To be Argued by:
CARTER G. PHILLIPS
(Time Requested: 30 Minutes)

APL-2020-175 and APL-2021-144
Appellate Division–First Department Appellate Case Nos.
2019-05390, 2019-05458 and 2019-05459
New York County Clerk's Index No. 652044/14

Court of Appeals

of the

State of New York

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

Appellants,

– against –

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

Respondents.

BRIEF FOR APPELLANTS

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RULE 500.1(f) DISCLOSURE STATEMENT

Appellant TCR Sports Broadcasting Holding, LLP, d/b/a Mid-Atlantic Sports Network (MASN), is a limited liability partnership formed under the laws of Maryland. MASN's current and only partners are appellant Baltimore Orioles Limited Partnership (BOLP), Baltimore Orioles, Inc., and respondent WN Partner, LLC. BOLP is a limited liability partnership formed under the laws of Maryland, and holds as an asset and operates appellant Baltimore Orioles Baseball Club. In separate capacity, BOLP is the managing partner of MASN. BOLP's managing general partner is Baltimore Orioles, Inc.

STATEMENT OF RELATED LITIGATION

Besides the Supreme Court and First Department orders under review, the First Department in 2019 addressed a partnership dispute between respondent WN Partner, LLC and appellant BOLP. The First Department affirmed an order denying WN Partner's motion for a temporary restraining order and preliminary injunction enjoining a AAA arbitration commenced by the Orioles under the parties' partnership agreement. *See WN Partner, LLC v. Balt. Orioles Ltd. P'ship*, 179 A.D.3d 14 (1st Dep't 2019).

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PRELIMINARY STATEMENT

This case arises from an arbitration before the Revenue Sharing Definitions Committee (RSDC) of Major League Baseball (MLB), personally directed by Robert Manfred, the current Commissioner of Baseball. MLB's RSDC was supposed to impartially determine the fair market value of the Mid-Atlantic Sports Network's (MASN) right to televise the Washington Nationals' baseball games for 2012-2016. But as *amicus* Kenneth Feinberg put it below, the arbitration was instead the "poster child for everything that an arbitration should not be." C.346. Among other problems, MLB and Manfred did nothing to address blatant conflicts of interest that permeated the proceeding. The resulting arbitral decision was so lopsided that it threatened MASN's viability, the future of the Baltimore Orioles (MASN's majority owner), and the Orioles' public-private partnership with Baltimore and Maryland.

Supreme Court vacated this decision for evident partiality under the Federal Arbitration Act (FAA), finding that MLB's conduct "objectively demonstrate[d] an utter lack of concern for fairness" and was "inconsistent with basic principles of justice." A.41. The First Department

unanimously affirmed vacatur. A.3756. These unappealed rulings establish that MLB, the forum selected in the parties' arbitration clause—and thus obligated to conduct a fundamentally fair proceeding—instead proved partial.

These consolidated appeals now present three questions about what should have happened next.

First, although the First Department unanimously affirmed vacatur, it splintered 2-1-2 on whether MLB's RSDC could be trusted to impartially rehear the dispute, given these facts:

- Before and during the first arbitration, MLB totally failed to address the conflicts of interest that led to vacatur. A.41-42.

- MLB created a $25 million stake in the arbitration's outcome by making a side-deal to pay that sum to the Nationals while the arbitration was pending. Under this deal, personally signed by Manfred, MLB could recover the $25 million only if the RSDC issued a decision favoring the Nationals. A.2917-18. As MLB conceded below, if the RSDC had instead sided with the Orioles and MASN, "*Major League Baseball would have been out the money*." A.3651-52 (emphasis added); *accord* A.2498.

- MLB tried to obstruct MASN and the Orioles from challenging the RSDC decision, threatening to impose the "strongest

sanctions available … under the Major League Constitution" if they went to court. A.569, 570, 574.

- MLB and Manfred locked arms with the Nationals in litigation, urging confirmation of the RSDC decision, supporting the Nationals' factual and legal positions, and disparaging MASN's and the Orioles' positions. A.1761-75, 2921-35, 3167-85, 3426-27, 3475, 3702.

- Manfred told the press that the pending litigation would not affect the dispute's ultimate outcome, declaring: "I think the agreement's clear in MASN … I think the RSDC was empowered to set rights fees. That's what they did, and I think *sooner or later MASN is going to be required to pay those rights fees*." A.3426-27 (emphasis added), 3475.

- Manfred personally directed the RSDC's evidently partial first arbitration and oversaw the MLB staff who gave the arbitrators legal advice and drafted their now-vacated decision. A.989-91, 1010, 2476, 2835-36, 2850, 2958-59, 2968, 2898-2901, 3032, 3080, 3242.

- Manfred personally appointed the RSDC members and repeatedly claimed the power to "instruct" them in their task. A.2498, 2499, 3032-33, 3670.

Given all this, two Justices would have disqualified MLB's RSDC from presiding over a rehearing: "MLB's pervasive bias and unfair conduct has infected the RSDC so as to frustrate the parties' intent to submit their dispute to a fundamentally fair arbitration." A.3825 (Acosta, P.J., dissenting). A rehearing before MLB's RSDC, they presciently predicted, would be "all but guaranteed to yield the same result." A.3791.

Two other Justices assumed that courts can disqualify biased arbitral bodies, but did not believe that remedy was warranted here. They thought it was "[s]peculation" to think "MLB [would] dictate the outcome of the second arbitration." A.3758 (Andrias, J., concurring). They reached that conclusion despite evidence that Manfred claimed authority to "instruct" the RSDC and had personally ruled on a range of disputed issues in the first arbitration. A.2498, 2499, 3032-33, 3670. And the tie-breaking Justice—despite recognizing that MLB's conduct "has been far from neutral and balanced"—concluded that courts are essentially powerless to replace "the forum the parties chose." A.3788 (Kahn, J., concurring). The result was a *per curiam* order sending the parties back to the very forum that all six Justices below agreed was evidently partial.

This was error. MLB, and Manfred personally, showed both the desire and the means to steer the arbitrators toward the pro-Nationals decision that Manfred had publicly declared both correct and inevitable. Where the parties' agreed-to arbitral forum has been found evidently partial and holds a clear interest in the outcome of the rehearing, courts possess and should exercise discretion to direct the parties to arbitrate in an alternative, neutral forum.

Disqualifying MLB on these facts would serve the New York and federal policies favoring arbitration. MASN and the Orioles are not trying to avoid arbitrating—just the opposite. They are asking to arbitrate in a fundamentally fair forum, consistent with the law's guarantees and their original expectations. Failing to designate an alternative forum in the rare case where the *forum itself* is held evidently partial would undermine the integrity of arbitration, discourage parties from agreeing to industry arbitral forums, and reduce New York's attractiveness as an arbitration center.

Second, alternatively, the second arbitral decision should have been vacated, just like the first. On rehearing, MLB again engaged in conduct

objectively inconsistent with impartiality—no surprise, because Manfred had already announced who should win and why.

Most prominently, MLB created *another* side-deal with the Nationals, involving the same $25 million. This time, MLB would forfeit the $25 million repayment if MLB did not convene a rehearing before the RSDC. A.4812-14. Predictably, MLB's RSDC then declined MASN and the Orioles' recusal motion, refusing to independently consider the question of MLB's bias and influence over the RSDC process. A.5010-14, 4815-18, 4825-27. MLB and its RSDC also refused to disclose any communications between the arbitrators and the MLB personnel whom the courts had found biased. A.4819-21, 4923-24. And Manfred continued his advocacy in the press. A.5015.

Unsurprisingly, the rehearing bore out Manfred's promise that MASN would pay the amounts declared in MLB's first RSDC proceeding "sooner or later." MLB's second RSDC decision announced a valuation nearly identical to the vacated first decision. A.4657. Yet Supreme Court confirmed this second RSDC decision, A.3857, and the First Department affirmed without meaningful analysis, A.5420.

This, too, was error. An adjudicator cannot create a side-deal with one party in which the adjudicator will receive tens of millions of dollars only if it denies the other party's recusal motion. No forum that cares about procedural integrity would do that. Given MLB's obvious prejudgment of the dispute, the RSDC members could not simply turn a blind eye to MLB's bias. At a minimum, they needed to disclose their communications with MLB about the dispute's merits. They refused, just as Manfred refused to address improper conflicts in the first arbitration. The RSDC's second decision should therefore be vacated.

Third, even if the second RSDC decision stands, Supreme Court erred by converting the RSDC's *declaratory* decision into a *monetary judgment*. Consistent with its narrow contractual mandate, the RSDC limited itself to a single subject—valuing the Nationals' telecast rights fees for 2012-2016. A.4657. The RSDC recognized that calculating the final sum MASN would owe the Nationals required another step—calculating certain offsets for prior MASN payments. A.4626, 4656. The RSDC declined to undertake that calculation because it lacked the contractual authority to enter a judgment. A.4626, 4657. Supreme Court

nonetheless entered a money judgment on the RSDC's decision, without calculating all these offsets. A.3864-65, 3913-16.

By fixing the sum MASN purportedly owes the Nationals, the judgment intrudes into an area governed by a distinct contractual dispute-resolution process, A.206, 208-09, in which the RSDC plays no role. And because it fails to calculate the necessary offsets, the judgment includes tens of millions of dollars, plus interest, that MASN does not owe. At a minimum, this judgment must be modified so it does not enlarge the RSDC's decision and give the Nationals a double recovery.

JURISDICTIONAL STATEMENT

On October 22, 2020, Appellants were served with a copy of the First Department's order dated the same day (the 2020 First Department order), with notice of entry, affirming Supreme Court's judgment confirming the second RSDC decision. A.5416. Appellants timely moved the First Department for leave to appeal on November 20, 2020. *See* CPLR 5513(b). The First Department denied leave in an order dated and entered on January 11, 2021, and the Nationals served that order with notice of entry on the same day. On February 10, 2021, Appellants timely moved this Court for leave to appeal the 2020 First Department order.

See CPLR 5602(a)(1)(i); CPLR 5513(b). This Court granted Appellants' motion for leave to appeal on September 2, 2021. A.5411-14.

On November 19, 2020, Appellants timely served and filed a notice of appeal to this Court, under CPLR 5601(d), from the 2020 First Department order, to seek review, under CPLR 5501(b), of the First Department's July 13, 2017 order. *See* CPLR 5513(a); A.5403. The Nationals moved to dismiss this appeal on December 3, 2020, contending that the 2017 order did not "necessarily affect[]" the final judgment and that Presiding Justice Acosta's two-justice dissent was not "on a question of law." CPLR 5601(d); CPLR 5601(a). This Court denied the Nationals' motion to dismiss on September 2, 2021. A.5407-10.

This Court therefore has jurisdiction to review both the 2017 and 2020 First Department orders and Supreme Court's December 9, 2019 judgment. *See* CPLR 5501(a), (b).

Supreme Court addressed the first question presented at A.42, and the First Department addressed it at A.3756. Appellants preserved this issue at C.7, 42-65.

Supreme Court addressed the second question presented at A.3832-58, and the First Department addressed it at A.5420. Appellants preserved this issue at C.445-46, 465-480, 484-89.

Supreme Court addressed the third question presented at A.3855-56, 3864, 3915, and the First Department addressed it at A.5420. Appellants preserved this issue at C.489-93.

QUESTIONS PRESENTED

1. After unanimously affirming vacatur of the first RSDC decision because of MLB's evident partiality, did the First Department err by failing to disqualify MLB's RSDC and order rehearing in a neutral arbitral forum that MLB does not control?

Answer: Yes, the First Department erred as a matter of law. MLB and its RSDC should have been disqualified because they fostered impermissible conflicts of interest, threatened to punish the Orioles and MASN for seeking judicial review of those conflicts, and then offered, through the MLB Commissioner himself, direct testimony and press statements on the dispute's merits. MLB also created for itself a financial stake in the arbitration by paying the Nationals $25 million, recoverable only

from *MASN* out of the proceeds of an RSDC decision favoring the Nationals. This all gave MLB strong financial and reputational interests in the outcome. And Manfred had boasted, and showed, that he could "instruct" the RSDC and thus control its process and results.

