

permitted to litigate around the well-established standards for review of arbitration awards by repeatedly leveling accusations of bias that Supreme Court itself rejected here.

Given Supreme Court's findings and holdings in the November 2015 Vacatur Order, and the Nationals' selection of new arbitration counsel, the Nationals' motion for an order compelling a new arbitration before the RSDC should now be granted. Supreme Court may have been reluctant to order that remedy while MASN's appeal is pending on the underlying question whether the RSDC is the appropriate forum, but this Court now will be resolving that issue and thus can, and should, compel arbitration before the RSDC. At the same time, grounds also exist for reinstating the RSDC's original award.

ARGUMENT

I. MASN FAILS TO DEFEND SUPREME COURT'S REFUSAL TO COMPEL A NEW RSDC ARBITRATION

Under the FAA (which all agree applies here), when a court is "satisfied" that no triable issue exists as to (1) "the making of the agreement for arbitration" and (2) "the failure to comply therewith," the next step is mandatory: the court "*shall make an order* directing the parties to proceed to arbitration *in accordance with the terms of the agreement*." 9 U.S.C. § 4 (emphasis added); *accord* CPLR § 7503(a). As the Nationals showed (Nationals Br. 49-51), each of these statutory requisites is satisfied here. Supreme Court accordingly erred as a matter of law in

July 2016 by disregarding Section 4's mandatory language and failing to compel MASN to arbitrate before the RSDC. MASN fails to refute this showing.

First, MASN incorrectly argues (MASN Second Br. 63-66)[1] that there is no agreement to arbitrate before the RSDC, purportedly because the parties' Agreement should be reformed to require arbitration in a different venue.[2] But MASN does not dispute that the Agreement unambiguously provides that disputes over telecast-rights fees "shall be determined" via arbitration before the RSDC. R.203. The FAA dictates that an agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, and the courts must "rigorously enforce" such agreements, *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682-83 (2010). The FAA accordingly requires that the Agreement here to arbitrate before the RSDC "may not be disturbed, unless [it] is subject to attack under

[1] We refer to MASN's first brief (filed August 22, 2016) as "MASN First Br." and MASN's second brief (filed October 3, 2016) as "MASN Second Br."

[2] MASN couches this argument as relating only to MASN's appeal on the question whether Supreme Court properly declined MASN's request for an order that a new arbitration be before some body other than the contractually-agreed RSDC. In fact, the question whether the Agreement's arbitration clause is enforceable goes to the Nationals' entitlement to an order compelling arbitration before the RSDC, which is addressed in this reply.

general contract principles." *Aviall, Inc. v. Ryder Sys., Inc.*, 110 F.3d 892, 895 (2d Cir. 1997).

MASN does not and cannot show that the Agreement here is *unenforceable* "under general contract principles," *id.* And in arguing instead that the agreed arbitration provision should be *reformed*, MASN disregards the Nationals' showing (Nationals Br. 39-44) that "general contract principles" foreclose reformation. MASN now argues (MASN Second Br. 63) that "a different standard governs in arbitration" than applies elsewhere in contract law. That contention, however, flies in the face of FAA Section 2. It also rests on a disingenuous citation to *Aviall*, 110 F.3d at 896, where the Second Circuit actually *confirmed* that arbitration agreements are evaluated under "general contract principles"—a holding that cannot be reconciled with MASN's novel suggestion that a special (and different) reformation standard applies to arbitration contracts.

Indeed, *Aviall* suggested only that reformation might be proper where "*the parties'* contractual intent to submit their dispute to a neutral expert" has been frustrated. *Id.* (emphasis added). This is the equivalent of a "*mutual* mistake" under which reformation can be appropriate, *Chimart Assocs. v. Paul*, 66 N.Y.2d 570, 573 (1986) (emphasis added); *Md. Port Admin. v. John W. Brawner Contracting Co.*, 492 A.2d 281, 288 (Md. 1985); this rule is not distinct from

ordinary contract law, as MASN wrongly suggests.[3] And this rule provides no basis for reformation here, because any purported mistake or frustration in this case is at most *unilateral* on MASN's part. *See, e.g.*, *Simkin v. Blank*, 19 N.Y.3d 46, 51, 54 (2012); *Rotter v. Ripka*, 110 A.D.3d 603, 604 (1st Dep't 2013).[4]

Reformation would be available only if MASN could "show in no uncertain terms, not only that mistake or fraud exists, but exactly what was really agreed upon between the parties." *Chimart*, 66 N.Y.2d at 574 (citation omitted). MASN cites *no* evidence to support either prong of this test. It is undisputed that all of the parties here *expressly* intended for rights-fees disputes to be resolved *exclusively* in arbitration before the RSDC. As Supreme Court found, MASN "clearly agreed to an 'inside baseball' arbitration, where the parties and arbitrators would all be industry insiders who knew each other and inevitably had many connections." R.36. MASN conceded below that it "agreed to" and "had to live with" "whatever Major League Baseball's role was" at the arbitration. R.3286; *see also* R.2922-26; R.3307-08; Nationals Br. 42-43. Wholly absent here is anything even remotely approaching the "clear, positive and convincing evidence" required to justify

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[3] MASN incorrectly contends (MASN Second Br. 64 n.24) that federal law governs construction of the Agreement. Rather, "interpretation of an arbitration agreement is generally a matter of state law," *Stolt-Nielsen*, 559 U.S. at 681, and MASN does not suggest that any exception to that rule applies.

