To Be Argued By:

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

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

TCR SPORTS BROADCASTING HOLDING, LLP,

Petitioner-Appellant-Cross-Respondent-Respondent,

—against—

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

Respondents-Respondents-Cross-Appellants-Appellants,

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

Respondents-Respondents-Cross-Appellants,

—and—

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

Nominal Respondents-Appellants-Cross-Respondents-Respondents.

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

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PRELIMINARY STATEMENT

None of the arguments MASN and the Orioles advance provides any basis to vacate the RSDC's award. Although they continue to proceed as if the trial court's decision were based on their complaints of improprieties by MLB, the trial court in fact *rejected* them, and instead vacated the RSDC's award for one reason, and one reason alone: Proskauer's representation of the Nationals before the RSDC while also representing MLB and entities affiliated with the RSDC arbitrators in "unrelated" matters. R.37. And even then, the trial court advised that it would have been compelled to confirm the RSDC's award if MLB had only taken any one of various never-requested steps to try to address the Proskauer situation, even if those steps did not change anything in the arbitration, including Proskauer's role. R.38.

MASN and the Orioles do not even attempt to defend that reasoning, which is understandable because it is impossible to reconcile with the Federal Arbitration Act's demanding standards for overturning arbitral awards. The FAA requires *evident* partiality by the arbitrators, not just the mere appearance thereof. To demonstrate evident partiality, the challenging party must prove by clear and convincing evidence that a reasonable person *would have to conclude* that the arbitrators were partial toward one party. No reasonable person would be compelled to reach that conclusion merely because MLB purportedly appeared to

evince insufficient concern about Proskauer's role, where even the trial court did not find that Proskauer's involvement amounted to a *per se* disqualifying relationship. *Id.*

Indeed, on these facts, no reasonable person could reach that conclusion at all. It is uncontested that the arbitrators acted evenhandedly throughout the proceeding and ultimately awarded telecast rights fees nearly three times closer to the figures that MASN and the Orioles proposed than those the Nationals proposed. MLB Br. at 36–38. The undisputed facts also show that Proskauer did *not* represent the arbitrators individually, but merely represented the Clubs or a separate business with which the arbitrators were associated, in unrelated matters that presented no conflict of interest. *Id.* at 40–42. And the arbitrators, who were Club owners or executives, had every incentive to treat all sides fairly and equally and had no reason to be predisposed against MASN and the Orioles. They were all involved in the common enterprise of Baseball, frequently interacted with and sat on other MLB committees with other Club owners and executives, and on a future date could find themselves before a future RSDC panel in a fair market valuation review of their Clubs' telecast rights fees.

Unable to defend the trial court's reasoning or muster clear and convincing evidence that might support its ultimate conclusion, MASN and the Orioles advance a novel *per se* rule. They argue that evident partiality necessarily exists

any time an entity associated with an arbitrator shares the same counsel as a party, even in an unrelated matter—and even if the arbitrator does not know about the unrelated representation. That argument does not square with the fact that neither MASN nor the Orioles ever objected to the arbitrators' impartiality or asked any of the arbitrators to recuse—even though they contemporaneously knew that Proskauer represented entities associated with the arbitrators. Not only does that failure constitute fatal waiver; it also confirms that the *per se* rule they advance is both legally and logically unsustainable.

MASN and the Orioles alternatively return to their contentions that it was really *MLB*'s involvement, and not Proskauer's, that infected the arbitration with unfairness. Yet the trial court did not find that MLB was evidently partial. Rather, the trial court rejected claims that MLB usurped the role of the arbitrators or interfered with the exercise of their independent judgment. R.30. Instead, the court found that MLB provided only the kind of support that the parties necessarily envisioned when they selected an arbitral forum composed of Club owners and executives which always has been supported by MLB staff. *Id.* In short, MLB's sole interest in this case has been to promote the fair and orderly resolution of a dispute between Clubs and their regional sports network, according to the parties' Agreement.

MASN and the Orioles then turn around and claim that the decision below should be affirmed on the alternative ground that the RSDC exceeded its authority by declining to defer to the views of MASN and the Orioles' expert on what methodology to apply in resolving the parties' dispute. Why? Because, they argue, that expert was also a consultant previously used by the RSDC. In other words, according to MASN and the Orioles, the Nationals' selection of a law firm that was representing MLB and various Clubs in matters having nothing to do with rights fees infected the entire arbitration with incurable bias, yet their own selection of Bortz Media & Sports Group, Inc. ("Bortz"), an expert that the RSDC itself had previously used to assist it in resolving the same kinds of questions at issue here, not only was perfectly permissible, but actually compelled the RSDC to accept their position *in toto*.

MASN and the Orioles cannot have it both ways. There is no plausible world in which the parties bargained for an arbitration in which MASN and the Orioles could retain a self-styled "insider" as their expert, yet the Nationals could not even choose as its counsel a law firm that had any relationship—no matter how attenuated—with MLB or any of the Clubs. In fact, the parties received exactly what they bargained for: a hearing before a specialized industry body with real-world experience derived from exposure to and interaction with others, including professionals, involved in the field.

The RSDC considered the parties' arguments and rendered a detailed award explaining the RSDC's established methodology and determining the fair market value of telecast rights fees that the trial court found "reasonable on its face." R.28. This Court should reject MASN and the Orioles' invitation to supplant the arbitrators as the decision-maker, re-litigate the merits of the contract interpretation issue decided by the arbitrators, and override the arbitrators' determination of what their own "established methodology" means. Having chosen their arbitral forum and received precisely the fair and proper process for which they bargained, MASN and the Orioles cannot now disrupt the award.