2. Even if the post-vacatur remand to MLB's RSDC were proper, did the courts below err by refusing to vacate the RSDC's second decision, which reached nearly the same result as the evidently partial first proceeding?

Answer: Yes. The RSDC's second decision should have been vacated for evident partiality because MLB's bias and misconduct continued into the second arbitration. MLB retained its financial entanglement by entering into a *second* side-deal with the Nationals under which MLB would lose $25 million if MLB or the RSDC recused itself. The RSDC also failed to consider whether or how MLB's bias could be kept out of the second proceeding, and failed to disclose facts relevant to bias—the substance of the arbitrators' communications with MLB personnel. Given MLB's established partiality, Manfred's public commitment to the result of the first decision, and his significant power over the clubs whose representatives sit on MLB's RSDC, no reasonable person could be surprised

that the second proceeding all but duplicated the valuation that MLB's first panel had reached under Manfred's personal instruction. The proceeding was fundamentally unfair.

3. Even if the remand to MLB's RSDC were proper and the second RSDC decision stands, did Supreme Court err by entering a money judgment on that declaratory decision?

Answer: Yes. Supreme Court lacked the power to enter a money judgment because the RSDC's second decision was merely a valuation of rights fees. The decision could not and did not award damages, which would require calculating the offsets reflecting prior profits distributions that would need to be deducted from the rights fee totals to determine the final sum MASN would owe the Nationals.

STATEMENT OF THE CASE

A. Over the Orioles' objections, MLB places the failing Montreal Expos franchise in the heart of the Orioles' exclusive Mid-Atlantic television territory.

From 1972 to 2005, the Orioles were the only MLB team in the Mid-Atlantic region. A.137, 753. With MLB's encouragement, they invested heavily in cultivating fan loyalty and commercial backing throughout the D.C. area. A.137, 1042. They also held, under MLB's Constitution, the

exclusive right to televise their games in a home television territory encompassing all or part of seven Mid-Atlantic states, including all of Maryland, Virginia, Delaware, and D.C.; no other MLB club could do so. A.196, 215, 1035, 1042.

In 1992, the State of Maryland spent $200 million to build Camden Yards, the Orioles' state-of-the-art ballpark, at a site "selected specifically to allow easy access for baseball fans from the entire [Maryland] and Washington, D.C. region." A.1036. And in 1996, the Orioles' Baltimore-based ownership group formed a regional sports network called TCR to televise their games in the seven-state region, including in the D.C. area, under the name "O's TV." A.1041. By 2004, the D.C. area accounted for more than a third of the Orioles' fan base and significant revenues, advertising, and sponsorships. A.1042, 1067-69, 1122.

But in 2004, MLB announced that it planned to move the failing Montreal Expos franchise, which MLB had run since purchasing it in 2002, to Washington, where it would become "the Washington Nationals." A.694-95, 1042. This came as a shock, since MLB had just promised the Orioles it would *not* move the Expos to D.C.—just 38 miles from Camden Yards—without the Orioles' consent. A.691, 694-95.

Valuation experts at Deloitte estimated that MLB's decision to relocate the Expos would cost the Orioles up to $30 million and TCR up to $25 million—every year, in perpetuity. A.1042-43, 1075, 1097-1101, 1148. The move would also severely damage the Orioles' public-private partnership with Maryland, Baltimore, and the Maryland Stadium Authority, which owns and maintains Orioles Park at Camden Yards and the Camden Yards complex. A.1036-37. Then-MLB Commissioner Bud Selig publicly expressed "grave concerns" about these harms, A.689, 697, recognized that "the Orioles have to be protected" and emphasized that the Orioles' concerns, A.2521-22, "do not fall on deaf ears." A.2522.

B. The parties adopt a structure to compensate the Orioles in perpetuity, including an "impartial" RSDC arbitration to resolve telecast-rights-fee disputes.

To compensate the Orioles for these ongoing harms—and to allow the Expos to gain access to the Orioles' exclusive home television territory, a vital step if MLB wanted to re-sell the franchise for a significant profit—MLB proposed a solution. *See* A.796-97, 1031-33. The Orioles' existing network, TCR, would become a partnership between the Orioles and the Expos/Nationals (who, before the settlement, had media rights only in Canada). A.1031-33, 2518-20. The partnership, rebranded as

MASN, would exclusively televise both teams' games. A.200-01, 1031-33. The Orioles would own a supermajority of MASN and would receive a supermajority share of its profits. A.204-05, 1031-33. This arrangement would empower the Orioles to earn continuing compensation for the perpetual harms caused by the Nationals' presence just 38 miles away, and avoid forcing the Orioles to disband or relocate to another community. A.1031-33, 4684-85.

The parties ultimately adopted this arrangement in a 2005 Settlement Agreement, A.200-07, 1031-33, 4684, which MLB called the "Agreement with [the] Orioles for Compensation," A.1033. Commissioner Selig emphasized to MLB's Executive Council that it was "his job to focus on the damage to the Orioles." *Id.* And MLB's press release announcing the settlement explained that it would "protect the Orioles from any adverse effects caused by the relocation of the Montreal Expos." A.4684.

The Settlement Agreement is the sole reason the Nationals can televise their games in the Orioles' home television territory, which the agreement attaches and incorporates. *See* A.196, 200-07, A.215. A key issue in negotiating the Settlement Agreement was the amount MASN would pay the Orioles and Nationals for the right to televise their games.

These "telecast rights fees" are typically a network's largest expense, and MASN is no exception.

Unlike with MASN's profits, the parties agreed that the telecast rights fees for the Orioles and Nationals would be the same. A.203. Thus, every dollar MASN pays in rights fees is split evenly between the teams, while every dollar MASN pays in profits—*after* paying the rights fees and other expenses—is split in proportion to the teams' ownership shares. A.204. So higher rights fees mean lower profits for MASN, and less compensation for the Orioles. A.203-04, 1032.

The Settlement Agreement fixed the rights-fee amounts for the first seven years. A.202. But the parties wanted a fair and impartial body to arbitrate any disputes over the fees from 2012 onwards. They designated the RSDC, a standing MLB committee composed of three representatives from MLB teams appointed by the Commissioner. A.800, 1762, 3670. Staffed and advised by MLB personnel, MLB lawyers, and MLB consultants, the RSDC "is an internal body of MLB." A.472, 474, 1762, 1845. The RSDC does not ordinarily arbitrate. Its usual role is to analyze—in a "fair, impartial and objective" manner—transactions between MLB clubs and other parties that involve baseball-related revenue (including

telecast agreements) to ensure the clubs' revenues reflect fair market value for revenue-sharing purposes. A.789, 1762, 1845, 2922.

Acting in that role, MLB's RSDC had consistently evaluated telecast rights fees using a specific, established methodology. Indeed, Commissioner Selig was "unwilling to endorse any material variation from" that approach. A.675-76; *accord* A.640, 655, 662-64, 669-70, 900. The Settlement Agreement thus provided that, if the parties could not agree on telecast rights fees for a given five-year period, they would arbitrate the dispute before MLB's RSDC, which would "determine[]" the fees' fair market value using "the RSDC's established methodology for evaluating all other related party telecast agreements in the industry." A.203.

After the Settlement Agreement was signed, MLB sold the Nationals for a $300 million profit—a margin of 200% after owning the franchise for just four years. A.144, 2996. From 2005 to 2011, MASN paid the rights-fee amounts listed in the Settlement Agreement. A.202. During this time, the Nationals' franchise value soared, reaching an estimated $1.3 billion. A.3533-34, 3586-92. MASN grew steadily in viewers and revenue, and the Orioles received their agreed-upon annual compensation through their supermajority share of MASN's profits.

C. MLB orchestrates, and then-Deputy Commissioner Manfred directs, an evidently partial arbitration before MLB's RSDC.

When it came time to negotiate rights fees for 2012-2016, the parties could not agree. MASN proposed to pay the Nationals annual sums ranging from around $34 million in 2012 to about $45.6 million in 2016, a significant increase from 2011's $29-million-per-year figure. A.1048, 1169, 1182. These amounts were calculated by the same industry expert who developed the RSDC's established methodology for MLB and performed all the RSDC's own telecast-rights-fee evaluations up to that time. A.1169-71. But the Nationals demanded almost $120 million per year, A.237—more than even the New York Yankees or Los Angeles Dodgers received in much larger markets. And since the Settlement Agreement requires MASN to pay the Orioles and Nationals the same amount of telecast rights fees, A.203, the Nationals' $120 million demand necessarily envisioned MASN paying $240 million per year—more than MASN's total revenues, then and now. *See* A.1204, 5643.

The parties submitted the dispute to the RSDC for arbitration. The RSDC's three members at the time were hand-picked by then-Commissioner Selig.

MLB corrupted the arbitral process. MLB let its own law firm, Proskauer Rose, concurrently represent (i) the RSDC arbitrators or their business interests, (ii) MLB in dozens of other matters, and (iii) MLB's Commissioner himself, while also representing the Nationals before MLB's RSDC against MASN and the Orioles. A.35, 2568-70, 2573-2760, 2903-05. Many of these overlapping representations involved the same individual Proskauer lawyers who were representing the Nationals. A.36, 2568-70, 2573-2760, 2903-05. Yet MLB refused to disclose the nature and extent of these overlapping and disqualifying relationships, or take any steps to correct this obvious unfairness.

Manfred was directly responsible for MLB's refusal to address these conflicts. At the time, Manfred was MLB's Deputy Commissioner and Commissioner Selig's protégé. A.682, 684, 686-87. Manfred personally responded to, and denied, MASN's and the Orioles' objections to these conflicts of interest. A.2476, 2830, 2937-38, 2941, 2945, 2950. The RSDC arbitrators later attested that they had not been made aware of these objections or Manfred's refusal to address them. *E.g.*, A. 1851-53, 1861-62, 1870.

Manfred also ruled on other procedural issues, including the form and content of the parties' submissions, the arbitral procedures, the parties' disclosure obligations, and what evidence to submit. A.989-91, 1010, 2476, 2833, 2945, 2958-59, 2968, 2979. The arbitrators were not even present for these rulings. During the arbitral hearing, Manfred sat with the arbitrators and questioned the parties. A.2942.

As MLB later disclosed, MLB staff, including Manfred, were also "acting as counsel to the RSDC" and "giving them legal advice." A.2835-36, 2850, 2881, 2896, 2898-2901 (MLB's privilege log showing MLB staff's "legal advice to RSDC re issues raised in the Nationals-MASN future telecast rights fees dispute"). Indeed, MLB staff drafted the RSDC's decision. A.2922, 2934. In Manfred's words, "we wrote the whole thing." A.2956; *see* A.3080, 3242 (MLB staff circulating decision drafts). MLB staff even told the RSDC when the decision would be released. A.2889.

D. MLB and Manfred create a $25 million stake in the outcome of their own RSDC proceeding.

Although the arbitral hearing occurred in early 2012, the dispute remained pending before the RSDC without decision until mid-2014. A.568-69. During this time, MASN paid the Nationals telecast rights fees calculated using the contractually mandated methodology, which came

to almost $34 million for 2012 alone. A.1182. It also made profits distributions to the Nationals and the Orioles based on the amount of revenue remaining after these (and other) expenses. A.1053.

But MLB had told the Nationals that a draft RSDC decision existed, which valued the rights fees at roughly $20 million more per year than MASN was paying. A.2038-40. The Nationals pushed MLB to release the draft and MASN to increase payments accordingly. *Id.*

Manfred responded with a startling choice. In August 2013, MLB paid the Nationals $25 million—the difference between the amounts MASN was already paying in telecast rights fees and profits and the higher amounts contemplated in the unissued draft. This payment was documented in a letter agreement signed by Manfred providing that "if the RSDC issues a decision that covers 2012 and/or 2013, any payments from MASN otherwise due to the Nationals will be made first to [MLB] to cover" the $25 million, plus interest. A.2917-18. As MLB's counsel said below, the Nationals would "never have to repay these funds … no matter what happens with the RSDC"; rather, "the funds would [be] paid, *by MASN*, to [MLB], to recoup what [MLB] had laid out." A.2844 (em-

phasis added), A.2041 (MLB "will not look to the Nationals for repayment"). In other words, MLB paid a $25 million advance to one party to an arbitration that MLB was conducting, repayable *by the other party* from the proceeds of any future decision in the first party's favor.