[4] MASN continues relying on *Erving*, *Morris*, and *Fleming* (MASN Second Br. 63-64), ignoring the Nationals' demonstration that those cases are inapposite (Nationals Br. 43-44 & n.14).

reformation. *Warberg Opportunistic Trading Fund, L.P. v. GeoResources, Inc.*, 112 A.D.3d 78, 85-86 (1st Dep't 2013); *accord Hearn v. Hearn*, 936 A.2d 400, 410 (Md. Ct. Spec. App. 2007). Absent such evidence, the Court may not "rewrite an agreement that is complete on its face, … particularly where, as here, the parties were sophisticated business entities represented by counsel." *Resort Sports Network Inc. v. PH Ventures III, LLC*, 67 A.D.3d 132, 136 (1st Dep't 2009).[5]

MASN's purported bases for reformation (MASN Second Br. 65-66) are in any event unfounded. Supreme Court found *only* that MASN "did not agree to" Proskauer's involvement in the initial RSDC proceeding as the Nationals' counsel, R.36, and that purported flaw has been remedied by the Nationals' retention of different counsel for the new arbitration, R.3489; R.3493—a step undertaken after Supreme Court noted that the parties could "thereby return to arbitration by the RSDC, however currently constituted, pursuant to the parties' Agreement." R.42-43 n.21. Moreover, the RSDC members that sat on the initial panel have now been replaced by new arbitrators. R.3666; R.3670. And there is no evidence that MLB—whose staff are required to treat each Club "fairly and equitably," R.3142, and which did not control the original RSDC decision, R.3124; R.3129; R.3134;

[5] MASN's newly-minted argument that the rights-fee dispute should be referred to the trial court (*see* MASN Second Br. 52 n.22) was not advanced below and is waived. *See, e.g.*, *Sea Trade Mar. Corp. v. Coutsodontis*, 111 A.D.3d 483, 486 (1st Dep't 2013).

R.3170—would wield any improper or unforeseen power over a new arbitration. Indeed, except with respect to Proskauer, Supreme Court *rejected* all of MASN's challenges to MLB's role in the original RSDC hearing. R.26; R.29-34.

MASN certainly cannot justify its request for reformation by reference (MASN Second Br. 55, 65) to MLB's $25 million advance to the Nationals, as to which MASN was "enthusiastic and supportive" at the time. R.1770; *see also* R.3173-74; R.3178-80 (MASN knew the advance would be repaid); Nationals Br. 19-20. Supreme Court *rejected* MASN's arguments that the advance provided any basis for vacatur. R.32-34. And it is well established that "[e]quity will not aid one who consciously invites the wrong of which he complains." *Meisner v. Meisner*, 29 N.Y.S.2d 342, 345 (N.Y. Cnty. 1941), *aff'd*, 264 A.D. 758 (1st Dep't 1942); *see also* 55 N.Y. JURISPRUDENCE 2d *Equity* § 89 (same). MASN tries to sidestep Supreme Court's findings, and offers no response either to this legal principle or to its own enthusiasm for the advance.

Second, MASN has "unambiguously manifest[ed] an intention not to arbitrate" before the RSDC, *PaineWebber Inc. v. Faragalli*, 61 F.3d 1063, 1066 (3d Cir. 1995), thus satisfying the remaining requirement for an order compelling MASN to do so under FAA Section 4. *See* R.3485-86; R.3498; R.3490; R.3496; R.3488; Nationals Br. 50-51.

MASN does not dispute this point. MASN instead argues (MASN Second Br. 66) that Supreme Court properly granted a stay—but the Nationals have not appealed the stay, because this Court's decision will dissolve it.

The Nationals' appeal concerns what should happen *when the stay is lifted*. Under the FAA, the clear answer is that Supreme Court is *required* here to "make an order directing the parties to proceed to arbitration" of the 2012-2016 rights fee dispute before the RSDC, "in accordance with the terms of the agreement." 9 U.S.C. § 4; *see Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 844 (2d Cir. 1987) (court has no discretion under Section 4 not to order contractually mandated arbitration); *Kensington Ins. Co. v. James River Specialty Ins. Co.*, 997 N.Y.S.2d 407, 408-09 (1st Dep't 2014) (similar).

