To be Argued by:
CARTER G. PHILLIPS
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APL-2020-175 and APL-2021-144
Appellate Division–First Department Appellate Case Nos.
2019-05390, 2019-05458 and 2019-05459
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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.

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STATUTES

PRELIMINARY STATEMENT

The Nationals never confront a critical fact: Supreme Court vacated the initial arbitration decision because Major League Baseball and its current Commissioner, Robert Manfred, were evidently partial.

Justice Marks ruled that "*MLB*, as administrator of the arbitration," failed to take "MASN's objections" to the impermissible conflicts of interest "seriously, and actually [do] something about it." A.38 (emphasis added). *MLB* was "responsible for ensuring the overall fairness of the arbitration," and could have "taken reasonable steps to protect the arbitral process"—"Yet *MLB* did nothing." A.38-39 & n.14 (emphasis added). Commissioner Manfred was directly responsible for these failures. He personally "presided over" the hearing addressing the conflicts, refusing to remedy them; the arbitrators were not even present. A.19-20; Br. 51.

Justice Marks found this "complete inaction" by MLB and Manfred "unquestionably inconsistent with impartiality." A.41. And the First Department unanimously affirmed vacatur, confirming that "the conduct of Major League Baseball and its representatives has been far from neutral and balanced." A.3788 (Kahn, J., concurring); *see* A.3773 (plurality); A.3792 (Acosta, P.J., dissenting).

The record is thus clear: MLB's and Manfred's conduct corrupted the first RSDC proceeding. And that corruption went beyond just ignoring the conflicts of interest:

- MLB and Manfred 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. MLB could recover this money only if its RSDC issued a decision favoring the Nationals. A.2917-18. As MLB conceded below, if its RSDC had instead sided with the Orioles and MASN, MLB "would have been out the money." A.3651-52; *accord* A.2498.

- MLB tried to block MASN and the Orioles from challenging the RSDC decision, threatening to impose the "strongest sanctions available … under the Major League Constitution" if they pursued their rights under the FAA in court. A.569, 570, 574.

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

- Manfred publicly accused MASN of "a pattern of conduct designed to avoid th[e] agreement being effectuated," A.3702, and declared: "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, 3475. These statements, as one journalist reported, showed that "Manfred has chosen sides in the legal dispute." A.3702.

- 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 claimed the power to "instruct" them on how to resolve the dispute. A.2498, 2499, 3033, 3670.

On this record, the First Department erred as a matter of law by remanding the dispute to MLB's RSDC. It makes no sense to again trust the same forum whose "utter lack of concern for fairness" required vacatur, A.41, and which retains "significant influence over the arbitration process," Resp. Br. 45. As Presiding Justice Acosta stressed, a second RSDC arbitration "would be all but guaranteed to yield the same result," A.3791—a result so lopsided that it would destroy the Orioles' compensation under the Settlement Agreement and irreparably damage their public-private partnership with Baltimore and Maryland, Br. 14, 23.

Courts have the power to disqualify a biased arbitral forum like MLB's RSDC, contrary to the Nationals' claims. FAA Section 10(b) gives courts discretion to disqualify biased arbitral actors, including biased forums, after vacatur. The Nationals disagree, but the statute does not support their restrictive view. Section 2 also allows disqualification, by empowering courts to reform or rescind an arbitration clause designating an arbitral actor whose bias becomes known after the contract was made. This is not some improper arbitration-specific rule, as the Nationals contend, but a well-settled application of general contract doctrines.

Arguing policy, the Nationals say disqualifying MLB will somehow undermine industry arbitration and weaken New York's position as a preeminent arbitration center. But that cannot be right—New York courts have long recognized a broader disqualification power under state law, even pre-award, *see Rabinowitz v. Olewski*, 100 A.D.2d 539 (2d Dep't 1984), with no ill effects. And this Court need only adopt a narrow rule for exceptional cases: A court has power to disqualify an arbitral body *whose bias has already led to vacatur* in a completed arbitration. Refusing to allow disqualification even in such rare cases would *harm* industry arbitration, because commercial parties will not agree to arbitral forums

they cannot escape even if the forum disregards "basic principles of justice," as MLB has done. A.41. Indeed, the Nationals' rule would leave arbitral parties at the mercy of biased actors.