ARGUMENT

I. The Trial Court's Evident Partiality Ruling Should Be Reversed and the RSDC's Award Confirmed.

The trial court identified only one ground for vacating the arbitral award: that Proskauer's representation of the Nationals somehow gave rise to an "evident partiality" problem. R.34. And even so, the problem was not Proskauer's participation *vel non*, but the supposed failure to do more to assuage concerns about Proskauer's role. R.38; R.41. The court considered and rejected every other argument MASN and the Orioles pressed—including all their accusations that MLB somehow usurped the role of the arbitrators or otherwise interfered with the arbitration. R.29–31. Accordingly, the decision the trial court actually rendered can be sustained only if MASN and the Orioles proved by clear and convincing

evidence that a reasonable person would have to conclude that the fact of Proskauer's representation of the Nationals rendered the arbitrators partial. That, they did not and cannot do; there was no such evidence.

A. The FAA Poses an Exceptionally High Standard for Proving Evident Partiality.

At the outset, MASN and the Orioles show little regard for the strong national policy in favor of arbitration that the FAA embodies, or the limited role it assigns courts in reviewing arbitral awards. Courts are bound by the FAA to "rigorously enforce arbitration agreements according to their terms." *Am. Express, Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013). The FAA thus limits the power of courts to set aside arbitral awards to cases involving "egregious departures from the parties' agreed-upon arbitration" or "extreme arbitral [mis]conduct." *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 586 (2008).

The standard for vacating an award for "evident partiality" is particularly demanding. The challenging party has the burden of proving by "*clear and convincing evidence*," *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527, 548 (2d Cir. 2016) (emphasis added), that a "reasonable person *would have to conclude* that an arbitrator was partial to one party to the arbitration." *Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984) (emphasis added). This is an extremely high hurdle: "The conclusion of bias must be ineluctable, the

favorable treatment unilateral." *Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 253 (3d Cir. 2013). Moreover, "[a] showing of evident partiality must be direct and not speculative," "remote," or "uncertain." *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr.*, 729 F.3d 99, 104, 106 (2d Cir. 2013).[1] Even MASN and the Orioles concede that the mere appearance of bias is not nearly enough. MASN Reply at 11. Arbitrators are decidedly "*not* subject to the same standards of impartiality as Article III judges." *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 137 (2d Cir. 2007) (emphasis added).

Moreover, because "arbitration is a matter of contract, . . . the parties to an arbitration can ask for no more impartiality than inheres in the method they have chosen." *Nat'l Football League Mgmt. Council*, 820 F.3d at 548; *see also Williams v. Nat'l Football League*, 582 F.3d 863, 885 (8th Cir. 2009). Indeed, the very "point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute" at issue.

[1] MASN and the Orioles' incorrectly suggest that this language and language from *U.S. Electronics, Inc. v. Sirius Satellite Radio, Inc.*, 17 N.Y.3d 912 (2011), somehow implies a lesser standard than "clear and convincing evidence." *See* MASN Reply at 11–12. In fact, *Kolel*, which post-dates *U.S. Electronics*, illustrates that the evidence of partiality must be *both* clear and convincing *and* direct. *See Kolel*, 729 F.3d at 106 ("Appellants do not present any direct or plausible evidence, let alone any clear and convincing evidence indicating why or how [the arbitrator] is biased toward [one party] . . . . However, this Circuit now holds, and others agree, *it must be done by clear and convincing evidence*." (emphasis added)).

AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011). "And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution." *Id.* at 345. Accordingly, if members of a "tightly knit professional communit[y]" in which "[k]ey members are known to one another, and in fact . . . work with, or for, one another, from time to time" agree to submit their dispute to an internal arbitral forum, they cannot then claim that the very relationships to which they necessarily agreed when they selected that forum render the arbitrators evidently partial. *Morelite*, 748 F.2d at 83; *see* MLB Br. at 45–47.

B. The *Per Se* Evident Partiality Rule that MASN and the Orioles Press Is Legally Unsupported and Logically Unsustainable.

Because the FAA imposes such a high standard for vacating an arbitral award, ordinarily "a claim of evident partiality requires . . . concrete actions in which [the arbitrator] appeared to actually favor the disadvantaged party." *Amerisure Mut. Ins. Co. v. Everest Reinsurance Co.*, 109 F. Supp. 3d 969, 988 (E.D. Mich. 2015). MASN and the Orioles do not and cannot identify any such actions here. The RSDC handled all procedural rulings evenhandedly and gave all parties a full and fair opportunity to present their case. *See* MLB Br. at 36–38. And the arbitrators' decision belies any contention that they were predisposed toward the Nationals: The RSDC awarded rights fees nearly three times closer to MASN and the Orioles' proposal than to the Nationals' proposal; the award fell

$292 million short of what the Nationals requested. *Id.* at 18. The award does not evince any favoritism, let alone provide the clear and convincing evidence of evident partiality that the FAA requires.