II. MASN FAILS TO DEFEND SUPREME COURT'S EVIDENT PARTIALITY FINDING

Grounds also exist for reversing Supreme Court's "evident partiality" finding, and for confirming the initial RSDC award. *First*, MASN waived any challenge based on *the arbitrators'* supposed partiality by failing to seek *the arbitrators'* removal prior to the award's issuance. *Second*, MASN has not met its legal burden of proving that any reasonable observer would *have* to conclude that the arbitrators were biased in the Nationals' favor. *Third*, MASN falls distantly short of overcoming the virtually insurmountable burden of establishing that the

RSDC acted in excess of its powers or in manifest disregard of the parties' Agreement.

A. Proskauer's Representation of The Nationals Does Not Support A Finding Of Evident Partiality

1. MASN Waived Its Evident Partiality Challenge

MASN cannot overcome its waiver of any challenge to the composition of the arbitral tribunal. *See* Nationals Br. 51-54. The FAA "precludes attacks on the qualifications of arbitrators on grounds previously known but not raised until after an award has been rendered." *AAOT Foreign Econ. Ass'n (VO) Technostroyexport v. Int'l Dev. & Trade Servs., Inc.*, 139 F.3d 980, 982 (2d Cir. 1998). A party cannot "withhold an issue or argument during arbitration and then, upon losing, raise it to the reviewing court." *Boehringer Ingelheim Vetmedica, Inc. v. United Food & Commercial Workers*, 739 F.3d 1136, 1140 (8th Cir. 2014); *see also, e.g.*, *Dean v. Sullivan*, 118 F.3d 1170, 1172 (7th Cir. 1997) ("A disputant 'cannot stand by during arbitration, withholding certain arguments, then, upon losing the arbitration, raise such arguments in federal court.'") (citation omitted).

Here, before the RSDC issued its award, MASN never "attack[ed] … the qualifications of [the] arbitrators," *AAOT*, 139 F.3d at 982, or raised any argument that the RSDC or MLB should be disqualified.[6] Rather, MASN sought only a

[6] MASN cites (MASN Second Br. 28) one post-hearing e-mail to assert that it challenged "the constitution of the panel," R.962, but that message only purported

distinct remedy: disqualification *of Proskauer* as the Nationals' counsel. R.1772; R.1774; R.1852; R.1861-62; R.1870.[7] That is insufficient to preserve MASN's current argument that *the RSDC* was biased and incapable of arbitrating the dispute: MASN "had to make plain and timely [its] *exact objection* so that a responsible party—whether … the arbitrator or a … court—could have enforced" MASN's purported entitlement to a different arbitrator. *Brook v. Peak Int'l, Ltd.*, 294 F.3d 668, 674 (5th Cir. 2002) (emphasis added).[8]

MASN asserts that "no authority supports" this requirement to make a precise objection (MASN Second Br. 28), but in fact the Nationals cited (Nationals Br. 52) a string of cases so holding—all of which MASN ignores. Under that authority, MASN was obligated to object to "*the composition of the arbitration panel* at the time of the hearing." *Bernstein Seawell & Kove v. Bosarge*, 813 F.2d 726, 732 (5th Cir. 1987); *see also, e.g.*, *Kiernan v. Piper Jaffray Cos.*, 137 F.3d 588, 593 (8th Cir. 1998). The cases demonstrate that it was not enough for MASN to "express[] concern to the arbitrators" regarding Proskauer's involvement;

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to "reserve [MASN's] rights"—it did not actually assert an *objection* to the panel's constitution, nor did it request appointment of different arbitrators.

[7] Indeed, MASN's initial objection to Proskauer's representation of the Nationals was not based on any relationship between Proskauer and the arbitrators (or MLB), but on the fact that Proskauer had previously represented the Orioles in an unrelated matter. *See* R.2194-95.

[8] MASN's attempt to distinguish *Brook* (MASN Second Br. 28 n.10) ignores the court's holding that a precise objection is required.

MASN was required to "request [the arbitrators'] removal" in order to preserve an objection to their alleged partiality. *Delta Mine Holding Co. v. AFC Coal Props., Inc.*, 280 F.3d 815, 821 (8th Cir. 2001); *see also Douglas Elliman, LLC v. Parker Madison Partners*, 2007 WL 2175574 (N.Y. Cnty. June 12, 2007) (similar under New York law), *aff'd*, 45 A.D.3d 252 (1st Dep't 2007). This rule makes sense: a party cannot be permitted to complain in court that arbitrators should not have been allowed to decide a dispute unless the party has first requested that the arbitrators recuse themselves. The alternative is to allow a party unhappy with a tribunal to set up a confirmation proceeding governed by the logic of "Heads I win, tails you lose." *AAOT*, 139 F.3d at 982.

MASN also misses the significance of the RSDC's (and MLB's) incapacity to disqualify Proskauer. MASN Second Br. 29; *see* Nationals Br. 53-54. The point is that the *only* relief that MASN requested during the arbitration was futile, *see Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Benjamin*, 1 A.D.3d 39, 44 (1st Dep't 2003), and that MASN knew it, R.2928; R.1772. MASN could have asked the RSDC members to recuse themselves. Or MASN could have filed a complaint against Proskauer in a forum (such as a court or a state bar body) with authority to do something about an alleged conflict of interest—which is what MASN should have done had it been serious about "trying to resolve the [purported] problem presented by Proskauer's overlapping representations" (MASN Second Br. 28

(emphasis omitted)). But MASN did neither of those things. Instead, it persisted in pressing pointless objections that could never have succeeded in obtaining *either* the relief it requested at the time *or* the relief it now says should have been granted. This was sheer gamesmanship, designed to create the "Heads I win, tails you lose" scenario that the arbitral waiver doctrine exists to avoid. *AAOT*, 139 F.3d at 982.