But even if the remand to MLB's RSDC could be justified, the second RSDC decision warrants vacatur too. The Nationals fail to show either that MLB lacked a $25 million stake in whether the RSDC recused itself from the second hearing, or that an arbitral forum may permissibly hold such a stake. And given MLB's proven bias, the Nationals cannot justify the RSDC's refusal to disclose its communications with MLB about the merits of this dispute.

Alternatively, Supreme Court erred by entering a money judgment on the second RSDC decision. The Nationals ignore the separate contractual process they agreed to follow before seeking money damages—in which the RSDC plays no role. Because the RSDC adhered to this limitation, refusing to award damages, Supreme Court's judgment improperly enlarges the arbitral decision. And the Nationals do not dispute that Supreme Court's money judgment includes a roughly $30 million double recovery. That MASN could try to claw back this money in other ways does not excuse Supreme Court's error.

ARGUMENT

I. MLB's RSDC should have been disqualified after vacatur.

After affirming vacatur of the initial RSDC decision because of MLB's evident partiality, the First Department erred by sending the dispute right back to MLB's RSDC. The Nationals' policy defense of this error is baseless, as is their contention that the court lacked power to do anything else. Nor can they explain away MLB's biased conduct.

A. Disqualifying a proven partial actor is pro-arbitration.

Emphasizing arbitral parties' freedom to "select familiar decisionmakers with relevant industry expertise," the Nationals say disqualifying MLB here would be anti-arbitration. *See* Resp. Br. 27-34. This argument wrongly assumes that industry-insider arbitration excuses evident partiality. The issue here is not expertise or industry connections, but MLB's "utter lack of concern for fairness of the proceeding," A.41, exemplified by Manfred's willingness to let "partiality run[] without even the semblance of a check," A.42.

The Nationals ignore that the FAA requires a fundamentally impartial arbitration. It thus incorporates an unwaivable judicial-review "safety net." Br. 38-40, 64-65. Neither "freedom of contract" nor "deference to private agreements to arbitrate" can override the FAA's "critical[]

safeguards." *Hoeft v. MVL Grp., Inc.*, 343 F.3d 57, 63-64 (2d Cir. 2003), *overruled on other grounds by Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008). And those safeguards prohibit courts from blessing arbitral processes "tainted by partiality." *Id.* at 64.

The Nationals thus get nowhere by arguing that parties "can ask for no more impartiality than inheres in the [arbitration] method they have chosen." Resp. Br. 30. The Nationals cite no case refusing to disqualify an arbitral actor whose partiality required vacatur. Indeed, the Nationals cite no post-vacatur cases at all. *See id.* at 29-31.

This difference in posture is crucial. Before arbitration, courts properly hesitate to interfere with the parties' chosen process, and Section 10's safety net has yet to kick in. *See Aviall, Inc. v. Ryder Sys., Inc.*, 110 F.3d 892, 895 (2d Cir. 1997). But after the arbitration is over, concerns about judicial "interfere[nce]" make little sense. *Contra* Resp. Br. 28. The FAA's very design is that courts will review arbitration awards and grant appropriate post-arbitration remedies.

In any event, the Nationals cannot show that MLB's "utter lack of concern for fairness," A.41, "inhere[s]" in the RSDC process. MASN and the Orioles knew MLB would be involved, but *not* that MLB would be

partial. *See* A.37 n.13. Rather, as the Nationals elsewhere concede, MASN and the Orioles agreed to arbitrate before "a neutral third party." Resp. Br. 5, 9. MLB violated that agreement by flouting "basic principles of justice," A.41, and Manfred flagrantly violated it when he "cut a deal with the owners of the Nationals, as it related to MASN," to become Commissioner. Br. 24. None of this was an inherent or expected part of the RSDC process, and the Nationals do not contend otherwise. If MLB's conduct were just a routine part of an industry arbitration, the courts would not have unanimously vacated the RSDC's decision in the first place.

In truth, it is the Nationals' rule that is anti-arbitration. They nowhere grapple with the idea that *failing* to disqualify an arbitral forum whose partiality already led to vacatur would undermine arbitration. *See* Br. 68. If credited, their rule would handcuff the courts, preventing them from remedying even the most serious abuses by biased arbitral actors. And if parties know that partial forums have free rein to impose egregiously unfair results, they will be reluctant to accept industry arbitration in the first place.