Manfred personally arranged this payment, and later sought to secure "protection on the $25 million"—*i.e.*, to ensure repayment. A.2498. In these discussions, Manfred made clear his influence over the RSDC process, referring to "the way *we* approached the RSDC review," A.3032 (emphasis added), and suggesting that he could "eliminate the potential for 'adverse precedent'" by stopping the RSDC decision from issuing, A.2498, or that he could give "new instructions to the RSDC" or "fresh instructions" in a new arbitration, A.2499, 3032-33.

MASN and the Orioles did not learn the amount of this payment until late 2013, and did not learn that any repayment terms existed (or what those terms were) until early 2014. A.2408, 2409-10. Until then, they believed MLB was funding this payment itself because Manfred said precisely that: MLB would "fund the entire cost of the resolution," and "[MLB] would not ask [the Orioles] for anything." A.2496.

E. MLB releases its first RSDC decision, which erases MASN's profits and thus destroys the Orioles' ongoing compensation.

MLB issued the RSDC decision in June 2014. A.216-235. The decision applied a new methodology, entirely different from the "established methodology" mandated by the Settlement Agreement. *Compare* A.675-676, 5046, *with* A.216-35. Relying on a November 2011 letter by Manfred, A.220, 970, the decision declared the rights fees' fair market value to be roughly $60 million per team per year—$20 million more than MASN calculated and paid using the RSDC's established methodology.[1] *Compare* A.234, *with* A.1182 *and* A.1048. This new amount was so high that it would erase virtually all of MASN's profits, eliminating the Orioles' annual compensation under the Settlement Agreement for the Nationals' continued presence and threatening MASN's economic viability. In turn, the RSDC decision threatened the Orioles' competitiveness, economic viability, and ability to remain in Baltimore. A.1055, 1176.

[1] Manfred's November 2011 letter, A.220, 970, contradicted a December 2010 letter that Manfred wrote before the dispute arose, which accurately described the established methodology. A.5046.

F. The Nationals cast the deciding vote to make Manfred Commissioner.

Manfred succeeded Selig as Commissioner in 2015. He became Commissioner when, after he first failed to secure the 23 votes required from the 30 MLB clubs, the Nationals' owners switched positions, casting the decisive vote in Manfred's favor. A.684-85, 1888. As an executive of another MLB club later revealed, Manfred's faction "cut a deal with the owners of the Nationals, as it related to MASN, and their fight with the Orioles … there were some commitments made to how that would go down, and the Nationals therefore changed their vote."[2] Manfred remains Commissioner today.

G. MLB and Manfred try to block MASN and the Orioles from seeking judicial review, then litigate against them in tandem with the Nationals.

After issuing the RSDC decision, MLB tried to obstruct MASN and the Orioles from exercising their rights under the FAA to seek judicial review. MLB threatened to impose the "strongest sanctions available … under the Major League Constitution" if they challenged the decision in

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[2] The Dan Le Batard Show with Stugotz, *Local Hour: David Samson's Top 5 Mutinies*, at 26:55-31:06 (May 20, 2021), *available at* https://poorstuart.com/podcast-episode/Dan-Le-Batard/Local-Hour-David-Samsons-Top-5-Mutinies-/444805/

court, A.569-70, and purported to "direct[]" MASN to "make the payments due and owing to the Nationals," A.574. Even so, MASN (supported by the Orioles) brought this special proceeding, asking Supreme Court to vacate the decision and disqualify MLB and the RSDC from conducting any post-vacatur rehearing. A.122.

MLB responded by purporting to "order[]" them "to withdraw" their court filings and "forbidd[ing]" them from filing any more documents "in any court." A.570. And MLB again threatened "sanctions," "not limited to monetary penalties"—suggesting MLB might try to strip the Orioles' franchise from its Baltimore-based owners. A.577.

MASN and the Orioles thus sought a preliminary injunction, which Supreme Court granted, to stop MLB or the Nationals from terminating the contract or otherwise interfering while the court considered these issues. A.408. The Nationals responded by seeking confirmation of the RSDC decision. A.1910.

MLB and its most senior officials participated directly in the litigation, urging Supreme Court to deny the vacatur motion and confirm the RSDC decision. Manfred personally filed three affidavits supporting the

Nationals' litigation positions. A.1761-75, 2921-35, 3167-85. Those affidavits attacked MASN's arguments with venom, describing them as "false," "groundless," "baseless," "inaccurate," and "misleading." A.3167-85. Manfred also took a position on the key merits question in the arbitration, attesting that MASN's interpretation of the Settlement Agreement "does not conform to the text." A.3181.

Manfred also took sides in the press. As one journalist reported, Manfred said: "I think the agreement's clear in MASN … I think the RSDC was empowered to set rights fees. That's what they did, and I think *sooner or later MASN is going to be required to pay those rights fees*." A.3426 (emphasis added); 3475. Unsurprisingly, journalists reported Manfred to be "lay[ing] down the gauntlet [for] MASN," A.3429, saying that MASN "eventually will be forced to pay" the increased telecast rights fees, A.3475, and "sid[ing] with the Nationals," A.3702.

During the litigation, Manfred also hand-picked three new RSDC members to replace the ones who participated in the first arbitration. A.3670 (Manfred: "I have selected" them). MLB relied on the RSDC's new membership to argue against disqualifying it.

H. Supreme Court vacates the first RSDC decision for evident partiality because MLB and Manfred displayed an "utter lack of concern for fairness."

Supreme Court vacated the RSDC decision. Justice Marks held that MLB's total inaction in response to the Proskauer conflicts "objectively demonstrate[d] an utter lack of concern for fairness of the proceeding" that was "completely inconsistent with basic principles of justice." A.41. But the court did not think MLB's $25 million arrangement "actually prejudiced" MASN and the Orioles, because (i) the amount reflected the "planned" RSDC decision, and (ii) even if the amount were reduced, it would probably still be large enough for the Nationals to repay MLB. A.32-34.[3] And in a footnote, the court asserted that it lacked authority to disqualify MLB from presiding over the rehearing. A.42.

I. The First Department unanimously affirms vacatur because of MLB's partiality, but splits on whether to disqualify MLB's RSDC.

MASN and the Orioles appealed Supreme Court's failure to disqualify MLB. A.44. The Nationals—again joined by MLB—cross-appealed vacatur and the denial of confirmation. A.76, 87.

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[3] As explained below in § I.B.2.c, this reasoning misunderstood the $25 million deal's repayment terms (A.2917-18).

MASN and the Orioles explained that, with the RSDC decision vacated but the dispute headed back to MLB, the $25 million arrangement became even more problematic: Because the $25 million amount was based on the now-vacated decision, MLB could not recover this money unless the RSDC produced the same result on remand. *E.g.*, C.51. If the RSDC declared a lower amount, in line with MASN's arguments, MLB would be—in its own counsel's words—"out the money." A.2845.

In response, the Nationals' counsel promised the First Department panel at oral argument that they would "post a bond to guarantee repayment of" MLB's $25 million. A.3781, 3815. The Nationals' briefing did not mention any bond or its terms.

The First Department unanimously affirmed vacatur, but split 2-1-2 on whether to disqualify MLB from rehearing the dispute. Because there was no majority for any opinion, the court entered a brief *per curiam* order, A.3756, leaving the Justices' respective reasoning to three separate opinions.

All five Justices agreed that Supreme Court properly vacated the RSDC decision because of MLB's evident partiality. The two-Justice plu-

rality (Andrias and Richter, JJ.) explained that MLB's conduct was "inconsistent with impartiality": "MLB failed to exercise what power it had to ensure confidence in the fairness of the proceedings." A.3773. The one-Justice concurrence (Kahn, J.) agreed that vacatur was proper because MLB's conduct was "far from neutral and balanced." A.3788. And the two-Justice dissent (Acosta, P.J., and Gesmer, J.) agreed that the decision "was properly vacated due to evident partiality," because MLB "refused to take any steps to correct [the] obvious unfairness" in the arbitral process. A.3792. But the Justices could not agree on a remedy, or even how to analyze the remedy question.

The plurality concluded that "even if" courts have the power "to protect fundamental fairness by sending the arbitration to a new forum in an exceptional case," that remedy was not justified here. A.3775. MLB's "lack of concern for the fairness of the first proceeding" was a "defect [that had] been remedied," the plurality said, because the RSDC had new members and the Nationals had new lawyers. A.3780. The plurality also reasoned that because the parties deliberately chose the RSDC as arbitrators, they knew MLB would be involved. A.3779. And the plurality

accepted and relied on the Nationals' promise to post a bond to "guarantee repayment" of the $25 million. A.3781.

The concurrence concluded that the courts had no power to disqualify MLB unless the initial agreement to arbitrate was *procured* through "an established ground for setting such agreement aside, such as fraud, duress, coercion or unconscionability." A.3788. On this view, no amount of post-agreement misconduct could warrant disqualification.

The dissent would have disqualified MLB and referred the dispute to the American Arbitration Association (AAA) as a neutral forum. A.3817. Presiding Justice Acosta explained that the concurrence was wrong to conclude that courts categorically lack the power to disqualify partial arbitral actors, citing cases granting precisely that relief. A.3805, 3809-11, 3817. Any other rule, he observed, would lead to "an endless loop of partial arbitrations, vacaturs, and remands." A.3793. And disqualification was warranted because "MLB's pervasive bias and unfair conduct has infected the RSDC so as to frustrate the parties' intent to submit their dispute to a fundamentally fair arbitration." A.3825. This was so because of several "unique circumstances":

1. "MLB's apparent lack of concern for fairness at the first proceeding";

2. "MLB's refusal to address the Orioles' complaints of the unfairness created by Proskauer's multiple roles";

3. "MLB's direct monetary stake in the outcome of the dispute as a result of its $25 million loan to the Nationals";

4. "MLB has actively opposed MASN's claims by threatening sanctions for pursuing a judicial remedy, disparaging the claims, and making clear its view that MASN's reading of the [Settlement Agreement] is incorrect";

5. "MLB has actively supported the Nationals' attempts to confirm the award and/or compel a rehearing before the RSDC";

6. "MLB's continued defense of the original arbitration award which all members of this bench agree was affected by evident partiality"; and

7. "evidence of the current Commissioner's [Manfred's] personal involvement in the prior arbitration, including the drafting of the vacated award and his publicly stated views about the dispute."

A.3812.

Presiding Justice Acosta also explained that the plurality's reliance on the RSDC's new membership was misplaced "because MLB retains its significant influence over the panel." A.3816. Indeed, the plurality itself recognized that "MLB … [had] significant influence over the arbitration process" and that "MLB staff would provide administrative, organizational and legal support, including analyzing financial information and

preparing draft decisions." A.3779. And, the dissent pointed out, Manfred's "influence on the [RSDC] panel, including his ability to marshal and exclude evidence and draft an award, remains substantial." A.3816. Finally, the dissent explained that the court "should not countenance" the Nationals' "unpreserved" promise to post a $25 million bond, "raised for the first time at oral argument," which in any event did not address the other evidence of bias. A.3815.

The dissent would thus have referred rehearing to the AAA, "the logical choice given that … the parties' agreement selected the AAA as a catchall to arbitrate disputes that were not specifically covered by other clauses in the contract." A.3817; *see* A.209. And the dissent closed with a prescient prediction: "it is highly unlikely that the RSDC would come to a different conclusion if it were to rehear the case." A.3816.

J. In collaboration with MLB and Manfred, the Nationals renege on their promise to the First Department to remove MLB's $25 million stake in the arbitration.