2. MASN Does Not Establish That A Reasonable Person Would Be Compelled To Find That The RSDC Was Predisposed To Favor The Nationals

MASN fails to defend the trial court's evident partiality finding. As MASN acknowledges (MASN Second Br. 11), an "appearance of bias" is insufficient to justify vacatur, which is permitted only if "a reasonable person would *have to* conclude that an arbitrator was partial to one party to the arbitration." *U.S. Elecs. Inc. v. Sirius Satellite Radio, Inc.*, 17 N.Y.3d 912, 914 (2011) (quoting *Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984)) (emphasis added). Under this standard, MASN bore the burden of marshaling "objective facts," "direct and not speculative," which are "inconsistent with impartiality." *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust*, 729 F.3d 99, 104-06 (2d Cir. 2013) (citation omitted). MASN was thus required to establish facts such that *any* reasonable person would be bound to conclude the arbitrator was "predisposed to favor one party over another."

Scandinavian Reins. Co. v. St. Paul Fire & Marine Ins. Co., 668 F.3d 60, 74 (2d Cir. 2012). MASN failed to do so.

(a) The RSDC Was Not Evidently Partial

MASN *never* proffers a theory of how Proskauer's presence could reasonably be considered to have rendered the RSDC predisposed to rule in the Nationals' favor (*see* Nationals Br. 55-58; MLB First Br. 38-43). Proskauer's representation of the Nationals did not give the RSDC members any *financial* incentive to inflate the rights-fees determination—indeed, the RSDC awarded an amount that is nearly $60 million *less per year* than the Nationals requested, and far closer to MASN's proposal, *see* R.234; R.1934; R.2062. Nor would a reasonable person have to conclude that the distantly *indirect* relationships between the RSDC members and Proskauer (by way of related third parties in unrelated matters) gave the panel any nonmonetary reason to favor the Nationals. MASN simply does not say how ruling in the Nationals' favor could have benefitted any member of the RSDC. As the arbitrators all attested without contradiction, Proskauer's involvement had no effect on their valuation of the Nationals' rights fees, which the RSDC panelists reached through exercise of their own independent judgment. R.1846; R.1849; R.1856, R.1859; R.1865; R.1867.

MASN acknowledges (MASN Second Br. 13-14; *see* Nationals Br. 25-26, 57) that the "objective facts" on which Supreme Court relied in finding evident

partiality were limited to supposed "inaction" in response to MASN's complaints about Proskauer (R.41; *see also* R.38-39 & n.15). But MASN does not defend Supreme Court's reliance on this inaction as a basis for vacatur. The RSDC cannot have demonstrated evident partiality by declining to take "steps" that would have been outside its authority under the FAA and New York law.

MASN attempts instead to draw bright-line rules that "evident partiality can rest solely on the existence of 'nontrivial' conflicting relationships" (MASN Second Br. 12), or on a failure to investigate or to disclose a relationship (*id.* at 21). But MASN simultaneously acknowledges that evident partiality should be assessed on a "case-by-case" basis after considering "the totality of the circumstances," and not through the "dogmatic rigidity" of a one-size-fits-all rule. *Id.* at 13 (citation omitted). The relevant question is whether a reasonable person would have to conclude that the RSDC was prejudiced, not whether one of MASN's purported tests is met.

MASN relies (MASN Second Br. 12, 21) on *Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132 (2d Cir. 2007), but that case does not establish any rule under which MASN should prevail on the facts here. The Second Circuit there stated that an "arbitrator who *knows* of a *material* relationship *with a party* and fails to disclose it" may be found evidently partial. *Id.* at 137 (emphasis added). But the Second Circuit has since clarified

that it is not "appropriate to vacate an award solely because an arbitrator fails … to conform in every instance to the parties' respective expectations regarding disclosure," because "nondisclosure does not by itself constitute evident partiality. The question is whether the *facts* that were not disclosed suggest a *material conflict of interest*." *Scandinavian Reins.*, 668 F.3d at 76-77 (second emphasis added).