A narrow holding here—that courts have power to disqualify an arbitral actor whose evident partiality led to vacatur—will not open the floodgates to frivolous challenges. Parties "disappointed with the results of their chosen inside-industry arbitration," Resp. Br. 34, would have to clear the "high hurdle" of vacatur, *id.* at 54, before they could even try to disqualify the forum under this rule. And MLB's and Manfred's abuses are so flagrant that disqualifying them here will hardly invite challenges to other arbitral forums.

New York's long experience with a broader disqualification power—both pre- and post-award—also belies the Nationals' doomsaying. Br. 67-68. That this is a state-law standard, Resp. Br. 51, is irrelevant to the policy point. If the existence of a disqualification backstop would destabilize arbitration in New York, it would have happened years ago. It did not, even though courts still use this remedy in appropriate cases. *E.g.*, *County of Nassau v. Nassau Cnty. Investig. Police Benev. Ass'n*, 203 A.D.3d 824, 827 (2d Dep't 2022) (affirming vacatur and remand to "a different arbitrator"). This history shows that a disqualification guardrail, applied narrowly, "safeguard[s]" arbitration by helping ensure "the integrity of the process." *Goldfinger v. Lisker*, 68 N.Y.2d 225, 231 (1986).

B. The FAA enables courts to disqualify a biased forum.

The Nationals say FAA Section 10(b) lets courts disqualify biased arbitrators, but not biased forums. That is incorrect, and Section 2 also authorizes relief here.

1. Section 10(b) authorizes courts to disqualify arbitral forums.

After vacatur, a "court may, in its discretion, direct a rehearing by the arbitrators." 9 U.S.C. § 10(b). These are words of empowerment, not limitation. Section 10(b) neither directs nor forbids specific action. It identifies one option a court "may" exercise in its "discretion"—"direct[ing] a rehearing" by the same arbitrators. This means the court also "may" adopt other remedies. *See Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 198 (2000) (interpreting the FAA's venue language, including the word "may" in Section 10(a), to allow suits in courts not named in the statute). That is the nature of "discretion"—it "implies that a decision is lawful at any point within the outer limits of the range of choices appropriate to the issue at hand." *Eastway Constr. Corp. v. City of New York*, 821 F.2d 121, 123 (2d Cir. 1987).

This reading tracks the uniform conclusion of courts in New York and elsewhere that Section 10 confers "discretion to remand a matter to

the same arbitration panel or a new one," even though the option of sending the dispute to a new panel is "not made explicit in the statute." *Sawtelle v. Waddell & Reed, Inc.*, 304 A.D.2d 103, 117 (1st Dep't 2003); Br. 40 & n.4. More broadly, the federal courts hold that if arbitral "bias" is found, a court may "formulate an appropriate remedy to provide for the resolution of the parties' differences by arbitration." *Hart v. Overseas Nat'l Airways Inc.*, 541 F.2d 386, 393–94 (3d Cir. 1976). This "broad discretion in fashioning appropriate relief" includes the power to disqualify a biased arbitral actor. *See Aircraft Braking Sys. Corp. v. Loc. 856*, 97 F.3d 155, 162-63 (6th Cir. 1996). That is true even if the biased arbitrator is named in the parties' contract. *See Pitta v. Hotel Ass'n of N.Y.C., Inc.*, 806 F.2d 419, 422 (2d Cir. 1986); Br. 41-42.[1]

The Nationals respond that Section 10(b) only "addresses remand to a new *panel* in the *same forum*, and not a change of forum." Resp. Br. 35. They say this follows from the statutory "text and structure," *id.*, but do not explain why. Regardless, they are wrong.

[1] Some of these cases arise in "the closely related context of labor arbitration," but the same principles apply under Section 10(b). *See Kashner Davidson Sec. Corp. v. Mscisz*, 601 F.3d 19, 24-25 (1st Cir. 2010).