Implicitly recognizing as much, MASN and the Orioles eschew any effort to marshal customary proof of evident partiality, and instead advance the novel theory that Proskauer's participation in the arbitration was a *per se* violation of the FAA. In their view, there is no need for this Court to "examine the particulars of the [arbitrators'] conduct to determine whether it actually evinces partiality" because Proskauer's representation of the arbitrators' Clubs and businesses in wholly unrelated matters created the kind of "disqualifying relationship" that requires a finding of evident partiality as a matter of law, no matter how impartial the arbitrators truly proved to be. MASN Reply at 12. MASN and the Orioles do not identify a single case supporting the wide-sweeping *per se* rule they seek to establish. Courts have conclusively presumed evident partiality only in exceptionally rare circumstances, none of which involved a relationship between an arbitrator and a party's law firm—let alone between an entity simply *affiliated with* an arbitrator and a party's law firm. MASN and the Orioles identify only two cases in which a court has ever found facts sufficient to render an arbitrator *per se* evidently partial toward one party. *See id.* at 12–13. Neither involves facts remotely analogous to these.

One of those cases, *Pitta v. Hotel Ass'n of N.Y.C., Inc.*, 806 F.2d 419 (2d Cir. 1986), involved an arbitrator called upon to decide the validity of *his own* dismissal from employment. *Id.* at 424. Unsurprisingly, the court found the "impermissible self-interest" in that situation self-evident. *Id.* at 423. Even so, the court stressed that its holding was a very narrow one, and should not even be taken to "suggest that an arbitrator must recuse himself from every decision that might have any bearing on his compensation." *Id.* at 424. The second case, *Morelite*, involved an arbitrator whose father was president of an international labor union, a chapter of which was a party to the dispute. 748 F.2d at 84. There, too, the court found itself "bound by our strong feeling that sons are more often than not loyal to their fathers, partial to their fathers, and biased on behalf of their fathers." *Id.* At the same time, however, the court observed that the list of relationships that compel "*per se* vacation of an arbitration award . . . would most likely be very short." *Id.* at 85.

In the thirty-two years since *Morelite,* the Second Circuit has made no further additions to that very short list. Now is not the time to do so. Nothing in *Pitta* or *Morelite* remotely suggests that representation of entities associated with the arbitrators by the same law firm in unrelated matters is even a plausible candidate for the list of relationships that creates evident partiality *per se*. How that kind of connection compromises an arbitrator's impartiality, MASN and the

Orioles never explain. After all, it is not as if one client of a law firm stands to benefit, either financially or personally, from the mere fact that the firm secures a victory for some other client.

Indeed, even the trial court did not find that Proskauer's involvement amounted to a *per se* disqualifying relationship. Instead, the court vacated the award on the reasoning that more attention should have been paid to MASN and the Orioles' objections to Proskauer's involvement. R.38–39; R.41. Thus, in the trial court's view, "the FAA standard might have dictated a simple decision from this Court to confirm the award" had MLB only taken various "steps" that purportedly would have evinced greater concern for those objections—even if those steps had not actually led Proskauer to withdraw. R.38; *see also* R.41.

Even MASN and the Orioles do not defend that reasoning, and could not because it reflects precisely the kind of concern over appearances—*i.e.*, the "appearance of partiality"—that they concede does not suffice to satisfy the FAA's demanding *evident* partiality standard. MASN Reply at 11. In fact, *no* "reasonable person would have to conclude that an arbitrator was partial to one party," *Morelite*, 748 F.2d at 84, just because the arbitration administrator (not even the arbitrator himself) evinced insufficient concern toward an objection to a relationship. That is particularly so when, as MASN concedes, MASN Reply at 29, MLB had no power to grant the remedy that MASN and the Orioles sought—

Proskauer's disqualification—as New York law prohibits arbitrators from disqualifying a party's counsel. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Benjamin*, 1 A.D.3d 39, 44 (1st Dep't 2003). And it bears emphasis that neither MASN nor the Orioles ever asked MLB to take any of these "steps" during the arbitration and did not argue that MLB's failure to take the "steps" was a basis for vacatur. The suggested "steps" were the trial court's own *post hoc* invention that first appeared in its decision and are not supported by any judicial decisions or other authority. MLB Br. at 50 & nn.8–9.

This approach puts every arbitral award at risk, because its validity would hinge on the discretionary judgment and predilections of particular judges presiding over enforcement actions (each of whom might impose his own *post hoc* "steps") rather than the clear rule of law. Such an approach, if endorsed by this Court, would seriously undermine New York as a favored place of domestic and international arbitrations. The tendency of courts at the seat to interfere with awards is one of the principal factors (often the preeminent factor) considered by parties in selecting a place of arbitration. GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION § 14.02(A)(2) (2d ed. 2014). Sophisticated

commercial parties will not choose to seat arbitrations in jurisdictions where courts vacate awards for *ad hoc* reasons, as the trial court did here.[2]

MASN and the Orioles do not address, let alone distinguish, the legion of cases that have declined to find evident partiality—let alone impose a *per se* rule—where arbitrators had much closer relationships with the parties or their attorneys than those at issue here, *see* MLB Br. at 39–40, 43–44—including a case where the arbitrator *himself* previously provided legal counsel on the matter at issue in the arbitration, *Williams*, 582 F.3d at 885–86. They also decline to address the cases cited by MLB that hold that even under the more stringent federal standard for judicial recusal, the fact that a judge himself previously represented a party appearing before him does not require recusal. *See* MLB Br. at 39. The same holds true under New York recusal standards. *See, e.g.*, *People v. Glynn*, 21 N.Y.3d 614, 619 (2013) ("[T]he judge was not required to recuse himself simply because he had previously defended or prosecuted defendant.").