Here, none of the RSDC members had any "*material* relationship *with a party*," *Applied Indus.*, 492 F.3d at 137 (emphasis added), and the facts that supposedly were not disclosed do not "suggest a material conflict of interest," *Scandinavian Reins.*, 668 F.3d at 77: The relationships were between a law firm (not a party to the arbitration) and third-party businesses or individuals (also not parties to the arbitration), R.35, R.37, and the representations in question were immaterial because they were entirely unrelated to the arbitration and created no identifiable conflict of interest. *See* R.1848-51, R.1858-60, R.1867-69, R.2206. Moreover, the arbitrators *did not know* of two of the relevant representations at the time of the arbitration, R.1860, R.1869, and of the other two, one did not come about until *after* the RSDC's hearing in early 2012, and one did not come about until after the RSDC had reached its decision in mid-2012, R.1787-88; R.1873-74; R.2207-09. MASN does not and cannot explain how indirect relationships of this sort could have created any incentive for the RSDC to rule in the Nationals' favor.

For identical reasons, MASN cannot prevail under *Applied Industrial*'s alternative rule that an arbitrator should investigate where he "has reason to believe that a *nontrivial conflict of interest* might exist." 492 F.3d at 138 (emphasis added). MASN has not shown that Proskauer's representations created a conflict of interest: the RSDC members' private interests were not in any way incompatible with their duties as arbitrators, nor did any of them have any reason to favor the Nationals over MASN. And the relationships on which MASN relies are so attenuated as to be trivial under the FAA—particularly given (as Supreme Court found, R.36) that MASN "clearly agreed to an 'inside baseball' arbitration, where the parties and arbitrators would all be industry insiders who knew each other and inevitably had many connections."

MASN's cases are wholly distinguishable, because they involve relationships that actually gave rise to *identifiable* conflicts. In *Applied Industrial*, the arbitral panel's chairman was president and CEO of a company that had a direct and lucrative commercial relationship with the parent of one of the arbitrating parties. 492 F.3d at 135-36, 139. In *Pitta v. Hotel Association of New York City, Inc.*, 806 F.2d 419 (2d Cir. 1986), an arbitrator was tasked with deciding whether *he himself* had been improperly discharged from his lucrative employment. *See id.* at 421, 423-24; Nationals Br. 33. And in *Morelite*, the

arbitrator's *father* was president of the union involved in the arbitration. 748 F.2d at 84.[9]

Finally, MASN cannot legitimately complain about the RSDC as the arbitration venue, because "the parties contracted" in the Agreement "to specifically allow" the RSDC "to sit as the arbitrator in all disputes brought pursuant" to Section 2.J.3. *N.F.L. Mgmt. Council v. N.F.L. Players Ass'n*, 820 F.3d 527, 548 (2d Cir. 2016). Arbitrating parties "can ask for no more impartiality than inheres in the method they have chosen." *Id.*; *see also N.F.L. Players Ass'n ex rel. Peterson v. N.F.L.*, 831 F.3d 985, 998 (8th Cir. 2016). MASN purports to distinguish *N.F.L. Management Council* on grounds that the contract there granted the arbitrator broad authority (MASN Second Br. 25), but that is not material here. *N.F.L. Management Council* establishes that, having elected to arbitrate this dispute in an industry forum composed of baseball insiders, MASN cannot claim

[9] The Second Department's decision in *Schmitt v. Kantor*, 83 A.D.2d 862 (2d Dep't 1981) (cited at MASN Second Br. 17), applied state law rather than the FAA, and vacated an arbitral award because there was "no way of knowing" whether a *direct* attorney-client relationship had affected the arbitration. *Id.* at 862. Such a mere *appearance* of *possible* bias is insufficient under the FAA (as MASN admits, MASN Second Br. 11), and the relationships here are not substantial enough even to meet the standard set forth in *Schmitt*. In *Sanko S.S. Co. v. Cook Industries, Inc.*, 495 F.2d 1260 (2d Cir. 1973) (cited at MASN Second Br. 17), the court remanded for further factual development—it did not find evident partiality. *Id.* at 1263.

that the arbitrators were "evidently partial" based on relationships that were foreseeable at the time of the Agreement.

(b) MLB Was Not Evidently Partial And Did Not Influence The RSDC's Decision

Finally, MASN cannot establish evident partiality based on Proskauer's representations of MLB. Here again, MASN points to nothing in the record that would require a reasonable person to conclude MLB was biased in the Nationals' favor: MLB did not stand to gain anything through an RSDC ruling for Proskauer's client. MASN, again, does not make a contrary showing. And, again, MASN's complaint is not cognizable because MASN *agreed* to arbitrate this dispute in an MLB-administered forum. *See N.F.L. Mgmt. Council*, 820 F.3d at 548.

MASN cannot prevail on the theory that MLB should have made a more complete disclosure of its engagements of Proskauer (*see* MASN Second Br. 14-16). MASN again disregards the settled law (*see* Nationals Br. 53) holding that "a party cannot avoid [confirmation] of an award based on its discovery of a non-disclosed relationship where the party 'could have made such a review just as easily before or during the arbitration rather than after it lost its case,'" *Schwartzman v. Harlap*, 377 F. App'x 108, 110 (2d Cir. 2010) (citation omitted),[10]

[10] *See also Lucent Techs. Inc. v. Tatung Co.*, 379 F.3d 24, 28 (2d Cir. 2004); *In re Andros Compania Maritima, S.A.*, 579 F.2d 691, 702 (2d Cir. 1978).

nor does it deny that Proskauer's representations of MLB were discoverable through public-records searches, *see* R.165-66, R.190, or by dint of the Orioles' seat on MLB's Executive Council, *see* R.3143. MASN was of course aware at the time that Proskauer represented MLB in various matters, even if it did not know the entire scope of its representations. MASN Br. 16-17 & n.4. MASN failed of its own accord even to *attempt* to uncover Proskauer's additional representations of MLB, and cannot now be allowed to use those representations as a basis to undo the RSDC's award.