The term "the arbitrators" in Section 10(a)(2)'s evident-partiality provision—and thus in Section 10(b)—must encompass the forum as well as the arbitrators. Any other reading would require courts to confirm awards even "where there was evident partiality or corruption in" the forum, 9 U.S.C. § 10(a)(2), violating the basic principle that courts cannot bless an "award grounded in fraud or bias," *Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984); *see Hoeft*, 343 F.3d at 64. Indeed, in holding that MLB's conduct "as administrator of the arbitration" required vacatur, *see* A.38-42, the courts below necessarily recognized that Section 10(a)(2) reaches forum bias. The courts thus rejected MLB's and the Nationals' arguments that "*MLB* [being] partial" was not grounds for vacatur, because Section 10(a)(2) requires partiality "*in the arbitrators*" themselves. C.130-31; C.238 (similar).

Because "the arbitrators" in Section 10(a)(2) includes the forum, the same must be true in Section 10(b). *See Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 n.4 (2009) ("identical words and phrases within the same statute should normally be given the same meaning"). In both provisions, "the arbitrators" refers to all the arbitral actors the parties chose

in their contract. This understanding tracks Section 10's purpose of protecting the procedural integrity of arbitration. Br. 38-40. Courts could not perform this task if certain arbitral actors were immune from judicial scrutiny.

On the Nationals' view, by contrast, a court can *never* disqualify a partial arbitral forum—even after vacatur, and despite manifest bias—unless the arbitration agreement was improperly formed at the outset. *See* Resp. Br. 34-52. That position ignores that forum bias may be unrelated to contract formation, because (unlike here) arbitral forums typically are not contractual parties and do not participate in the contract's execution.

New York law has recognized the ability to disqualify an arbitral forum for decades, *see Rabinowitz*, 100 A.D.2d at 540, and the Nationals cannot explain why the FAA must be different. The FAA "is almost identical to, and is derived from, [New York's] arbitration statute." *Matter of Weinrott*, 32 N.Y.2d 190, 198 (1973); Br. 43. The Nationals try to distinguish *Rabinowitz* based on the decision's precise disqualification standard and timing, Resp. Br. 39, but at most those points go to *when* forum disqualification is appropriate—not whether it is possible. The Nationals

cannot rebut the basic point that disqualifying an arbitral forum "permeate[d]" with bias protects the "arbitration process." *Rabinowitz*, 100 A.D.2d at 540.

The Nationals also say *Pitta* did not apply Section 10(b), but merely followed the contractual process for replacing a "*contractually-ineligible* arbitrator." Resp. Br. 40 n.6. But the Second Circuit turned to the contractual process only *after* disqualifying the named arbitrator for "evident partiality" under the FAA. 806 F.2d at 423-24 & n.2. And the Nationals' view would mean that, without the contractual process, the court would have had to let the arbitrator "determine[] the validity of his own dismissal from a lucrative position." *Id.* at 424. That cannot be the law. Indeed, the Nationals cite no case, from any court, suggesting that a biased arbitrator or forum cannot be replaced after vacatur. Disqualifying an arbitral actor whose partiality led to vacatur lies comfortably within the courts' broad remedial discretion under Section 10(b).

But that does not mean an abuse-of-discretion standard governs here. *Contra* Resp. Br. 25. The First Department's 2017 *per curiam* order remanding to MLB's RSDC reflects no exercise of discretion because (i) the two-Justice plurality asserted no discretionary power, and (ii) the

tie-breaking concurrence concluded that the court had no power to send the dispute to another forum. A.3788; *see Nash v. Port Auth. of N.Y. & N.J.*, 22 N.Y.3d 220, 226 (2013) ("Supreme Court exercised *no* discretion, 'because it erroneously perceived that it had no discretion to exercise'"). The Nationals call this conclusion "nonsensical," but they ignore the concurrence and identify no assertion of discretion by the plurality. Resp. Br. 26 n.2.

In any event, remanding an arbitration to an actor whose partiality led to vacatur is almost always an abuse of discretion, Br. 41, as it would be here, *see infra* § II.C.

2. Under Section 2, the RSDC clause is unenforceable.

Section 2 also allows the Court to disqualify MLB's RSDC. After vacatur, the Nationals moved to compel a second RSDC arbitration. That motion implicated Section 2, which "direct[s] that an agreement to arbitrate shall not be enforced when it would be invalid under general contract principles." *Aviall*, 110 F.3d at 896. And the First Department erred by granting that motion, because the Commissioner's unforeseen bias rendered the RSDC clause unenforceable. Br. 44-47.