Despite having prevailed in the First Department in part by promising to "post a bond to guarantee repayment of" the $25 million, A.3781, 3815, the Nationals never did so. Instead, MLB and the Nationals made

another side-deal. The Nationals "agree[d] to re-pay" MLB the $25 million (plus interest) "not less than ten (10) business days before the RSDC commences a hearing on the 2012-2016 rights fees, which amount shall be held in escrow by [MLB] until, and shall automatically be released from such escrow upon, commencement of such hearing." A.4813. The agreement continued: "If, however, such hearing does not so commence within 14 days of its scheduled commencement, the Required Payment shall promptly be returned in full to the Nationals." *Id.* Thus, if MLB's RSDC did not rehear the dispute, MLB would not recover $25 million.

K. MLB conducts its second biased arbitration before Manfred's hand-picked RSDC panel, which reaches the same result that Manfred directed before.

After signing this new $25 million deal—but without mentioning it—MLB informed MASN and the Orioles that it intended to reconvene its RSDC, now composed of Manfred's three hand-picked replacement arbitrators. A.3670, 4456. The Orioles and MASN immediately responded by objecting to any new RSDC proceeding, including because MLB still had a $25 million stake in the outcome. A.5010-14. Only then did the Nationals reveal the new deal conditioning repayment of the $25 million on MLB holding an RSDC hearing. A.4812-14.

This new deal had a predictable effect. With MLB determined to go forward, MASN and the Orioles made two requests to try to address MLB's bias: (1) MLB and its RSDC should recuse themselves, or (2) given MLB's significant influence over the RSDC process, MLB and its RSDC should at least disclose any substantive communications between the RSDC members and the very MLB officials whose conduct the courts found evidently partial. A. 4815-18, 4884-93, 4896-99, 4901-03, 4920-22, 5010. Both requests were denied—even though MLB admitted that its officials were communicating with Manfred's chosen RSDC members. A.4819-21, 4825-26, 4923.

As Presiding Justice Acosta predicted, MLB's second RSDC reached the same result as its first. Relying on the very same November 2011 letter by Manfred as the first decision, A.220, 970, 4636, Manfred's hand-picked RSDC panel valued the telecast rights fees around $59.4 million per year—within 0.2% of the first decision Manfred directed. *Compare* A.234, *with* A.4657.

MLB's RSDC did, however, properly recognize one limit on its authority. The panel explained that, because the RSDC's "authority runs no further than determining the fair market value of the rights at issue,"

it "lacks authority to enter a judgment." A.4626; *accord* A.4617, 4657. Indeed, the Nationals never submitted a damages calculation, prayer for relief, or *ad damnum* statement to the RSDC. A.5760, 5819, 5858.

L. The courts below confirm the second RSDC decision but expand it to include a money judgment.

Supreme Court (Cohen. J.) confirmed the second RSDC decision. A.3832-3858. As to the $25 million agreement, the court said it was "not a secret" because MASN and the Orioles were told about it "after it was signed." A.3847.

Supreme Court also said the new $25 million side-deal removed any stake in the arbitration's outcome, and that any resulting disincentive for MLB's RSDC members to recuse themselves was irrelevant because the RSDC was "mandated" to hear the dispute. A.3847. As to MLB's disclosure obligations, the court agreed that Manfred's public statements were "troubling," but deemed them not "sufficient to throw into doubt the fairness" of the second arbitration that reached the same result as the vacated first decision. A.3851-52.

Supreme Court then entered a money judgment based on the second RSDC decision. MASN and the Orioles moved for reargument, ex-

plaining that a money judgment was improper because the RSDC decision merely declared the telecast rights fees' fair market value. Supreme Court granted reargument, describing its authority to enter a money judgment as a "close" question. A.3871, 3873, 3876, 3899. But the court adhered to its earlier decision and awarded the Nationals just over $105 million. A.3864, 3915. This amount reflects the RSDC's fair-market-value declaration, minus the rights fees MASN already paid—but it does not account for the higher profits distributions MASN paid the Nationals as a result of the previously lower rights fees. *See* A.4656. The judgment (whose enforcement is currently stayed) thus includes a double recovery of roughly $30 million.

After a delay during the Covid-19 pandemic, the First Department affirmed in a two-page opinion. In contrast to the prior panel's thorough opinions, the new panel's entire reasoning on confirmation was this:

> Petitioner failed to establish evident partiality in the RSDC in the second arbitration. Moreover, we reject petitioner's arguments that the RSDC otherwise violated its obligations, exceeded its powers or denied petitioner a fair hearing. To the extent petitioner makes arguments about the RSDC's ability to be impartial that it did not advance in the prior appeal, we reject them.

A.5420. On the validity of the money judgment, the court merely cited a prior Appellate Division decision without explaining its relevance. *Id.*

These appeals followed, bringing up for review the First Department's split decision remanding to the RSDC, Supreme Court's money judgment, and the First Department's decision affirming confirmation and the money judgment.

ARGUMENT

I. After vacating MLB's first RSDC decision for evident partiality, the courts below should have disqualified MLB's RSDC from the rehearing.

After vacating the first RSDC decision because MLB "objectively demonstrate[d] an utter lack of concern for fairness," A.41, the courts below should have followed that determination to its natural conclusion: MLB could not be trusted to conduct a fair and impartial rehearing of the same dispute. Courts have established authority under the FAA to require that a new arbitrator replace an arbitrator whose evident partiality led to vacatur. That is true even if the first arbitrator is named in the arbitration clause. And though the issue rarely arises for arbitral *forums*—no doubt because most are scrupulously neutral—courts can also disqualify a biased forum like MLB's RSDC. This is a narrow rule for a rare situation, but this case illustrates its necessity.

A. The FAA empowers courts to ensure a fair process by disqualifying an arbitral forum whose bias led to vacatur.

As Presiding Justice Acosta observed, there is "no real dispute that courts are empowered to substitute a contractually chosen arbitrator where there is evidence of a conflict or bias." A.3808. And that power, he explained, extends to disqualifying the parties' chosen "arbitral forum" if the forum's proven bias "undermine[s] the reasonable expectations of the parties to have a fundamentally fair hearing." A.3810.

This power reflects the basic principle that arbitration proceedings must be fundamentally fair. In the FAA, Congress "provide[d] not merely for *any* arbitration but for an impartial one." *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 147 (1968). "Precisely because arbitration awards are subject to [significant] judicial deference, it is imperative that the integrity of the process, as opposed to the correctness of the individual decision, be zealously safeguarded." *Matter of Goldfinger v. Lisker*, 68 N.Y.2d 225, 230 (1986); *accord Commonwealth Coatings*, 393 U.S. at 149. Thus, an arbitral tribunal must "grant the parties a fundamentally fair hearing," *Bell Aerospace Co. v. Local 516*,

500 F.2d 921, 923 (2d Cir. 1974), and courts must "ensure that fair treatment is afforded" to arbitral parties, *U.S. Elecs., Inc. v. Sirius Satellite Radio, Inc.*, 17 N.Y.3d 912, 914 (2011).

Two FAA provisions reflect this basic policy: Section 10, which governs review and vacatur of arbitral awards; and Section 2, which makes arbitration clauses enforceable—or unenforceable—on the same grounds as other contractual provisions. Courts have applied both of these federal provisions (and their New York analogues) to disqualify biased arbitral actors, including those named in the arbitration agreement. This Court should do the same.

1. FAA Section 10(b) confers the power to order rehearing before a new arbitral panel.

Section 10 empowers a reviewing court to "make an order vacating [an arbitral] award" on specified grounds and, after vacatur, to "direct a rehearing by the arbitrators." 9 U.S.C. § 10(a), (b). Congress thus "impressed limited, but critical, safeguards onto [the arbitral] process" by creating a "confirmation and vacatur safety net" that parties cannot waive. *Hoeft v. MVL Group, Inc.,* 343 F.3d 57, 63 (2d Cir. 2003), *overruled on other grounds by Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008). These protections "ensure a minimum level of due process for

parties to an arbitration." *In re Wal-Mart Wage & Hour Emp't Practices Litig.*, 737 F.3d 1262, 1268 (9th Cir. 2013).

Section 10's "safeguards against arbitral abuse," *id.*, include a reviewing court's power, "in its discretion, [to] direct a rehearing." 9 U.S.C. § 10(b). "[C]ourts have discretion" under this provision "to remand a matter to the same arbitration panel or a new one." *Sawtelle v. Waddell & Reed, Inc.*, 304 A.D.2d 103, 117 (1st Dep't 2003). Every federal court of appeals to address the issue has so held.[4]

Courts also agree that a "different arbitrator should be appointed on remand if an award is vacated due to [the] arbiter's partiality." 4 THOMAS H. OEHMKE, COMMERCIAL ARBITRATION § 131:17 (2016 update); *e.g.*, *Matter of Excelsior 57th Corp. (Kern)*, 218 A.D.2d 528, 529 (1st Dep't 1995) (disqualifying a party-appointed arbitrator from rehearing because he "already heard the evidence" and "displayed extreme partisanship"); *Stroehmann Bakeries*, 969 F.2d at 1446 (court properly ordered "*de novo*

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[4] *See Kashner Davidson Sec. Corp. v. Mscisz*, 601 F.3d 19, 25 (1st Cir. 2010); *Aircraft Braking Sys. Corp. v. Local 856*, 97 F.3d 155, 163 (6th Cir. 1996); *Stroehmann Bakeries, Inc. v. Loc. 776*, 969 F.2d 1436, 1446 (3d Cir. 1992); *Pitta v. Hotel Ass'n of New York City, Inc.*, 806 F.2d 419, 422 (2d Cir. 1986); *Grand Rapids Die Casting Corp. v. Loc. Union No. 159*, 684 F.2d 413, 416-17 (6th Cir. 1982); *Hart v. Overseas Nat'l Airways Inc.*, 541 F.2d 386, 394 (3d Cir. 1976).

hearing before a different arbitrator" where arbitrator was "biased or partial"). And with good reason. First, if "the first award [was] vacated because of … partiality[,] the arbitrators would then have shown themselves to be unfit to be judges, and it would be a clear abuse of discretion to trust them further." *Hyman v. Pottberg's Ex'rs*, 101 F.2d 262, 266 (2d Cir. 1939) (L. Hand, J.). Second, the arbitrators have already heard the evidence and reached a decision colored by the earlier proceeding's bias. They would thus come to the new arbitration with predetermined views. *See Kern*, 218 A.D.2d at 529; *Aircraft Braking*, 97 F.3d at 162-63.

These principles apply equally to arbitrators specifically named in the parties' agreement. For example, in *Pitta*, a trade association and a union had appointed Mr. Cass as "permanent umpire" to resolve all disputes between them. 806 F.2d at 420-21. When the union purported to dismiss Cass from that role, the association asked him to arbitrate "whether he had been validly dismissed." *Id.* at 421. He unsurprisingly concluded that he still had the job. The district court vacated his ruling, and the Second Circuit ordered a new arbitration "before a different arbitrator," *id.* at 420, because Cass's "impermissible self-interest" created "evident partiality," *id.* at 423.

This case presents the same fundamental issue as *Pitta*. Here, the *arbitral forum* named in the parties' clause, rather than a named *arbitrator*, was found evidently partial. But the same reasoning and result should apply. If the forum has "shown [itself] to be unfit," *Hyman*, 101 F.2d at 266, replacing the forum is equally necessary to "ensure a minimum level of due process," *Wal-Mart*, 737 F.3d at 1268.

To be sure, forum bias rarely arises, because arbitral forums carefully safeguard their disinterested role. But in that rare situation, courts can and should replace a biased forum with a neutral arbitral body. For example, in *Rabinowitz v. Olewski*, the parties, members of the Diamond Dealers Club (DDC), agreed to arbitrate any disputes inside this industry organization. 100 A.D.2d 539 (2d Dep't 1984). But after a dispute arose and they initiated arbitration, a "highly inflammatory letter" about one of the parties "was circulated among the membership of the DDC," accusing him of crimes and terrorist links. *Id.* at 539. The court thus disqualified the entire organization and "ordered the arbitration to continue before an independent arbitrator": Because the resulting bias "permeate[d] the entire DDC," "removing the arbitration" from the group was the proper remedy. *Id.* at 540.