And they have no substantive response to *National Football League Management Council*, where the Second Circuit reversed a trial court and ordered

[2] Likewise, New York is home not only to arbitration institutions such as the American Arbitration Association, but also to business organizations and associations that, like MLB, resolve intra-industry disputes through internally-administered arbitration processes. *See* MLB Br. at 46–47 (citing internal arbitrations involving NYSE, NYMEX, NHL, and NFL). All such organizations rely on the New York courts to apply the FAA in a clear and predictable manner and to respect and enforce arbitral awards rendered by internal bodies rather than subject them to *ad hoc*, subjective standards of review.

that an arbitral award be confirmed even though the same law firm that represented a party to the arbitration (the NFL) also was retained by the sole arbitrator (the NFL Commissioner) to prepare a report on the subject matter of the arbitration. *See Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 125 F. Supp. 3d 449, 460, 473 & n.21 (S.D.N.Y. 2015), *rev'd*, 820 F.3d at 533, 548. MASN and the Orioles' attempt to distinguish the case as arising from a collective bargaining agreement, MASN Reply at 25, is no distinction at all; the RSDC is an outgrowth of the Revenue Sharing Plan in MLB's Collective Bargaining Agreement, MLB Br. at 6–7. And in any event, that case was governed by the same FAA standards that apply here. *See* 820 F.3d at 548.

If those much more direct relationships do not justify a *per se* vacatur rule, then the far more attenuated situation of entities associated with the arbitrators sharing the same outside counsel in unrelated matters cannot. As even the trial court recognized, this is not one of the exceedingly rare situations in which the "relationships" of which the challenging party complains so overwhelmingly predispose an arbitrator to be partial to one side that there is no need to identify "concrete actions in which [the arbitrator] appeared to actually favor the disadvantaged party." *Amerisure*, 109 F. Supp. 3d at 988. MASN and the Orioles' efforts to relieve themselves of the burden to make that showing by clear and convincing evidence thus fail as a matter of law.

C. MASN and the Orioles Fail To Meet the Demanding Burden Necessary To Sustain Their Evident Partiality Claim.

Without their unsustainable *per se* rule, MASN and the Orioles' efforts to defend the trial court's decision fail. There is no dispute that the representations of which MASN and the Orioles complain have nothing to do with the telecast rights fees issue the RSDC was asked to resolve. Accordingly, MASN and the Orioles' repeated contentions that those separate matters gave rise to some sort of "conflict of interest" for the arbitrators, *see, e.g.*, MASN Reply at 4, 9, 20, is flatly incorrect. Moreover, contrary to MASN and the Orioles' contentions, *see, e.g.*, *id.* at 1, 14, 16, 23, 24, none of Proskauer's representations during the arbitration involved the arbitrators themselves. None of the arbitrators was represented by Proskauer during the arbitration, and none had any direct personal, financial, or other confidential or fiduciary relationship with Proskauer. R.1848 ¶¶ 19–20; R.1858 ¶¶ 19–20; R.1867 ¶¶ 17–18; R.2210 ¶ 68. Tellingly, at the hearing on the parties' cross-motions, MASN and the Orioles never argued that Proskauer represented any of the arbitrators individually during the arbitration, R.3281–84, and the trial court did not find that any such representations existed, *see* R.35.[3]

[3] The only time Proskauer ever represented one of the arbitrators was when it represented Mr. Coonelly in his previous official capacity as an MLB employee in *Phillips v. Selig*, a suit related to the 1999 umpire strike. R.1849 ¶ 24. Not only was this representation contemporaneously known to MASN and the Orioles, R.3212–13 ¶¶ 4–8, but it ended *in 2009*—years before the arbitration began. Moreover, Mr. Coonelly was sued in his official capacity along with a host of other MLB entities and officials, and thus was indemnified by MLB, did not make the decision

Instead, the Proskauer representations involved only the arbitrators' *Clubs* (along with many other Clubs), or in one instance a separate business interest. Critically, MASN and the Orioles do not dispute that the RSDC arbitrators are expected to exercise independent judgment, and do not sit to represent the interests of MLB, their Clubs, or anyone else, rendering representations of those outside interests irrelevant. R.1845–46 ¶¶ 6, 10; R.1855–56 ¶¶ 5, 9; R.1864–65 ¶¶ 5, 9. Moreover, it is undisputed that the arbitrators had no involvement in those legal proceedings or the selection of Proskauer to handle them—in fact, in most cases they did not even *know* that Proskauer was handling those matters until this vacatur proceeding began. MLB Br. at 40–42; *see CRC Inc. v. Computer Sciences Corp.*, 2010 WL 4058152, at *4 (S.D.N.Y. Oct. 14, 2010) (An arbitrator cannot be partial "on the basis of relationships he did not know existed."). Indeed, two of the four matters on which the trial court relied (*Garber* and *Senne*) did not even begin until after the RSDC hearing. R.1787–88 ¶ 16; R.1873–74 ¶ 7. Nor did the arbitrators ever engage in any *ex parte* communications with Proskauer during the arbitration, whether on those matters, the rights fees dispute, or anything else. R.1848–50 ¶¶ 21, 26, 29; R.1858–59 ¶¶ 21, 25; R.1867–68 ¶¶ 19, 23.

to hire Proskauer, did not pay Proskauer, and did not sign an engagement letter with Proskauer. R.1849 ¶ 24.

Moreover, even as to those unrelated representations, the parties to the arbitration either had no interest (as with the Rays salary arbitration and the Sterling Equities ERISA suit) or had the same interest as Proskauer's clients (as in the *Garber* antitrust litigation and the *Senne* wage-and-hour litigation, where all Clubs, including the Orioles, were named defendants). *See* MLB Br. at 40–42. Accordingly, those representations did not create any "conflict of interest" for Proskauer under the New York Rules of Professional Conduct, Rules 1.7–1.8, the ABA Model Rules of Professional Conduct, Rules 1.7–1.8, or any other ethical rules.