The Nationals rejoin that Section 2 provides relief only for "fraud or mutual mistake"—contract defenses based on circumstances at execution. Resp. Br. 38. But Section 2 reaches *all* "grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, including post-execution frustration of purpose and material breach.

a. Frustration of purpose bars enforcement.

Under Section 2, an agreement to arbitrate before a particular person or entity is unenforceable if unforeseen bias "result[ed] in frustration of the parties' contractual intent to submit their dispute to a neutral expert." *Aviall*, 110 F.3d at 896. *Aviall* explained that *Erving* is an example: Because the basketball commissioner turned out to be partial, the "frustration" of the arbitration clause's purpose justified "substituting a neutral arbitrator." *Id.*; *see Erving v. Va. Squires Basketball Club*, 468 F.2d 1064, 1067-68 & n.2 (2d Cir. 1972).

Section 2 thus extends to "unforeseen intervening events [that] have frustrated the intent of the parties." *Fleming Cos. v. FS Kids, L.L.C.*, No. 02-cv-59E(F), 2003 WL 21382895, at *4 (W.D.N.Y. May 14, 2003) (quoting *Aviall*, 110 F.3d at 895); *see id.* ("[R]emoval and appointment of a new arbitrator was warranted … because the parties' intent to

have their dispute resolved by a neutral party had been frustrated."). *Morris v. N.Y. Football Giants, Inc.* provides another example. The NFL commissioner was disqualified from arbitrating player contract disputes because his "advocacy of a position in opposition to [the players'] position herein, deprive[d] him of the necessary neutrality." 150 Misc. 2d 271, 276-77 (Sup. Ct. N.Y. Cnty. 1991) ("both Federal and State law" demanded this result).

These cases did not create some arbitration-specific "fairness" standard. *Contra* Resp. Br. 36. They instead applied the general principle that "enforcement of [a] contract is barred by" a subsequent "frustration of purpose." *E.g.*, *Arons v. Charpentier*, 36 A.D.3d 636, 637 (2d Dep't 2007). Because arbitration clauses are severable, *Monarch Consulting, Inc. v. Nat'l Union Fire Ins. Co.*, 26 N.Y.3d 659, 675-76 (2016), these cases measured frustration not of the contract as a whole, but of the parties' purpose in seeking arbitration specifically. That purpose, even in insider-arbitration cases like *Aviall* and *Erving*, is dispute resolution by a "neutral expert," free from biases that were not "disclosed" or "foreseen." *Aviall*, 110 F.3d at 896. Indeed, *every* arbitration clause necessarily contemplates "a system whereby disputes are fairly resolved by an impartial

third party." *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999).

This case is no exception. The parties intended MLB's RSDC to be a "neutral," "impartial and objective" forum. A.789, 1987; *see* Br. 66-67; Resp. Br. 5, 9. But as in *Erving*, this intent to "submit [the] dispute to a neutral expert" was frustrated by an unforeseen bias in the commissioner's office. *Aviall*, 110 F.3d at 896. The basketball commissioner in *Erving* was just as much an insider as the baseball commissioner here, but those foreseeable industry connections do not negate the parties' interest to ensure an impartial arbitration.

Unable to dispute that MLB frustrated the original purpose of the RSDC clause, the Nationals quibble with the Second Circuit's explanation that *Erving* involved contract "reformation." *See id.* They say it instead "filled a mechanical lapse under" FAA Section 5, *see* Resp. Br. 40 n.6, 41, which allows a court to "designate and appoint an arbitrator" if the position is "vacan[t]" or there is "a lapse" in the appointment process, 9 U.S.C. § 5. But in *Erving*, the arbitral position was not vacant—the named arbitrator could not serve because he was partial. *See* Br. 45. So

whether *Erving* reformed the parties' arbitration clause or instead rescinded it and then invoked Section 5, both paths lead to the same result: "a neutral arbitrator … be[ing] substituted … in spite of the contract clause naming the Commissioner as arbitrator … to insure a fair and impartial hearing." 468 F.2d at 1067 n.2; *see also In re Salomon Inc. Shareholders' Deriv. Litig.*, 68 F.3d 554, 560 (2d Cir. 1995) ("Section 5 applies" if there is a "breakdown in the arbitrator selection process," as when the "arbitrator designated in parties' agreement" has a "conflict of interest").