Although *Rabinowitz* applied New York law, it drew on the U.S. Supreme Court's decision in *Commonwealth Coatings*, *see id.*, and in any event, "no significant distinction can be drawn between the policies supporting the FAA and the arbitration provisions of the CPLR," *Smith Barney, Harris Upham & Co. v. Luckie*, 85 N.Y.2d 193, 205-06 (1995). And again, cases applying the FAA have held that once "bias" has been found, a court can "formulate an appropriate remedy," including appointing "a new arbitrator" if necessary, *Hart*, 541 F.2d at 394; *accord Aircraft Braking*, 97 F.3d at 162. The federal case law thus tracks New York case law. Both bodies of precedent support the courts' power to ensure that biased actors will not remain in a position to undermine "the integrity of the process." *Goldfinger*, 68 N.Y.2d at 231.

Presiding Justice Acosta recognized this principle and its proper application here, as well as the problems a contrary rule would cause. Any other approach would require a vacating court to remand the matter to a forum that has already "shown itself to be unwilling to guarantee a baseline of impartiality." A.3793. Indeed, he explained, "it would be far-

cical to permit an arbitration to proceed in an arbitral forum whose administrator has signaled an intent to do everything in his or her power to compel a particular result." A.3807.

Presiding Justice Acosta was correct. This Court should confirm that once a party has cleared the "very high" bar of showing that vacatur is warranted because of the *arbitral forum's* evident partiality, *see U.S. Elecs.*, 17 N.Y.3d at 915, Section 10(b) empowers a court to order rehearing before a new arbitral panel, or in a new arbitral forum, to ensure an impartial adjudication.

2. FAA Section 2 confers the power to reform an arbitral agreement to avoid frustrating the parties' intent to conduct a fair proceeding.

Section 2 of the FAA provides that an arbitration clause is valid and enforceable, "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Thus, "an agreement to arbitrate shall not be enforced when it would be invalid under general contract principles." *Aviall, Inc. v. Ryder Sys., Inc.*, 110 F.3d 892, 896 (2d Cir. 1997). In turn, "courts applying the FAA have the power in egregious cases to remove an arbitrator or reform an arbitration agreement, even

pre-award, where an arbitration clause is invalid under general contract principles." A.3811 (Acosta, P.J., dissenting).

Courts have applied this principle, including in the professional-sports context, to replace a contractually designated arbitrator whose "unanticipated and unintended" bias would otherwise "frustrat[e] … the parties' contractual intent to submit their dispute to a neutral expert." *See Aviall*, 110 F.3d at 896. For example, in *Erving v. Virginia Squires Basketball Club*, the parties' contract provided that any dispute would be arbitrated by the Commissioner of the American Basketball Association. 349 F. Supp. 716, 718 (E.D.N.Y.), *aff'd*, 468 F.2d 1064 (2d Cir. 1972). But when a dispute arose, the new Commissioner was a partner in the defendant's law firm. *Id.* at 719. The district court thus held that the "arbitration should proceed before a neutral arbitrator," *id.*, and the Second Circuit agreed that a substitution "to insure a fair and impartial hearing" was required "in spite of the contract clause naming the Commissioner as arbitrator," 468 F.2d at 1067 & n.2; *see Aviall*, 110 F.3d at 896 (*Erving* "reformed the contract by substituting a neutral arbitrator").

Morris v. New York Football Giants, Inc., 150 Misc. 2d 271 (Sup. Ct. N.Y. Cnty. 1991), is similar. The parties' agreement "expressly provide[d] that [their] disputes be submitted to the Commissioner of the NFL" for arbitration. *Id.* at 276. But the NFL Commissioner had previously advocated against the players' positions in the dispute. *Id.* at 277. He was also named as a defendant in the underlying action. *Id.* The court held that the Commissioner's "past advocacy of a position in opposition to plaintiffs' position herein, deprive[d] him of the necessary neutrality to arbitrate these claims." *Id.* To rule for the plaintiffs, he "would have to reverse certain positions he previously strongly advocated, and declare non-binding or void a certain directive he, through his office, issued." *Id.*

Courts have also applied Section 2 based on a party's material breach of a contractual obligation to provide a fair arbitral process. *See Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999). In *Hooters*, the arbitral agreement made the company "responsible for setting up [an arbitral] forum by promulgating arbitration rules and procedures" for disputes with its employees. *Id.* at 938. But the company adopted a "bi-

ased" system that (among other things) gave it total control over arbitrator selection, allowing it to choose "partial arbitrators." *Id.* at 939. This materially breached the parties' agreement "to submit their claims to arbitration—a system whereby disputes are fairly resolved by an impartial third party." *Id.* at 940. The court thus rescinded the arbitration clause. *Id.*

These cases show that Section 2 authorizes courts to reform an arbitral agreement to replace a named arbitrator with a neutral one, *e.g.*, *Erving*, 468 F.2d at 1067 & n.2, or to disqualify a named arbitral body to ensure the parties' dispute is "fairly resolved by an impartial third party," *Hooters*, 173 F.3d at 940.

* * *

None of this means replacing arbitral forums should be common. It is, and should be, rare. But when a party challenging an arbitral decision has already carried its heavy burden to prove the forum's evident partiality, replacing the forum will ordinarily be justified too. To again quote Judge Hand, where "the first award [was] vacated because of … partiality[,] the arbitrators would then have shown themselves to be unfit to be judges, and it would be a clear abuse of discretion to trust them further."

Hyman, 101 F.2d at 266. The same holds true for a forum charged with preserving the integrity of an arbitration proceeding, but which instead acts in a manner "inconsistent with basic principles of justice"—as MLB did. A.41. That forum should not be trusted further.

B. Under either standard, MLB's RSDC should have been disqualified because it could not be trusted to conduct a fair rehearing.

Under either Section 10(b) or Section 2, sending this dispute back to the RSDC was wrong. MLB had already shown itself to be biased, to have prejudged the dispute's merits, to have significant interests in the outcome, and to exert significant control over the RSDC process. The record confirms that this bias was not and could not be cured on remand. The courts below should thus have disqualified MLB's RSDC and ordered rehearing before a neutral arbitral body.

Although this kind of remedy is discretionary, there was no exercise of discretion below to which this Court could defer. Supreme Court mistakenly believed it lacked any authority to disqualify the RSDC, *see* A.42, and the First Department merely entered a barebones *per curiam* order declaring the outcome because no opinion garnered a majority (and the tie-breaking concurrence believed the court had no remedial discretion),

A.3756, 3788-89. Thus, the courts below "summarily rejected an application by a party for a discretionary remedy without in any way exercising [their] discretion with regard thereto," presenting a question of law for this Court's *de novo* review. ARTHUR KARGER, POWERS OF THE N.Y. COURT OF APPEALS § 16:4 (Sept. 2021 update). Regardless, remanding to the RSDC was an abuse of discretion as a matter of law.

1. Disqualifying a partial actor is the rule, not the exception.

The plurality below treated MLB's evident partiality as a sort of technical "defect" that could be "remedied" by replacing the individual arbitrators and the Nationals' counsel. A.3780. But as just explained, a finding of evident partiality means "a reasonable person would have to conclude that" the actor in question—here, MLB—"was partial." *U.S. Elecs.*, 17 N.Y.3d at 914. So once a court has found evident partiality, the question is not whether there is some *additional* reason to disqualify the actor on remand, but whether there is some compelling reason *not* to do so. In this situation, it would be "anomalous *not* to direct" rehearing before a new tribunal. *See In re First Nat'l Oil Corp. (Arrieta)*, 2 A.D.2d 590, 592-93 (2d Dep't 1956) (emphasis added); *Hyman*, 101 F.2d at 266. And MLB made no showing to justify departing from this default; it just

replaced one set arbitrators with another hand-picked by Manfred. In any event, as explained next, the record confirms that MLB could not be trusted to conduct a fair rehearing.

2. MLB's and Manfred's conduct proved they could not be trusted to direct a fair rehearing.

Presiding Justice Acosta observed that he could not "recall having previously encountered such a confluence of factors that call for judicial intervention in an arbitration." A.3790-91. He was right—this is the rare case where courts must step in to ensure the integrity of arbitration. At the time of the first appeal, when the court considered whether to remand the case to MLB, the record showed that (in Presiding Justice Acosta's words):

- MLB "refused to take any steps to correct [the] obvious unfairness" of the Proskauer conflicts, which all Justices agreed showed evident partiality;
- MLB "made a bet on the outcome of the arbitration by loaning one of the parties $25 million to be repaid after an award in that party's favor";
- Manfred, "who controls the arbitration process[,] made public statements during post-award litigation indicating a position on the merits of the case";

- and MLB displayed "significant influence over the arbitrators, including the power to marshal evidence and draft arbitral award decisions."

A.3791-92, 3813. These exceptional facts warrant disqualification.

a. MLB and Manfred did nothing to address rampant conflicts of interest.

MLB did not lift a finger to address the rampant conflicts of interest created by its own counsel, Proskauer. A.41-42. This was not merely a failure of the individual RSDC members. *Manfred* himself refused to remedy the conflicts. A.2476, 2830, 2937-38, 2941, 2945, 2950. Thus, as even the plurality recognized, "MLB and the arbitrators" did nothing to remedy these problems, and "MLB failed to exercise" its power to try to ensure a fair process. A.3772-73. That MLB shrugged at this clear impropriety shows it cannot be trusted to administer a fair process.

b. MLB and Manfred sided with the Nationals in litigation and public statements.

MLB's litigation conduct and its Commissioner's public statements confirm its partiality. That MLB litigated this matter against MASN and the Orioles is remarkable. It would be unthinkable for the AAA to participate in post-arbitration litigation, taking public positions on the par-

ties' credibility and the contract's meaning. Yet MLB fought by the Nationals' side at every step—to try to keep the case out of court; to try to preserve the first, tainted decision from vacatur; and to secure a remand to the RSDC, where the Commissioner's hand-picked panel produced the same result again.

As part of this campaign, MLB's Commissioner, Manfred, filed sworn affidavits asserting that MASN's and the Orioles' interpretation of the Settlement Agreement "did not conform to the text"—thus making clear MLB's view on the ultimate issue in any rehearing. A.3181. Manfred's affidavits also disparaged MASN's and the Orioles' claims and factual assertions as "false," "groundless," "baseless," "inaccurate," and "misleading." A.3170-84.

Manfred's public statements were equally unambiguous. While Supreme Court was considering the vacatur petition, Manfred told the press that "the RSDC was empowered to set rights fees. That's what they did, and *I think sooner or later MASN is going to be required to pay those rights fees*." A.3426-27 (emphasis added), 3475. Even after Supreme Court vacated the RSDC decision—confirming that MLB and Manfred had corrupted the proceeding—Manfred declared that "[t]he Orioles have

engaged in a pattern of conduct designed to avoid that agreement being effectuated." A.3702. These comments underscored Manfred's continuing adversity to MASN and the Orioles. And Manfred made these comments at press conferences associated with MLB owners' meetings, where the entire league—including the new RSDC members—would hear them.

In short, Manfred publicly committed himself to defending the RSDC proceeding that he had personally directed, and to attacking the parties that had proved its corruption in court. This "advocacy of a position in opposition to" MASN and the Orioles "deprive[d] him of the necessary neutrality." *Morris*, 150 Misc. 2d at 277 (disqualifying the NFL Commissioner for this reason). The only way for Manfred to "avoid the appearance of having erred or changed position," *see Williams v. Pennsylvania*, 136 S. Ct. 1899, 1906 (2016), was for the RSDC to reach the same result on rehearing—which is exactly what happened.

c. MLB and Manfred created a $25 million stake in the outcome of the arbitration.