At bottom, this is not a case in which the mere fact that entities associated with the arbitrators had some relationship with a *law firm* involved in the arbitration would compel a "reasonable person . . . to conclude that an arbitrator was partial to one party." *Morelite*, 748 F.2d at 84. And MASN and the Orioles have yet to cite a single case in which the court vacated an arbitral award for evident partiality on the basis of common counsel between an arbitrator and a party to the arbitration, let alone a case in which a court found evident partiality on the basis of a common counsel situation involving a separate entity with which the arbitrator is associated.

On top of that, MASN and the Orioles make arguments that are fundamentally inconsistent. They first claim that Proskauer's involvement

rendered the arbitrators incapable of impartiality, and then turn around and fault the arbitrators for refusing to defer to the views of their expert, Bortz, on how to resolve the parties' dispute. MASN Reply at 30–43. According to them, the arbitrators were obligated to defer to Bortz's views on how to set the rights fees because the RSDC previously used Bortz in rights fees proceedings. They go so far as to argue that not only was it *permissible* for *them* to use an "insider" expert, but that the arbitrators should have automatically deferred to their expert *precisely because* it had previously consulted for the RSDC.

That argument is not only wrong, *see infra* Part II.C, but also fundamentally inconsistent with their own evident partiality argument. As MASN and the Orioles confirmed when they selected Bortz as their expert, the parties were well aware that they bargained for an intra-industry arbitration that inevitably would involve relationships among the arbitrators, the parties, and the other participants. Indeed, the parties selected as their arbitrators a committee composed solely of *Club owners and executives*, who were bound to know the parties at least as well as whatever lawyers and experts they might select. The parties presumably chose the RSDC to arbitrate their dispute precisely because it has considerable experience with determining the fair market value of Clubs' telecast rights fees—experience that comes from "exposure, in ways large and small to those engaged in" the industry. *Morelite*, 748 F.2d at 83 (internal quotation omitted). And they received

the benefit of that experience in the fair and well-reasoned award that the RSDC issued.

D. MASN and the Orioles Waived Their Evident Partiality Claim by Failing To Make Specific Objections to the Arbitrators' Participation and Request Their Recusal.

Even MASN and the Orioles did not believe during the arbitration that the arbitrators were evidently partial. They did not request recusal even though they admittedly were contemporaneously aware of all but one of the Proskauer representations of which they complain, *see* MLB Br. at 16–17, 34, and admittedly could have discovered the other through a simple public records search, *see* R.493 (a search they apparently decided to perform only *after* they found themselves dissatisfied with the RSDC's award). Instead, as they concede, their sole objection was to *Proskauer's* participation, and the only remedy they ever sought was *Proskauer's* disqualification. MASN Reply at 28.[4]

That alone is reason enough to reject their belated claim that Proskauer's involvement rendered *the arbitrators* partial, as it is settled law than an objection must be both timely and *specific* to be preserved. *See, e.g.*, *Brook v. Peak Int'l*,

[4] MASN and the Orioles never even effectively raised their objection to *Proskauer's* involvement with the arbitrators themselves. The only objections put to the arbitrators were in three boilerplate footnotes within their voluminous submissions. R.883; R.901; R.952–53; *cf. In re Arbitration between Halcot Navigation Ltd. P'ship & Stolt-Nielsen Transp. Grp.*, 491 F. Supp. 2d 413, 419 (S.D.N.Y. 2007) ("general reservation[s] of rights . . . without in any way specifically objecting" do not preserve objections). And of course none of the footnotes called the arbitrators' neutrality into question. MLB Br. at 33 n.4.

Ltd., 294 F.3d 668, 674 (5th Cir. 2002); *N.Y.C. Dist. Council of Carpenters Pension Fund v. TADCO Constr. Corp.*, 2008 WL 540078, at *5 (S.D.N.Y. Feb. 28, 2008).[5] An objection to a lawyer's participation as counsel (which arbitral tribunals have no authority to interfere with) is entirely different from an objection to an arbitrator's participation based on his evident partiality. *Merrill Lynch*, 1 A.D.3d at 44 (arbitrators have no authority to "disqualif[y] . . . an attorney from representing a client"; rather, only a court may do so). The object and goal of the objections, and the law applicable to them, are completely different.[6]

"Where a party has knowledge of facts possibly indicating bias or partiality on the part of an arbitrator he cannot remain silent and later object to the award of the arbitrators on that ground." *AAOT Foreign Econ. Ass'n (VO) Technostroyexport v. Int'l Dev. & Trade Servs., Inc.*, 139 F.3d 980, 982 (2d Cir. 1998); *cf. People v. Rosa*, 212 A.D.2d 376, 376 (1st Dep't 1995) ("Since defense counsel never requested that the Judge at this bench trial recuse himself . . . defendant's current challenge is unpreserved for appellate review."). That rule

[5] Contrary to MASN and the Orioles' mistaken assertion, both of these cases turned on the lack of specificity in the objection. *See* MLB Br. at 33.