At all events, Proskauer's representations of MLB are irrelevant because—contrary to MASN's protestations (MASN Second Br. 18-20)—*MLB was not the decision-maker*. As Supreme Court found, MLB provided only "the sort of support that the parties must necessarily have expected when they entered into the Agreement." R.30. MLB played only an administrative and organizational role, in accordance with the parties' expectations and the RSDC's "standard practice." *See* R.2922-26; R.3124; R.3129; R.3134; R.3151-52; R.3307-08; R.3170; *accord* R.3286 (MASN conceding below that it "agreed to" and "had to live with" "whatever the structure was, whatever Major League Baseball's role was"). Supreme Court thus properly *rejected* MASN's complaint that "MLB improperly controlled or influenced the arbitration process, or usurped the arbitrators' decision-making function." R.30; *see* R.29-31.

While MASN persists in complaining (MASN Second Br. 18) that MLB prepared a draft of the RSDC's decision, it does not refute the Nationals' showing (Nationals Br. 14-15) that MLB staff did so *at the panel's direction*, to memorialize a decision *that had already been made*. R.3124; R.3129; R.3134; R.3170. And there is *zero* evidence for MASN's bald assertion that MLB "instructed the arbitrators as to the meaning of the … Agreement" (MASN Second Br. 18 (emphasis omitted)): for this point, MASN merely cross-references its opening brief, which makes the same assertion followed by a string of red-herring record citations that do not support MASN's claim. *See* MASN First Br. 21, 48 (citing R.2955-56 ¶¶ 15, 17; R.2987 ¶ 23; R.2934 ¶ 27; R.1052 ¶ 38). The linchpin of MASN's argument—its contention that MLB controlled the result of the arbitration—has no support.

The RSDC reached its decision independent of MLB. Each RSDC member attested that the RSDC "reviewed all of the evidence and arguments" before reaching its decision, instructed MLB staff as to what the written award should say, and then provided substantive review and comment on the draft that emerged. R.3124; *see also* R.3129; R.3134; R.3170. Each of them further attested that the RSDC decided the matter "independently and on the merits," and that MLB never "attempted to or did dictate the result of the RSDC Proceeding." R.1846; R.1856; R.1865; *see also* R.3123; R.3128; R.3133; R.1763; R.1767. MASN's argument

(MASN Second Br. 20) that the arbitrators' sworn statements should be treated as untrustworthy because they are *consistent* with one another (and with the statements of MLB's Commissioner) is farcical. The record contains no conflicting evidence, and MASN provides none. As Supreme Court found, "very little was establish[ed]" on this score "by those seeking to vacate the award, who have the burden of proof." R.30.

B. The RSDC Neither Exceeded Its Authority Nor Manifestly Disregarded The Agreement

MASN alternatively contends (MASN Second Br. 30-43) that the RSDC's award exceeded the RSDC's authority and manifestly disregarded the Agreement. But the argument is frivolous, and Supreme Court correctly rejected it. R.26-29.

1. The RSDC Interpreted The Agreement And Issued An Award That Draws Its Essence From The Contract's Terms

Under the FAA, judicial "review of an arbitration award is ... *severely limited* so as not to frustrate the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation." *Scandinavian Reins.*, 668 F.3d at 71-72 (emphasis added; citations omitted). The courts' power to vacate an award for excess of power or manifest disregard is therefore sharply restricted.

Under either test, "[i]t is not enough to show that the arbitrator committed an error—or even a serious error." *Oxford Health Plans LLC v. Sutter*, 133 S.Ct. 2064, 2068 (2013) (quoting *Stolt-Nielsen*, 559 U.S. at 671). Instead, "the crux …

is 'whether the arbitrator's award draws its essence from the … agreement.'" *Am. Postal Workers Union v. U.S. Postal Serv.*, 754 F.3d 109, 112-13 (2d Cir. 2014) (quoting *St. Mary Home, Inc. v. Serv. Emps. Int'l Union,* 116 F.3d 41, 44 (2d Cir. 1997)). "Because the parties bargained for the arbitrator's construction of their agreement, an arbitral decision even arguably construing or applying the contract must stand…." *Oxford Health*, 133 S.Ct. at 2068 (citation and internal quotation marks omitted). The "sole question … is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." *Id.* Vacatur for "manifest disregard of a commercial contract" is permissible "only if the arbitral award contradicts an *express and unambiguous* term of the contract or if the award so far departs from the terms of the agreement that it is *not even arguably* derived from the contract." *United Bhd. of Carpenters & Joiners of Am. v. Tappan Zee Constructors, LLC*, 804 F.3d 270, 275 (2d Cir. 2015) (quoting *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 222 (2d Cir. 2002)) (emphasis added); *see also, e.g.*, *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471, 485 (2006) (same, quoting *Westerbeke*); *Cantor Fitzgerald Sec. v. Refco Sec., LLC*, 83 A.D.3d 592, 593 (1st Dep't 2011) (similar, citing *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.,* 592 F.3d 329, 339 (2d Cir. 2010)).