MLB and Manfred also showed their partiality by creating a "direct monetary stake in the outcome" of this dispute. A.3812 (Acosta, P.J., dis-

senting). Again, while the arbitration was pending, MLB paid the Nationals $25 million, reflecting the difference between the amount MASN was already paying the Nationals and the amount set forth in the RSDC's internal draft. MLB and the Nationals agreed that this sum would be repaid "from MASN" out of any "payments … otherwise due to the Nationals" under an RSDC decision "that covers 2012 and/or 2013." A.2918.[5] MASN and the Orioles did not learn the amount of this payment or the repayment terms, or obtain a copy of this agreement, until much later. *Supra* p. 22.

This $25 million payment violated the "axiomatic" rule that "a neutral decision-maker may not decide disputes in which he or she has a personal stake." *Pitta*, 806 F.2d at 423. MLB made this payment almost a year before it issued the RSDC decision—and thus while the arbitration was still pending before it. *See* 1 DOMKE ON COMM. ARB. § 18:1 (3d ed. 2014) ("The relevant time-frame is from the date the arbitration was noticed until the award was issued."). This is improper. Research reveals no case allowing an arbitrator or arbitral body to create a direct financial

[5] The agreement also provided for repayment out of the proceeds of any sale of MASN, A.2918, which did not occur.

interest in the outcome of a pending dispute—whether or not they had reached a tentative result. As Presiding Justice Acosta put it, quoting *amicus* Judge Robert S. Smith (Ret.), an arbitral actor can "[n]ever" have "a significant financial stake in the outcome of an arbitration." A.3815.

Yet Supreme Court and the plurality below did not believe this arrangement undermined MLB's partiality. Their reasons for that view were mistaken.

First, Supreme Court and the plurality suggested that this arrangement did not give MLB a stake in the outcome because the Nationals could repay MLB no matter what the RSDC ultimately decided. A.33-34, 3781-83. But that misconstrues the repayment terms, which (1) did not require *the Nationals* to repay *anything*, and (2) allowed MLB to be repaid *from MASN* only if MLB's RSDC rejected MASN's and the Orioles' arguments about the proper valuation. MASN had already paid the Nationals the telecast-rights-fee amounts based on the Settlement Agreement's established methodology. So the only way there could be additional "payments from MASN otherwise due to the Nationals" was if the RSDC issued a "decision that covers 2012 and/or 2013" declaring that the Nationals were entitled to a *larger* amount. *See* A.2917-18. MLB could

thus recover its $25 million only if MLB's RSDC declared a rights-fee value at least $25 million higher than what MASN already paid.

Consider a simplified example. Suppose MASN calculates that the Nationals are owed $20 million for 2012, and pays them that amount. But MLB and the Nationals think the amount should be $30 million, so MLB pays the Nationals $10 million to cover the difference. If the RSDC concludes that MASN's calculation was correct, "an appropriate award would be zero," A.3814 (Acosta, P.J., dissenting), because MASN has already paid what it owed. No more money changes hands, and MLB recoups nothing. Only if the RSDC confirms the entire $30 million figure will there be $10 million in new "payments from MASN" through which MLB could recoup its money.

MLB's counsel conceded all of this below. The Nationals would "never have to repay these funds … no matter what happens with the RSDC." A.2844. In turn, "if the award was less favorable to the Nationals, more favorable to the Orioles" than the unissued draft decision, "the Nationals would not be required to refund any of the money," so MLB "*would have been out the money*." A.3651-52 (emphasis added); *accord*

A.2498 (Manfred conceding this point). Presiding Justice Acosta correctly explained the resulting problem: "the only way MLB [could] now recover the loan amount is through an award in excess of the [] fees" that "MASN has already paid the Nationals." A.5403. "In other words, if MASN's calculations [were] adopted (and the Nationals' and MLB's calculations rejected) … MLB [would] not be repaid." *Id.*

Second, Supreme Court and the plurality emphasized that MLB made the $25 million payment only after "the parties were informed of the RSDC's internal decision." A.33, 3765. But at that point, the RSDC's decision was merely an unissued "draft," subject to revision or rewriting. A.3782 (Andrias, J., concurring); *see Kalyanaram v. New York Inst. of Tech.*, 91 A.D.3d 532 (1st Dep't 2012) (an arbitrator has the "power to amend or modify" a decision until "a final arbitration award has been rendered"). No one would countenance a judge creating a financial stake in a pending case just because she had tentatively decided who would win. So too here.

In any event, this rationale lost all force as soon as the first decision was vacated. At that point, as Presiding Justice Acosta explained, "MLB's actual financial interest in the outcome of the second arbitration"

was "quite significant" because if the RSDC adopted MASN's and the Orioles' position in the second proceeding, "MLB will not be repaid." A.3814. This created an obvious "incentive" for "MLB to do whatever it can to steer a second arbitration in its (and the Nationals') favor." *Id.* Yet MLB continued to insist that this arrangement was proper and that the dispute must be remanded to the RSDC. *E.g.*, A.3815. Again, an unbiased adjudicator does not behave this way.

Third, the plurality accepted and relied on the Nationals' promise at oral argument to "post a bond" to "guarantee repayment of" the $25 million, A.3781 (a promise they broke, as explained below). But as Presiding Justice Acosta explained, it was improper to let the Nationals "buy their way out" of trouble by relying on a surprise unsworn representation by counsel at oral argument with no basis in the record and no documentation. A.3816. In any event, even if MLB's financial incentive "to steer a second arbitration" magically disappeared, *the fact that MLB was willing to create an improper $25 million stake in the dispute in the first place* shows that it is not impartial. *See Sun Ref. & Mktg. Co. v. Statheros Shipping Corp. of Monrovia*, 761 F. Supp. 293, 302 (S.D.N.Y. 1991) (explaining that an improper fee allocation "cast[s] lights and shadows" on

other evidence of the arbitrator's bias). This bell cannot be unrung by a tardy promise at oral argument—particularly where the promise goes unkept.

d. Manfred maintains significant influence over MLB's RSDC.

In short, MLB and Commissioner Manfred have chosen their side, and they are publicly entrenched there. And as Presiding Justice Acosta explained, this bias "permeates the entire arbitral forum": "MLB still controls nearly every facet of the RSDC and has shown itself—through its past conduct and the Commissioner's statements—to be incapable of protecting fundamental fairness in administering an arbitration of the instant dispute." A.3817 (brackets omitted). Disqualifying MLB is thus necessary "to ensure fundamental procedural fairness." A.3793.

The plurality's contrary conclusion lacks merit. The plurality did not really dispute that MLB and Manfred are partial. Nor did it dispute the dissent's factual recitation. But the plurality said it was "[s]peculation" to think that "MLB [would] dictate the outcome of the second arbitration." A.3758. This conclusion overlooks the ample evidence of MLB's influence over the RSDC members and the arbitral process—evidence the

court needed to view through the lens most favorable to MASN and the Orioles before summarily ruling against them.[6]

To start with the obvious, the MLB Commissioner appoints and removes the RSDC members. Manfred hand-picked the current members after he became Commissioner, shortly after the Supreme Court litigation began. A.3670. Given his strong, stated views about the proper outcome, it is at least reasonable (if not obligatory) to infer that he chose members he trusted to carry out his goals. Indeed, if the first RSDC decision were vacated, he would need new RSDC members who would reach the same result again to ensure recovery of the $25 million payment he personally approved.

The Commissioner also holds significant power over all MLB teams. Because the RSDC members are team executives, this provides another means of influence. The Commissioner can steer funds to specific teams,

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[6] A special proceeding under CPLR 7502(a), like this one, may be resolved via "summary determination" if the "summary judgment" standard is met. CPLR 409(b). Thus, "[i]f material facts are in dispute, or if different inferences may reasonably be drawn from facts themselves undisputed," summary determination is improper. SIEGEL & CONNORS, N.Y. PRAC. § 278 (6th ed. 2018). A court must therefore "indulge all available inferences" in favor of a party before summarily ruling against it. *Torres v. Jones*, 26 N.Y.3d 742, 763 (2016).

as the $25 million payment here shows. He can grant or withhold valuable benefits like hosting the All-Star Game, as the Nationals did in 2018 (but the Orioles have not done since 1993). And he "has the authority to act unilaterally 'in the best interests of baseball,'" which includes the ability "to take action against clubs."[7] To be sure, the Commissioner can be removed by the owners as a group, and thus must serve their *collective* interests. But he exercises substantial power over individual clubs, and thus over their executives—including the RSDC members.

Thus, Manfred both chose the replacement RSDC arbitrators in the midst of this dispute, A.3670, and holds substantial power over their business interests. And as explained above, he repeatedly and publicly made clear his views about the merits of the dispute. No one in baseball could have missed this message. "Given the unrestricted control that [a biased] party … has over the panel, the selection of an impartial decisionmaker would be a surprising result." *Hooters*, 173 F.3d at 939.

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[7] Richard Justice, *'Best interests of baseball' a wide-ranging power*, MLB.com (Aug. 1, 2013), https://www.mlb.com/news/richard-justice-best-interests-of-baseball-a-wide-ranging-power-of-commissioner/c-55523182; *Charles O. Finley Co., Inc. v. Kuhn*, 569 F.2d 527, 534 (7th Cir. 1978).

And as Presiding Justice Acosta observed, MLB's pervasive involvement in every aspect of the first RSDC arbitration suggested a similar ability to influence any rehearing. Indeed, the undisputed facts of the first arbitration show that MLB had significant power to dictate procedure and influence the arbitrators' decision making. Manfred "sat with the RSDC arbitrators and asked questions during the hearing at the first arbitration, acting as a de facto fourth arbitrator." A.3816 (Acosta, P.J., dissenting). He also demonstrated his "ability to marshal and exclude evidence," and even to "draft an award" on the RSDC's behalf. *Id.*; *supra* pp. 18-20. Manfred described the RSDC's staff in an email as "my people" A.858, and referred to "the way we approached" the review. A.3032. And Manfred repeatedly claimed the power to "instruct" MLB's RSDC members in their task. A.2498, 2499, 3033, 3670

The situation thus boils down to this: The person who hand-picked new arbitrators while the dispute was raging, who exercises significant, ongoing power over their business interests, and who personally directed every aspect of the prior, biased arbitration, has repeatedly and publicly picked a side—signaling to the whole world that "sooner or later" his view must prevail. Only a ruling that duplicates the vacated first decision will

vindicate his publicly stated position and his handling of the first arbitration. On these facts, the forum he heads cannot be trusted to deliver the fundamentally fair process, free of bias or prejudgment, that the FAA requires.[8]

C. An "industry insider" arbitration is not exempt from the FAA's basic safeguards of fundamental fairness.

The plurality expressed concern that disqualifying MLB's RSDC could undermine "the viability of industry-insider arbitrations in general." A.3781. That concern was misplaced.

First, the plurality got the law wrong. It said that (i) "[b]ecause 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,'" and (ii) "the FAA permits parties to select arguably partial arbitrators." A.3777 (quoting *NFL Mgt. Council v. NFL Players Ass'n*, 820 F.3d 527, 548 (2d Cir. 2016)). But these principles have limits, both generally and especially after vacatur.

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[8] At the very least, Presiding Justice Acosta's conclusion—that given the undisputed facts, "it is highly unlikely that the RSDC would come to a different conclusion if it were to rehear the case," A.3816—is precisely the sort of reasonable inference a court must draw in favor of a party before summarily ruling against it. *See Torres*, 26 N.Y.3d at 763; *supra* p. 60 n.6. Indeed, that prediction came true.

As already explained, the FAA imposes minimum standards of fundamental fairness on all arbitrations. *Supra* § I.A. To be sure, arbitration cannot require the sort of "complete impartiality" judges must display; "[s]ome commercial fields are quite narrow," and "specific areas tend to breed tightly knit professional communities." *Morelite v. N.Y.C. Dist. Council Carpenters*, 748 F.2d 79, 83 (2d Cir. 1984). Thus, some industry arrangements might warrant more "relax[ed]" judicial scrutiny. *Id.* at 84. But that does not mean courts may approve an arbitral process "grounded in fraud or bias"; the FAA involves the courts "in the enforcement of 'private' remedies," and thus triggers their "responsibility to ensure … fair treatment" to litigants. *Id.* at 83-84.