[6] MASN and the Orioles' assertion that MLB "promise[d]" never to argue waiver in post-award proceedings is false. MASN Reply at 26. Commissioner Manfred's comment, which was made in the context of settlement discussions after the RSDC hearing, R.2492–94, had nothing to do with an evident partiality challenge to the arbitrators. As with all of MASN and the Orioles' objections, this email focused on opposing counsel, *not* the arbitrators.

should apply with all the more force when a party presses the kind of *per se* evident partiality argument MASN and the Orioles peddle here. A party cannot simultaneously argue that, on the one hand, the mere relationship between a party's law firm and an entity associated with the arbitrator was so glaring as to admit of no other conclusion than the arbitrator was partial to one side, yet, on the other, never ask the arbitrator to recuse himself.

II. MASN and the Orioles' Alternative Arguments Are Equally Meritless.

Unable to demonstrate that the arbitrators evinced any partiality, or that Proskauer's involvement created the exceedingly rare *per se* "disqualifying relationship," MASN Reply at 12, MASN and the Orioles conjure up a host of alternative grounds for vacating the award. The trial court already rejected those equally flawed theories, and this Court should do the same.

A. The Arbitrators Were Not Required To Disclose the Unrelated Representations of Which MASN and the Orioles Complain.

MASN and the Orioles fault the arbitrators for failing to disclose various Proskauer representations that MASN and the Orioles already knew about or were able to discover through a simple public records search. *Id.* at 20–23. The trial court summarily rejected this argument. R.42 ("The Court has considered the parties' other arguments, and finds them unavailing."). And rightly so. Setting aside the problem that the arbitrators could not reasonably be expected to disclose representations of which they were unaware, MASN and the Orioles never even

asked the arbitrators or their Clubs to make any disclosures about their or their Clubs' relationships with Proskauer. R.1773–74 ¶¶ 42, 44; R.1851–52 ¶ 34; R.1861 ¶ 34; R.1869–70 ¶ 31. They declined to seek disclosures even though MLB's general counsel specifically suggested that they seek such information from the relevant Clubs. R.1786–87 ¶¶ 13–14.

Nor was *sua sponte* disclosure of those representations legally required. The RSDC had no rules requiring such disclosure, MLB Br. at 8, and the FAA imposes no "free-standing duty to investigate" anything and everything that a party might deem grounds for challenging an arbitrator's impartiality, *Applied Indus.*, 492 F.3d at 138. Instead, arbitrators need only disclose "nontrivial" conflicts of interest. *Id.* Moreover, arbitrators need only "disclose dealings of which the parties cannot reasonably be expected to be aware." *Hunt v. Mobile Oil Corp.*, 654 F. Supp. 1487, 1500 (S.D.N.Y. 1987) (quoting *Cook Indus., Inc. v. C. Itoh & Co. (Am.) Inc.*, 449 F.2d 106, 108 (2d Cir. 1971)). By contrast, "where an undisclosed matter is not suggestive of bias, vacatur based upon that nondisclosure cannot be warranted under an evident-partiality theory." *Scandinavian Reinsurance Co. v. St. Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 73 (2d Cir. 2012). In short, nondisclosure matters only if a "material relationship" is so obvious and troubling that the failure to disclose is itself proof of evident partiality. *Applied Indus.*, 492 F.3d at 137.

Accordingly, "[t]he mere failure to investigate is not, by itself, sufficient to vacate an arbitration award." *Id.* at 138.

MASN and the Orioles cannot clear any of these hurdles. Here, the arbitrators had no nontrivial relationships with Proskauer to disclose, and none of these highly attenuated relationships created a conflict of interest. As discussed above, neither the RSDC itself nor any of the arbitrators was represented by or had any personal, confidential, or fiduciary relationship with Proskauer during the arbitration. R.1848 ¶¶ 19–20; R.1858 ¶¶ 19–20; R.1867 ¶¶ 17–18. Indeed, the arbitrators were not even *aware* of many of the representations that MASN and the Orioles fault them for failing to disclose, which dooms any argument that their nondisclosure is itself proof of partiality. MLB Br. at 41–42. In any event, MASN and the Orioles already knew about salary arbitration before the RSDC hearing; they learned of the post-hearing *Garber* and *Senne* representations once they arose; and MASN's counsel admitted in the trial court that the Sterling Equities representation was easily discoverable by anyone. *See* R.493; MLB Br. at 16, 34. Their nondisclosure argument thus provides no better grounds than any of their other arguments for sustaining the trial court's evident partiality decision.

B. MLB's Role and Relationships Are Irrelevant to the Court's Analysis.

MASN and the Orioles continue to levy baseless accusations against MLB for its role in helping to facilitate the RSDC arbitration. Those arguments are

irrelevant to the analysis of the arbitrators' evident partiality, but in all events are unsupported by the record—as the trial court found when it thoroughly rejected each and every one of them.

1. MLB's Role Has No Bearing on Whether the Arbitrators Were Evidently Partial.

At the outset, any complaints MASN and the Orioles may have about MLB's role in facilitating the arbitration have nothing to do with the evident partiality analysis, as MLB was not the decision-maker; the three RSDC arbitrators were. The FAA allows a court to vacate an arbitral award only upon clear and convincing proof of evident partiality "*in the arbitrators*," 9 U.S.C. § 10(a)(2) (emphasis added). Accordingly, "[c]ourts have interpreted [subsections] (1), (2), and (3) to require misconduct on the part of the arbitrator," and have rejected efforts to challenge the impartiality of the entity that facilitates the arbitration. *Nicholls v. Brookdale Univ. Hosp. & Med. Ctr.*, 2005 WL 1661093, at *9, *12 (E.D.N.Y. July 14, 2005) (rejecting evident partiality challenge to AAA's administration of the arbitration); *see also Austin South I, Ltd. v. Barton-Malow Co.*, 799 F. Supp. 1135, 1145 (M.D. Fla. 1992) (rejecting claim that AAA was biased as a result of arbitrator selection and noting that such allegations are "not grounds for vacating an arbitration award under 9 U.S.C. § 10").