This extraordinarily "heightened standard of deference," *United Bhd. of Carpenters*, 804 F.3d at 275, means that vacatur "is appropriate only in the

'narrowest' of circumstances." *Am. Postal Workers*, 754 F.3d at 113 (quoting *Jock v. Sterling Jewelers Inc.,* 646 F.3d 113, 122 (2d Cir. 2011)). And the standard is "especially" stringent where (as here) a party seeks "to challenge an award deciding 'a question which all concede to have been properly submitted in the first instance.'" *Jock*, 646 F.3d at 122 (quoting *DiRussa v. Dean Witter Reynolds Inc.,* 121 F.3d 818, 824 (2d Cir. 1997)). No extraordinary circumstances are presented here, and MASN should not be permitted to use accusations of bias as a means to litigate around the well-established and stringent manifest disregard standard.

To the contrary, the RSDC's award plainly "draws its essence from" the parties' Agreement. *Am. Postal Workers*, 754 F.3d at 113. Indeed, as Supreme Court found, the "arbitrators … set forth an extensive explanation of their determination of the appropriate methodology to apply" under the Agreement—providing a "reasonable" interpretation of the contract that is "more than sufficient" to warrant confirmation under the FAA. R.28-29. Supreme Court thus properly heeded its "obligation to defer even to a 'barely colorable justification' for the arbitrators' interpretation of the contract." R.29 (quoting *Wien & Malkin*, 6 N.Y.3d at 479).

Here, the RSDC interpreted the key contractual terms—"fair market value" and "the [RSDC's] established methodology"—and then ruled that the Agreement does not mandate *either* MASN's preferred "Bortz" methodology *or* the "analysis

of rights fees obtained by Clubs in comparable markets" that the Nationals had proposed. R.221-22. Instead, as the RSDC explained, its "prior estimates of the fair market value of broadcasting rights"—*viz.*, "*the Committee's* established methodology"—"considered, in addition to the [regional sports] network's income statement, a myriad of factors that may influence the value of the Club's rights." *Id.* Citing prior RSDC decisions, the panel explained that its methodology properly could take into account factors such as "the Club's local ratings and factors unique to the Club's market, … as well as comparable Clubs' local broadcast contracts." R.222. The panel viewed MASN's proposed analysis as "myopic," particularly given that "each previous analysis by Bortz" itself had considered information outside MASN's strict bottom-up approach. R.221.

Having articulated its methodology, the RSDC then applied it to the facts with which it was presented—considering MASN's income statements and operating margin, R.223-29, the increasing "market value of live sports programming" (and the Nationals' contractual entitlement to "fair market value"), R.227, the unusual circumstances of the parties' arrangement (involving two Clubs sharing a single regional sports network), R.227-28, and comparable local broadcast agreements, R.229-34. Based on those factors, the RSDC concluded that "in an arm's length negotiation," MASN would have agreed to pay the Nationals

an average of $59.6 million per year for their 2012-2016 broadcast rights. R.228-29, R.234.

The RSDC's analysis was quintessential contract interpretation. The panel addressed the relevant contract, explained what its terms mean, and applied those terms to the facts. That analysis cannot here be second-guessed. *Oxford Health*, 133 S.Ct. at 2068-69; *see also, e.g.*, *Cantor Fitzgerald*, 83 A.D.3d at 593 ("the manifest disregard standard does not permit review of the panel's interpretation of the parties' agreement").

2. The Agreement Does Not Call For Application Of MASN's Preferred Methodology

MASN asserts the Agreement requires application of MASN's preferred "Bortz" methodology. But the Agreement says no such thing, let alone "express[ly] and unambiguous[ly]." *United Bhd. of Carpenters*, 804 F.3d at 275.

MASN seeks to provide a self-serving description of the Agreement's purported history and purpose, and invokes other purported evidence extrinsic to the Agreement. MASN Second Br. 32-37. Invoking such extrinsic evidence ignores the Agreement's integration clause, which provides that the parties' agreement is fully set forth in the Agreement itself. R.210. As Supreme Court found, "the parties made no effort to define the RSDC's established methodology in the Agreement, or even to offer the slightest hint that a specific operating margin might be required"—leaving the Agreement's undefined terms to be interpreted by

the RSDC in the event of an arbitration. R.28. MASN's argument that the parties "carefully bargained for" their contract terms (MASN Second Br. 32) only confirms that MASN is not entitled now to inject terms that are not there.