This is also why the FAA's protections "represent a floor for judicial review of arbitration awards below which parties cannot require courts to go, no matter how clear the parties' intentions." *Hoeft*, 343 F.3d at 64; *accord Wal-Mart*, 737 F.3d at 1268. As Presiding Justice Acosta observed, "[e]ven if the parties' initial choice to arbitrate before the RSDC was not a choice for a totally neutral forum, we must assume that they intended to arbitrate in a forum that offered at least a reasonable level of fairness and impartiality." A.3825.

The plurality's "industry insider" focus also overlooked the posture here. Judicial "deference to private agreements to arbitrate" extends only as far as the FAA's "confirmation-and-vacatur safety net." *Hoeft*, 343 F.3d at 63. So once courts have found that the arbitral process was evidently partial, all available deference has been exhausted. That is, the necessary deference was baked into the initial vacatur determination, but it was overcome by MLB's biased conduct.

Second, in any event, the principles the plurality emphasized apply only to parties' *voluntary* choices—and the parties here did not agree to select partisan arbitrators.

In *NFL Management Council*, for example, the parties "specifically" agreed for the NFL Commissioner to arbitrate all disciplinary disputes under a certain contractual provision, "knowing full well" that, because of his role, he "would have a stake both in the underlying discipline and *in every arbitration*." 820 F.3d at 548 (emphasis added). Having made that voluntary choice, a disciplined player could not say the Commissioner was biased because of his dual role. *See id.*

Likewise, in *Aviall*, the parties' contract showed that they were "fully aware" that KPMG might be an auditor "for both, or either" of the

parties. 110 F.3d at 894. Thus, KPMG's auditor relationship with one side was foreseeable, and did not disqualify it as an arbitrator. *Id.* at 894-96.[9]

Here, by contrast, MASN and the Orioles did not and could not foresee what MLB would do. They certainly recognized that MLB would play a role in the RSDC process, since the RSDC is a part of MLB. *See* A.3812 (Acosta, P.J., dissenting). But contrary to the plurality's assumption, A. 3778-79, 3786, they could not foresee the *extent* of MLB's role. The RSDC had never conducted an arbitration before, so they had no experience to draw on. As Supreme Court observed, the RSDC's usual practice in *non*-arbitral proceedings should not have suggested to anyone that MLB would refuse to follow "certain safeguards" in arbitration. A.2834.

More importantly, MASN and the Orioles could not foresee MLB's pervasive bias. *See* A.3812-13 (Acosta, P.J., dissenting). MLB's RSDC

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[9] The plurality read *Aviall* as refusing to disqualify KPMG even though the parties' agreement required KPMG to be "an 'independent auditor' of both parties." A.3784-85. But as *Aviall* explained, that language governed the "resolution of other disputes." 110 F.3d at 894. The provision governing the dispute at issue in *Aviall* said simply that disputed "items shall be submitted to KPMG … for resolution," and the contract specifically contemplated that KPMG may at that time be auditor for only one party, not both—thus, that foreseeable fact did not disqualify KPMG. *Id.* *Aviall* thus conducted a straightforward foreseeability inquiry.

was supposed to be "impartial and objective," A.789—as Orioles owner Peter Angelos testified before Congress, "a neutral third party." A.1987. MASN and the Orioles had no reason to expect that MLB would foster rampant conflicts of interest with the Nationals' counsel, create a financial stake in the arbitration's outcome, litigate in tandem with the Nationals against MASN and the Orioles, and publicly reject and disparage their positions. Contrary to the plurality, A.3777, none of this "inheres" in the RSDC process.

Indeed, in the face of this startling conduct, pointing out that MASN and the Orioles agreed to arbitrate before an MLB body avoids the real issue. *Every* party in the disqualification cases discussed above agreed to arbitrate before the designated arbitrators—*before* they knew those arbitrators were biased. *E.g.*, *Erving*, 349 F. Supp. at 718 (disqualifying the basketball commissioner based on an unforeseen conflict); *Rabinowitz*, 100 A.D.2d at 540 (same, for the DDC). When circumstances changed to make the arrangement fundamentally unfair, the courts appropriately intervened. MASN and the Orioles seek the same relief here.

Third, New York's long experience shows the sky will not fall if this Court disqualifies MLB's RSDC in this exceptional case. This Court held

70 years ago that "[u]pon a showing that there is reason to believe that an arbitrator is incapable of discharging his duties in an impartial manner he may be removed." *Matter of Lipschutz*, 304 N.Y. 58, 65 (N.Y. 1952). Since then, decisions disqualifying arbitral forums have been rare, *e.g.*, *Rabinowitz*, 100 A.D.2d at 540, and have not undermined industry arbitration agreements in New York. Granting the same relief on these exceptional facts will not do so either.[10]

On the contrary, disqualifying MLB—and replacing it with a neutral arbitral forum—will strengthen arbitration by showing that parties will not be trapped if they select a forum that later proves biased. And denying relief may deter parties from choosing industry arbitrations, lest they find themselves trapped in a demonstrably biased forum.

* * *

[10] The plurality was also wrong to worry about preventing future RSDC arbitrations. A.3781. The RSDC is not normally an arbitral body, *see, e.g.*, A.474, and it has never arbitrated another dispute. In any event, granting relief here would not mean that the RSDC could not arbitrate a different dispute, where MLB has not disregarded basic fairness and publicly picked a side. 3823-24 (Acosta, P.J., dissenting).

For all these reasons, after the first RSDC decision was vacated, MLB's RSDC should have been disqualified from presiding over any rehearing, and the dispute referred to a neutral arbitral body. If the Court agrees, it need not address any of the issues discussed below, all of which stem from the inevitable result of remanding to MLB's RSDC for a do-over.

II. Even if the remand to MLB's RSDC were proper, MLB's second RSDC decision should be vacated for evident partiality.

Even if the split remand ruling stands, the second RSDC decision—which predictably reached a result almost identical to the first—should be vacated for evident partiality. Contrary to the Nationals' promise, MLB did not give up its $25 million stake, but merely changed its form. The RSDC also refused to consider whether the proceeding could be fair given MLB's bias. And MLB and its RSDC refused to disclose any communications between the RSDC arbitrators and the MLB actors, including Manfred, whom the courts unanimously held partial.

Vacatur for evident partiality is proper if "a reasonable person would have to conclude" that an arbitral actor "was partial to one party to the arbitration." *U.S. Elecs.*, 17 N.Y.3d at 914. "[P]roof of actual bias" is not required. *Id.* A "reasonable person" is necessarily "an objective,

disinterested observer fully informed of the underlying facts." *See United States v. Lovaglia*, 954 F.2d 811, 815 (2d Cir. 1992) (applying this standard to assess judicial impartiality), *overruled on other grounds by United States v. Yousef*, 750 F.3d 254, 261 (2d Cir. 2014). This standard is met here: A reasonable person, aware of MLB's pervasive bias in its first RSDC proceeding, would conclude that MLB remained partial in its second proceeding, which produced the same result.

A. MLB created an improper $25 million stake in whether to hold the rehearing.

As explained above, the Nationals' counsel made an out-of-the-blue promise at oral argument to "post a bond to guarantee repayment of" MLB's $25 million "regardless of the outcome of the [second] arbitration." A.3781, 3815. The plurality relied on this promise to rule that a remand to MLB was appropriate. A.3781.

But the Nationals did not post a bond. Nor did they just repay the money. Instead, MLB and the Nationals negotiated *another* side-deal—again, without MASN's or the Orioles' involvement—which conditioned the Nationals' repayment of the $25 million on the RSDC holding another arbitration hearing. The Nationals "agree[d] to re-pay" the $25 million (plus interest) at least ten "business days before the RSDC commences a

hearing on the 2012-2016 rights fees, which amount shall be held in escrow by [MLB] until, and shall automatically be released from such escrow upon, commencement of such hearing." A.4813. But if "such hearing does not so commence within 14 days of its scheduled commencement," the $25 million "shall promptly be returned in full." *Id.*

Thus, if MLB did not convene another RSDC hearing to decide this dispute—for example, if the RSDC members exercised their "unqualified right to recuse themselves," *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 174 (2d Cir. 1984)—the Nationals would keep the $25 million. This agreement thus retained MLB's financial stake in the arbitration—specifically, in ensuring an RSDC rehearing. Sure enough, when MASN and the Orioles sought the RSDC members' recusal, the arbitrators refused. A.4450-52.

These facts show evident partiality. In explaining the evident-partiality standard, the U.S. Supreme Court analogized an arbitrator's "close financial relations" with a party to a case where "a small part of the judge's income consisted of court fees collected from convicted defendants." *Commonwealth Coatings*, 393 U.S. at 148. The Court specifically declined to limit this principle to a situation where the financial interest

"actually depended on whether [the decision maker] decided for one side or the other"; this "is too small a distinction to allow this manifest violation of the strict morality and fairness Congress would have expected on the part of the arbitrator." *Id.* at 148. The Court saw "no basis" in the FAA to allow this kind of financial entanglement, regardless of the amounts at issue. *See id.* Yet the courts below approved just such an improper financial interest.

The most analogous New York and Second Circuit cases confirm that this principle requires vacatur of the second decision. As already discussed, the Second Circuit in *Pitta* found evident partiality where an arbitrator was asked to decide whether he had been validly dismissed from his role, since he had a direct financial interest in the question. *See* 806 F.2d at 423-24. Whether to continue in the arbitral role, of course, was also the question presented to MLB's RSDC here—and the question in which MLB held a $25 million stake.

Likewise, in *Coty Inc. v. Anchor Construction, Inc.*, 7 A.D.3d 438 (1st Dep't 2004), the First Department affirmed vacatur of an arbitral award because the arbitrators involved themselves "in the parties' dis-

pute over prepayment of arbitration fees, a matter in which the arbitrators had a direct financial interest." *Id.* at 439. The same reasoning applies here. Indeed, MASN and the Orioles are aware of no case suggesting that an arbitral actor can create a financial stake in whether to recuse (beyond the fee for conducting the arbitration). *See Pitta*, 806 F.2d at 424.

The courts below thus erred by blessing MLB's continued $25 million stake. The First Department's reasoning is unknown, but Supreme Court said the "financial disincentive for the RSDC to recuse itself" was immaterial because the courts in the prior vacatur litigation "mandated" that the RSDC decide the dispute. A.3848. But the question previously was whether the courts could and should exercise their remedial power to disqualify MLB's RSDC. The question before the RSDC was whether the members should recuse themselves, which all arbitrators "have an unqualified right" to do if "they, in their sole discretion, believe … their impartiality [may] be questioned." *Florasynth*, 750 F.2d at 174. The courts' answer to the first question says nothing about the proper answer to the second.

Supreme Court also misconstrued the repayment terms. It believed that if the RSDC members had recused themselves, MLB would still recover the $25 million "under the original terms of the loan." A.3849. But even if the original terms would kick back in, as the court assumed, those original terms conditioned repayment on MLB's "RSDC issu[ing] a decision that covers 2012 and/or 2013." A.2918. If MLB's RSDC recused itself, no such RSDC decision would exist, and MLB would still be "out the money." A.3652. MLB thus had a direct $25 million stake in ensuring that the RSDC did *not* recuse itself. That is improper, and warrants vacatur.

B. MLB's RSDC failed to disclose facts giving rise to an appearance of bias.

Vacatur is also warranted because MLB's RSDC violated its disclosure obligations. This Court long ago recognized that "a rule requiring maximum prehearing disclosure must in the long run be productive of arbitral stability." *J.P. Stevens & Co. v. Rytex Corp.*, 34 N.Y.2d 123, 126 (1974). The FAA incorporates this wisdom: "where dealings 'might create an impression of possible bias,' they must be disclosed." *Sanko S.S. Co., Ltd. v. Cook Indus., Inc.*, 495 F.2d 1260, 1263 (2d Cir. 1973) (quoting *Commonwealth Coatings*, 393 U.S. at 149); *accord* A.441.