Rather than produce any contrary case law, MASN and the Orioles cite an inapposite hornbook and insist that MLB was responsible for the arbitration and

thus should be evaluated for evident partiality. MASN Reply at 18–20. But this attempt to bypass the *actual* arbitrators the parties chose fails. As a factual matter, the RSDC arbitrators, not MLB staff members, were the decision-makers. The record is overwhelming and unrebutted that the arbitrators decided the amount of the parties' telecast rights fees independently and on the merits, and that their decision was not influenced by MLB, their Clubs, or anyone else. R.1845–46 ¶¶ 6, 10; R.1855–56 ¶¶ 5, 9; R.1864–65 ¶¶ 5, 9.[7] Moreover, the trial court did not find MLB to be evidently partial, and instead specifically found that MLB did not usurp the arbitrators' decision-making function or improperly control or influence the arbitration process. R.30.

2. MLB's Participation in the Arbitration Was Fundamentally Fair and Consistent with the Parties' Agreement.

MASN and the Orioles alternatively maintain that even if MLB's role in facilitating the arbitration is irrelevant to the evident partiality analysis, it rendered the arbitration fundamentally unfair. *See* MASN Reply at 4, 18–20. But that argument suffers from the same problem as their evident partiality argument: The

[7] MASN and the Orioles ask this Court to draw adverse inferences against the arbitrators' unrebutted testimony merely because privilege was asserted in response to requests for production of confidential internal communications. MASN Reply at 20. The trial court upheld those privilege claims, *see* R.2874, and MASN and the Orioles did not appeal that decision or seek such an inference from the trial court, thus forfeiting this argument. *See Nash v. Port Auth. of N.Y. & N.J.*, 131 A.D.3d 164, 167 (1st Dep't 2015). They likewise cite no authority to support their contention that a party successfully asserting privilege should be punished through an inference that the privileged documents would be harmful to him.

trial court considered and *rejected* as unsupported by the record all their allegations of "denial of fundamental fairness based on MLB's support role or the informality of the procedures used." R.31. As the court explained, the support MLB provided to the RSDC was entirely consistent with "the sort of support that the parties must necessarily have expected when they entered into the Agreement." R.30. Indeed, MLB has always provided the RSDC with administrative, legal, and organizational support. R.2922–23 ¶¶ 5, 8; R.3151–52 ¶ 6. This fact is well known to all MLB Clubs, including the Orioles, who participated in an RSDC proceeding the year before they entered into the Agreement. R.2924–25 ¶¶ 11–13. And the trial court found "no evidence that MASN and the Orioles had any expectation that the three Club representatives, when acting in their capacity as members of [the RSDC], would eschew assistance from MLB's support staff to the extent customary and appropriate." R.30. MASN and the Orioles offer scant evidence to challenge those findings.

Indeed, to support their claim of MLB's purported "unfairness" and "partiality," they point only to the bare facts that MLB did not default in this litigation and that Commissioner Manfred expressed confidence that the RSDC's award would be sustained. *See, e.g.*, MASN Br. at 28–29; MASN Reply at 60. As for the former, MLB can hardly be faulted for defending itself after MASN and the Orioles filed a lawsuit accusing it of, among other things, conspiring to perpetrate a

fraud on one its Clubs. R.26. Indeed, MLB has a critical stake in defending the propriety of the RSDC's function and procedure. As for the latter, Commissioner Manfred's comments reflect not any preference for the particular result the RSDC reached, but merely his (correct) belief that the award should be sustained because the RSDC conducted a fair process in which it abided by the parties' Agreement. R.3433–37. The Commissioner's confidence in the ability of the Club owners and executives who sit on the RSDC to render a fair decision, as they have done for nearly twenty years, hardly suggests any bias toward one party or another. In all events, as the trial court correctly found, *the arbitrators*, not MLB or the Commissioner, resolved the parties' dispute. R.30.

Finally, the trial court correctly rejected MASN and the Orioles' contention that the $25 million advance MLB made to the Nationals is grounds for vacating the RSDC's award. R.32–34. That advance undisputedly was made *after* the arbitrators reached their decision, MLB Br. at 18–20, which even MASN and the Orioles seem to recognize cannot give rise to a retroactive partiality or fundamental fairness problem, MASN Reply at 62. Nor do MASN and the Orioles dispute that they were aware of the advance before it was made. R.2866 (MASN's counsel: "On this $25 million loan, . . . the record is clear, Your Honor, yes, we know about it, we knew Major League Baseball was going to make this advance."). In fact, they encouraged MLB to advance the money to keep the

Nationals in settlement talks and to postpone the date on which MASN itself would have to begin making telecast rights fees payments at fair market value as determined by the RSDC. MLB Br. at 19.

Regardless, as the trial court found, the advance will be repaid irrespective of whether the RSDC awards the amount of telecast fees proposed by MASN or the Nationals. R.33–34. This is simple math—not even MASN and the Orioles are advocating for rights fees that would pay the Nationals less than $33 million per year for five years, more than enough to pay back a $25 million advance. R.1190. It is therefore outcome neutral, and provides no support either for vacating the RSDC's award or for overriding the parties' Agreement.