The Nationals nowhere dispute that Section 2 permits rescission as well as reformation. *See* Br. 47. Those remedies overlapped in *Erving*—and they overlap here—because arbitration clauses are severable and thus subject to "partial rescission." *Great Am. Ins. Co. v. Zelik*, 439 F. Supp. 3d 284, 288-89 (S.D.N.Y. 2020). Thus, the frustrated clause "may be rescinded and the remainder of the contract affirmed." *Ripley v. Int'l Rys. of Cent. Am.*, 8 N.Y.2d 430, 437-38 (1960). And frustration of purpose justifies rescission. *Arons*, 36 A.D.3d at 637.

A "partial rescission" would also track the Settlement Agreement itself, in which the parties agreed to treat as severable "any term, provision, covenant or condition of this Agreement, or any application thereof,"

that is found "unenforceable," without "affect[ing] any other provision." A.4424. This severability clause shows that the parties understood that aspects of their agreement—including the RSDC arbitration clause—could be narrowly revised if necessary under general contract principles.

Indeed, the Nationals cite no case—from any court, applying any body of law—enforcing an arbitration clause where the named arbitrator or arbitral forum had already been found partial. New York should not jeopardize its position as a preeminent seat for arbitration by embracing the Nationals' extreme argument that courts lack power to preserve the integrity of arbitration by disqualifying partial forums.

b. MLB's material breach bars enforcement.

MLB's material breach of the Settlement Agreement also warrants relief. As the Nationals agree, *Hooters* applied Section 2 to reject enforcing an arbitration clause when one of the contractual parties "failed to set up a reasonable arbitral forum, as required by the parties' agreement." Resp. Br. 41. When the party responsible for administering an arbitration is itself a "party under the contract," that party's failure to observe fundamental "fairness" is a "material breach" negating the agreement to arbitrate in that forum. *Hooters*, 173 F.3d at 941. In reaching

this conclusion, *Hooters* did not treat arbitration agreements differently from other contracts. It applied the general contract principle that a material "breach of [a] contract … justifies its rescission." *See Callanan v. Keeseville, Ausable Chasm & Lake Champlain R.R.*, 199 N.Y. 268, 279, 284 (1910).

Hooters' reasoning applies here. MLB, as a party to the Settlement Agreement, agreed to make its RSDC available to determine the fair market value of the parties' telecast rights and promised to "effectuate and enforce" the contract, including the arbitration clause. A.208 § 7. That is, MLB "by contract took on the obligation of" ensuring that the parties' telecast-rights-fee "disputes are fairly resolved by an impartial third party." *See Hooters*, 173 F.3d at 940. MLB then breached those obligations by failing to "ensur[e] the overall fairness of the arbitration." A.38 n.14; Br. 46-47. In *Hooters*, the court remedied that breach by disqualifying the party that established the partial forum. This Court should adopt the same remedy here.

C. The record confirms MLB's continuing bias.

Although circumstances may exist where disqualifying an arbitral actor after vacatur is unwarranted, this is not such a case.

1. MLB confirmed its partiality through brazen post-arbitration conduct. MLB threatened to punish MASN and the Orioles for seeking judicial review under the FAA, litigated against them in tandem with the Nationals, and publicly declared through its Commissioner that MASN will have to pay the amounts set in the biased proceeding "sooner or later." Br. 51-53.

The Nationals dispute that MLB's conduct was unprecedented, but their examples prove our point. Resp. Br. 48 n.11. In one case, AAA merely sought dismissal because it was "not a necessary or proper party." *In re Robinson*, Index No. 50262/2020, Dkt. 20 at 1 (Sup. Ct. Westchester Cnty. Jan. 30, 2020). In the other, NASD apparently moved to dismiss a pre-arbitration complaint on unspecified grounds. *Pompano-Windy City Partners, Ltd. v. Bear, Stearns & Co.*, 698 F. Supp. 504, 507 (S.D.N.Y. 1988). Neither arbitral body tried to punish a litigant for seeking judicial review of an award, publicly declared that the arbitrators' decision was correct, or argued the merits of the parties' dispute in court.