MASN also wrongly asserts (MASN Second Br. 35) that MASN's own version of Bortz was the RSDC's "*one* methodology." The RSDC explained that its "established methodology" was not restricted to a "bottom up" analysis of a sports network's income statement, as MASN advocated, but routinely took into account other factors bearing on the valuation in a given case. *See* R.219-23. For instance, in the RSDC's Eighteenth Report (cited at MASN Second Br. 35), the RSDC did not stop with a bottom-up calculation, but analyzed Boston's New England Sports Network in comparison to *eight* comparable markets. R.222. And the Orioles' owner himself represented to Congress in 2006, shortly after the Agreement was entered, that the Nationals are entitled to "fair market value payments … for the rights fees for the rights to their games," and that in the event of a dispute the fees could be determined based on a "survey" of similar transactions. R.1977.

The Agreement also does not state or remotely suggest that MASN is guaranteed a profit margin of 20% or more. As the RSDC explained, its precedents do not maintain either a general "assumption of a twenty-percent operating margin," or a "bright line rule that broadcasters will not enter into rights

fee arrangements that would reduce their operating margin below twenty percent." R.225-26. Some networks have in the past reported low or even *negative* margins. R.225. Here, the Agreement expressly entitles the Nationals to the "fair market value" of their telecast rights. R.202-03. As the RSDC recognized, *see* R.227-28, the Nationals' entitlement to "fair market value" cannot comport with MASN's supposed entitlement to a 20% profit margin under all circumstances.

Prior to the RSDC arbitration hearing, MASN sought clarification from MLB as to the meaning of "established methodology," R.1776—a request that cannot be reconciled with MASN's after-the-fact assertion that the Agreement unambiguously requires application of MASN's propounded "Bortz methodology." MLB responded at the time that the "established methodology" consists of a "multidisciplinary analysis of relevant variables," which "may include a related-party entity's operations and market forces, including the terms and circumstances of comparable agreements," depending on the case. R.1778. As the RSDC noted, no party during the arbitration challenged that description of the "established methodology." *See* R.220 n.5.[11]

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[11] MASN misleadingly suggests (MASN Second Br. 31) that the RSDC must have abandoned its "established methodology" because the award states that it "shall not constitute precedent of the RSDC," R.217 n.2. But MASN disregards the Nationals' explanation (Nationals Br. 18 n.6) that the RSDC's point was only that its methodology for evaluating what were then *forward-looking* rights fees would not bind it in its usual work of *retrospectively* evaluating contracts for compliance with MLB's revenue sharing plan.

MASN's cases do not support a different result. In *Stolt-Nielsen*, the arbitral panel's assertion of power to conduct a class-wide arbitration had no basis in the governing agreement, but was instead grounded in the arbitrators' conception of what constituted sound policy. 559 U.S. at 673-74. In *In re Marine Pollution Service, Inc.*, 857 F.2d 91 (2d Cir. 1988), the arbitrator "import[ed] his notions of equity into the arbitration proceeding" rather than interpret and apply the contract. *Id.* at 95. In *In re Kowaleski*, 16 N.Y.3d 85 (2010), decided under state law rather than the FAA, the arbitrator exceeded his authority by *refusing* to consider a defense when he was statutorily *obligated* to do so. *Id.* at 91.[12]

CONCLUSION

For the reasons set forth in the Nationals' prior brief, this Court should affirm Supreme Court's Vacatur Order insofar as it ruled that any new arbitration of the parties' 2012-2016 rights fee dispute must proceed at the RSDC. For the reasons set forth herein, this Court further should compel MASN to participate in such an arbitration. Grounds also exist for reversing the judgment vacating the RSDC's initial award, and for the matter to be remanded to Supreme Court with instructions to confirm the award.

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[12] The courts in MASN's remaining arbitration cases *upheld* the challenged arbitral awards. *See Wien & Malkin*, 6 N.Y.3d at 485; *In re Overseas Distributors Exch., Inc.*, 5 A.D.2d 498, 500 (1st Dep't 1958) (state law); *Schwartz v. Merrill Lynch & Co.*, 665 F.3d 444, 446 (2d Cir. 2011); *Local 1199, Drug, Hosp. & Health Care Emps. Union v. Brooks Drug Co.*, 956 F.2d 22, 26 (2d Cir. 1992).

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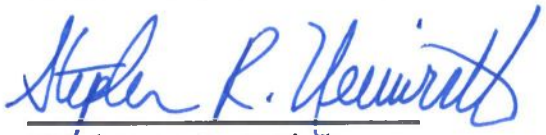
Respectfully Submitted,



Stephen R. Neuwirth
Sanford I. Weisburst
Julia J. Peck
Cleland B. Welton II
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010
Telephone: (212) 849-7000
Facsimile: (212) 849-7100
stephenneuwirth@quinnemanuel.com

Attorneys for Respondent-Respondent-Cross-Appellant-Appellant
Washington Nationals Baseball Club, LLC

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