C. MASN and the Orioles Cannot Collaterally Attack the Merits of the Award.

MASN and the Orioles alternatively attack the merits of the award, arguing that the arbitrators misinterpreted the Agreement and thereby exceeded their authority or manifestly disregarded the law. Only obliquely and belatedly do they acknowledge that the trial court carefully considered and categorically rejected this contention. MASN Reply at 32; *see* R.26–29. The trial court did so for good reason, as it is a cardinal rule of judicial review of arbitral awards that courts lack authority to re-weigh the evidence and reinterpret the contract.

Yet, that is precisely what MASN and the Orioles would have this Court do. Although they cast their arguments in terms of the arbitrators having "exceeded the

scope of their authority" under the Agreement and "manifestly disregarded the law," MASN Reply at 30, they are really asking this Court to usurp the RSDC arbitrators' decision-making function and revisit the merits of the arbitration. That kind of second-guessing is flatly prohibited by the FAA, as "a petition brought under the FAA is not an occasion for *de novo* review of an arbitral award." *Scandinavian*, 668 F.3d at 71; *see also Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471, 479–80 (2006) ("[W]e have stated time and again that an arbitrator's award should not be vacated for errors of law and fact committed by the arbitrator and the courts should not assume the role of overseers to mold the award to conform to their sense of justice.").

Instead, a party seeking to establish that an arbitrator exceeded its authority "bears a heavy burden. It is not enough . . . to show that the [arbitrator] committed an error—or even a serious error. . . . [T]he sole question for [the courts] is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 (2013). Thus, so long as the parties "intended for the arbitration panel to decide a given issue, it follows that the arbitration panel did not exceed its authority in deciding that issue—*irrespective of whether it decided the issue correctly*." *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 346 (2d Cir. 2010) (emphasis added).

The burden for showing manifest disregard of the law is equally demanding: MASN and the Orioles must prove "both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case." *Wien & Malkin*, 6 N.Y.3d at 481 (quoting *Wallace v. Buttar*, 378 F.3d 182, 189 (2d Cir. 2004)). When it comes to an arbitrator's resolution of a matter of contract interpretation, an award must stand so long as the arbitrator "provided even a barely colorable justification for his or her interpretation of the contract." *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 222 (2d Cir. 2002).

MASN and the Orioles cannot make either of those demanding showings. Although they quarrel with the methodology the RSDC used in resolving the rights fees dispute, they do not and cannot dispute that the Agreement authorized the RSDC to adjudicate that dispute, and instructed the RSDC to apply its "established methodology" in doing so. R.203. According to MASN and the Orioles, what that really meant was that the RSDC was obligated strictly to apply MASN and the Orioles' preferred version of the so-called Bortz methodology. MASN Reply at 30–43. But even assuming *arguendo* that their reading of the contract were correct, that would still not be a basis for vacatur. "[E]ven 'serious error' on the arbitrator's part does not justify overturning his decision, where, as here, he is construing a contract and acting within the scope of his authority." *Major League*

Baseball Players Ass'n v. Garvey, 532 U.S. 504, 510 (2001) (per curiam). In any event, as the trial 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." R.28. And MASN and the Orioles "failed to identify any well defined, explicit, and clearly applicable authority . . . that unequivocally defines the RSDC's established methodology . . . in the manner they prefer." *Id.* Accordingly, what the RSDC's "established methodology" was, and how it should be applied, were quintessential issues for the arbitrators.

As the trial court also correctly found, the RSDC provided far more than a "barely colorable justification" for its interpretation and application of the contract. *Id.* Indeed, "the arbitrators . . . set forth an extensive explanation of their determination of the appropriate methodology to apply" that was "reasonable on its face" and "more than sufficient" under the FAA. *Id.* The RSDC's award discussed in detail both sides' competing interpretations of the governing methodology. R.219–23. In assessing the "Bortz approach" that MASN and the Orioles advocated, the RSDC concluded that it was different in kind from the previous work Bortz had performed for the RSDC. R.221–22. Ultimately, the RSDC concluded that neither side's interpretation was correct, and instead explained its established methodology based on an analysis of its own precedents, industry data, and other factors raised by the parties. R.223. Because there can be

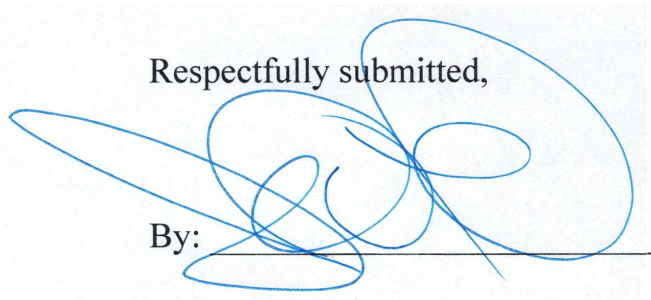
no serious dispute that the award meets the minimal "barely colorable justification" standard, the FAA prohibits MASN and the Orioles' efforts to convince this Court to second-guess the arbitrators' interpretation and application of the RSDC's own "established methodology." *See T.Co Metals*, 592 F.3d at 339.

CONCLUSION

The trial court's vacatur order should be reversed and the case should be remanded with instructions to enter an order confirming the RSDC's award.

October 24, 2016

Respectfully submitted,



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PRINTING SPECIFICATIONS STATEMENT

This computer-generated brief was prepared with Microsoft Word 2013 using the proportionally spaced typeface Times New Roman, in 14-point font, with double spacing. The total number of words in the brief, inclusive of headings and footnotes and exclusive of the cover and pages containing the table of contents, table of authorities, and this Statement, is 7,998.

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