MLB's RSDC violated that duty. As explained above, MLB and Manfred are thoroughly biased, and they had the opportunity to influence the RSDC's deliberations. After all, the RSDC is part of MLB. Manfred personally appointed its current members, and it has no separate legal existence. A.472, 1762, 1845, 3670. Under these circumstances, any communications or directives from Manfred or his staff to the RSDC members about the substance of this dispute would create the obvious impression that MLB was trying to influence the outcome. Put differently, Manfred and MLB are partisans here, so substantive communications between them and the arbitrators are like *ex parte* communications with a litigant. Thus, such communications "must be disclosed." *See Sanko*, 495 F.2d at 1263. Yet, despite repeated requests, no disclosure was made.

In refusing to recuse, each RSDC member disclaimed knowledge of any facts "that would call into question his independence" *as an individual*, but they said nothing about MLB's bias or its ability to influence their proceedings and deliberations. A.4825-26. The RSDC's and MLB's refusal to address this glaring problem by *at least* making proper disclosures warrants vacatur.

* * *

For these reasons, MLB's second RSDC decision should be vacated for evident partiality. And if the Court agrees, it should order that MLB's RSDC be disqualified from conducting yet another biased proceeding. A forum that twice disregards basic fairness to produce the same result—a result it must reach to vindicate its leader—cannot be trusted again.

III. The courts below independently erred by entering a money judgment based on the second RSDC decision.

For the reasons above, the RSDC's second decision should not have been confirmed. But if the Court disagrees, it should direct that Supreme Court's judgment confirming the decision be modified to conform to the arbitrators' actual decision. The RSDC proceeding was not a damages award, but a valuation. The RSDC was authorized only to "determine[ ]" the "fair market value of" the telecast rights. A.203. The RSDC itself recognized that limitation. Its decision states that the panel's contractual "authority runs *no further than determining the fair market value of the rights at issue*," and that the RSDC thus "lacks authority to enter a judgment." A.4626 (emphasis added), 4657. Yet Supreme Court entered a money judgment based on the RSDC decision. A.3864-65, 3913-15. That money judgment violates the basic rule that a court cannot enlarge

an arbitral ruling. And this is not mere a technicality: It led to a judgment that overpays the Nationals by roughly $30 million, plus interest.

A. Courts cannot enlarge arbitral decisions.

A judgment confirming an arbitral decision "encompasses the terms of the confirmed arbitration award[] and may not enlarge upon those terms." *Zeiler v. Deitsch*, 500 F.3d 157, 170 (2d Cir. 2007). Thus, a court confirming an award "does little more than give the award the force of a court order." *Id.* at 169. So when arbitrators enter only declaratory relief, the court's judgment is similarly limited. *See, e.g.*, *Canada Dry Del. Valley Bottling Co. v. Hornell Brewing Co.*, No. 11-4308, 2013 WL 5434623, at *10 (S.D.N.Y. Sept. 30, 2013). "[W]here an arbitrator has been asked to decide an issue, and expressly declines to do so," a "court may not expand the scope of the arbitration award in an enforcement proceeding" by resolving it. *See Daebo Int'l Shipping Co. v. Americas Bulk Transp. (BVI) Ltd.*, No. 12 CIV. 4750, 2013 WL 2149591, at *5 (S.D.N.Y. May 17, 2013).

B. The RSDC did not award damages or determine the full sum owed to the Nationals because of the arbitrators' decision.

The second RSDC decision does not determine liability or award any sum. A.4657. Instead, consistent with the RSDC's limited authority, it simply resolves "only one … discrete issue[] of fact in a complex commercial controversy"—the telecast rights fees' fair market value—"without reference to ultimate liability or to damages." *See Walter A. Stanley & Son, Inc. v. Trustees of Hackley Sch.*, 42 N.Y.2d 436, 438-39 (1977).

The RSDC's contractual mandate is narrow. Under § 2.J.3 of the Settlement Agreement, if the parties cannot agree on the value of the telecast rights fees, "then the fair market value of the Rights shall be determined by the [RSDC] using the RSDC's established methodology for evaluating all other related party telecast agreements in the industry." A.203. This language empowers the RSDC to do exactly one thing: "determine[ ]" the "fair market value" of the disputed telecast rights fees by applying a contractually prescribed methodology. Section 2.J.3 is thus limited to a valuation determination. The Settlement Agreement contains a separate contractual process governing a party's ability to seek

damages for non-payment of rights fees, *i.e.*, the question of how much more money MASN actually owes the Nationals in the event that the second RSDC decision is confirmed. A.206, 208-09.

The RSDC—despite going badly astray in valuing the rights fees—respected this limitation. It determined only "the fair market value of MASN's rights to the telecast of the Orioles and Nationals." A.4657. And the decision made clear the limited scope of the RSDC's mandate: Because the RSDC's "authority runs *no further than determining the fair market value of the rights at issue*," it "lacks authority to enter a judgment." A.4626 (emphasis added). The RSDC also explained that determining what MASN ultimately must pay would involve complex factual issues beyond the scope of this proceeding; any ultimate damages award "would have to offset any net increase in Nationals license fees" from "both the $24.6 million MLB loan (less interest payments made) … and profit distributions the Nationals have received" from MASN. *Id.*

The resolution of these remaining questions is governed by other contractual provisions. Under the contract's "Non-Payment" and "Dispute Resolution" provisions, if MASN "does not pay" the Nationals "the

rights fees contemplated herein in a timely fashion," the Nationals cannot seek "money damages or avail themselves of any other appropriate remedies" until they first take two procedural steps. *See* A.206 (§ 2.R.2). They must first (1) provide MASN with "written notice of the non-payment" and a "reasonable time to cure," *id.* (§ 2.R.1), and (2) "seek mediation to resolve their disput[e]," A.208 (§ 8.A).

After those steps are complete, the Nationals must bring the dispute before a AAA panel or the MLB Commissioner (depending on whether MLB has a financial interest in MASN or either Partner). A.208-09 (§ 8.B-C). Even if the second RSDC decision stands, the parties must follow this contractually prescribed process to resolve any resulting dispute about how much MASN must pay the Nationals in light of the RSDC's decision. The RSDC plays no role in that process.

Even the Nationals recognized this limitation. Their submissions to MLB's RSDC—in either the first or the second proceeding—did not include a prayer for relief, an *ad damnum* statement, or any other request for damages. A.237, 5760, 5819, 5858.

C. The courts below erred by enlarging the second RSDC decision to enter a money judgment, which included amounts MASN does not owe.

Because the RSDC could not and "did not assess any damages," its decision "was in the nature of a declaratory judgment." *See W. Mass. Elec. Co. v. Int'l Bhd.*, No. 11-30106, 2012 WL 4482343, at *7-8 (D. Mass. Sept. 27, 2012). The RSDC decision is plain: It did not fix any liability or determine any sum owed. A.4626, 4657. Supreme Court thus lacked authority to "enlarge" the RSDC's valuation by transforming it into a (too-large) damages award. *Zeiler*, 500 F.3d at 170.

Supreme Court simply misunderstood the RSDC's decision. In the court's view, "this award … mandates under contract that MASN pays these dollars. This is not … I direct you to figure out what the fair market value is. … This is an actual dollar figure that they had to pay." A.3877. But as just explained, "figure out what the fair market value is" was the RSDC's full mandate. The RSDC could not and did not go any further. A.4626, 4657.

Supreme Court thus erred by converting the RSDC's declaratory valuation into a money judgment. And by entering a money judgment on the rights fees alone—and thus omitting the offset proceedings the RSDC

recognized would be necessary, but are beyond the scope of this proceeding—Supreme Court ordered MASN to overpay the Nationals by some $30 million, plus interest. The RSDC recognized as much, explaining that any "net increase" in the Nationals' rights fees must be offset by the prior rights-fee payments *and* by "profit distributions the Nationals have received" already. A.5679. Even the Nationals recognized that "the question for the RSDC" was whether "funds that MASN has already distributed" should be "reallocated from … profits distributions to … rights fees." A.5812. Yet the Nationals persuaded Supreme Court to enter a judgment ignoring that precise issue.

Supreme Court actually recognized this unfairness by suggesting that MASN can seek to have some of that money returned in a subsequent arbitration over profits distributions. A.3864-65, 3913-15. But that is not the process the parties adopted in the Settlement Agreement to address payment issues. *See* A.206, 208-09. The court's only proper task was to confirm or vacate the decision the RSDC made.

This case is unlike *Morgan Guaranty Trust Co. of New York v. Solow*, 114 A.D.2d 818 (1st Dep't 1985), *aff'd,* 68 N.Y.2d 779 (1986), which the First Department cited to affirm the money judgment. *See*

A.5420. The *Morgan* agreement specifically "required [the losing party] to repay" the amount the arbitrators determined. 114 A.D.2d at 819. The *Morgan* arbitrators thus "directed" the losing party "forthwith to calculate and repay" the excess amounts. *Id.* at 821. The arbitration award also "fixed the formula" for the payments: "All that remained was a calculation of the amount due based upon that formula," a "ministerial act." *Id.* at 821-22.

None of that is true here. The Settlement Agreement does not direct MASN to pay the amounts the RSDC determines. Nor did the RSDC decision fix any formula for damages; it specifically declined to do so. It offered only an "estimate" of the total amount MASN would owe after the proper offsets, A.4656—which Supreme Court failed to follow.

If the Nationals wanted a money judgment ordering MASN to pay a sum certain in damages, they needed to follow the Settlement Agreement's procedures for payment disputes. *See* A.206, 208-09, 469; *ACE Sec. Corp. v. DB Structured Prod., Inc.*, 25 N.Y.3d 581, 598 (2015) (holding that a notice-and-cure provision was a "procedural prerequisite to

suit"). The courts below improperly overrode these contractual procedures. In doing so, they imperiled agreements that provide for bifurcated assessments of valuation and liability in different provisions.

Thus, even if the Court upholds the second RSDC decision, it should modify the judgment to conform to the arbitrators' declaratory decision, and to omit the further step of entering the money judgment that the arbitrators properly declined to render, based on calculations they properly declined to make. This relief will allow the parties to follow the Settlement Agreement's distinct procedures for addressing payment issues, in which the RSDC plays no role.

CONCLUSION

For these reasons, the Court should adopt one of three alternative holdings:

The Court should reverse the First Department's 2017 decision and order insofar as it referred the rehearing of the parties' dispute to MLB's RSDC, vacate the RSDC's decision on rehearing, and direct Supreme Court to refer the matter to an alternative arbitral forum.

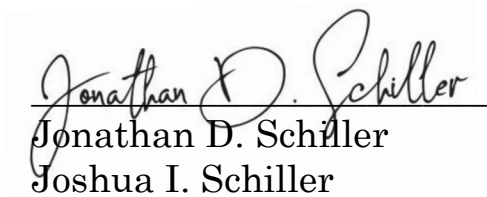
Alternatively, the Court should reverse the First Department's 2020 decision and order, vacate the RSDC's decision on rehearing, and direct Supreme Court to refer the matter to an alternative arbitral forum.

Alternatively, if the Court concludes that the RSDC's decision on rehearing was properly confirmed, it should remand the matter to Supreme Court to modify the confirmation judgment to award no damages.

The Court should also grant such other, further, or different relief as it may deem just and proper.

February 14, 2022

Respectfully submitted,



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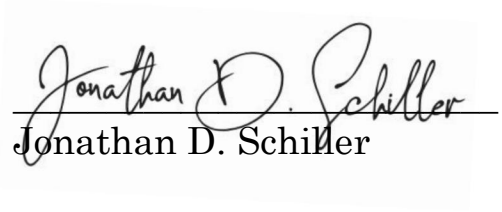
RULE 500.13(c) CERTIFICATION

On December 10, 2021, the Court granted MASN and the Orioles' request, pursuant to Rule 500.13(c)(4), to the extent of permitting 2,500 additional words in MASN and the Orioles' opening brief.

I hereby certify, pursuant to Court of Appeals Rule 500.13(c), that the foregoing brief was prepared on a computer using Microsoft Word. The total word count for all printed text in the body of the brief, exclusive of the material specified in Rule 500.13(c)(3), is 16,475 words.

Dated: February 14, 2022



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