The Nationals also contend it was proper for MLB to fight "by the Nationals' side" because MASN "named MLB and the Commissioner as

respondents." Resp. Br. 47. But MASN was responding to the Commissioner's threat to punish it for seeking judicial review under the FAA; MASN needed (and secured) an injunction against MLB so it could pursue its meritorious vacatur claims. *See* Br. 24-25. The Nationals say MLB threatened both sides, Resp. Br. 47 n.9, but the Nationals did not need to go to court—MLB was trying to force MASN to immediately pay the Nationals in accordance with the RSDC's decision. Br. 25. A trial judge who rules for one party and then says "nobody can appeal" is not neutral.

And once MLB's attempt to quash the litigation failed, it did not try to extricate itself. It fought hard to help the Nationals win. MLB argued that Supreme Court should "deny MASN's amended petition to vacate" and "grant the Nationals' cross-motion to confirm," because MASN supposedly could not prove the precise claims of evident partiality the courts ultimately upheld. Index No. 652044/2014, Dkt. 285 at 10–16, 25 (Sup. Ct. N.Y. Cnty. Oct. 20, 2014). And Manfred submitted a declaration arguing that MASN's and the Orioles' interpretation of the Settlement Agreement—the precise issue before MLB's RSDC on remand—does "not conform to the text." A.3181.

Indeed, while the Nationals insist MLB's conduct was appropriate, MLB has left the field, no longer defending its behavior. That is surely because MLB belatedly realized that its litigation campaign against MASN and the Orioles belied its claims of neutrality. But MLB spent years fighting tooth-and-nail in court. That bell cannot be unrung now.

The Nationals also say the Commissioner's public statements merely defended "the inside-MLB arbitration process in general." Resp. Br. 48. Not so. Manfred publicly slammed MASN's successful vacatur petition as "a pattern of conduct designed to avoid th[e] agreement being effectuated." A.3702. And he made clear his view on the proper outcome of this specific dispute: "sooner or later MASN is going to be required to pay th[e] rights fees" MLB's RSDC had "set" in the vacated decision. A.3426-27. These statements, as one journalist put it, showed that "Manfred has chosen sides in the legal dispute." A.3702. "Manfred"—and thus "the league as a whole"—"has sided with the Nationals." *Id.*

The Nationals also emphasize that Justice Cohen and the First Department held that the Commissioner's public statements were not grounds to vacate the *second* RSDC decision. Resp. Br. 46-47. But Jus-

tice Cohen found these statements "troubling"; he felt compelled to overlook them because the 2017 plurality "found them insufficient." A.3852. And the 2020 First Department panel simply pointed to "the prior appeal" to affirm without analysis. A.5420. This Court, of course, owes no such deference to the two-justice plurality's erroneous view.

2. MLB and Manfred also showed their partiality by creating a $25 million stake in the outcome of the pending arbitration. *See* Br. 53-59.

The Nationals tried to evade appellate review of this issue by suddenly promising the First Department at oral argument in 2017 to "post a bond"—presumably because they realized MLB's $25 million stake was indefensible. But they never posted a bond, instead signing a new side-deal tying MLB's recovery to whether the RSDC reheard this dispute. Br. 32-33. And despite breaking the promise they made specifically to prevent the First Department from considering the propriety of the original payment, the Nationals now insist that the payment was acceptable. They are wrong.

The Nationals say the $25 million payment was "outcome-neutral" because, even if the final RSDC decision differed from the unreleased

draft, "the Nationals could [still] repay" it. Resp. Br. 49-50. But they ignore the opening brief's explanation that this is wrong. Under the Nationals' side-deal with MLB, "the Nationals would not be required to refund any of the money." A.3651-52. Repayment would come "from MASN," out of the decision's proceeds. A.2918. Thus, as MLB conceded, if the decision were "more favorable to the Orioles" than the unissued draft, MLB "would have been out the money." A.3651-52. The Nationals had to win for MLB to get paid. Br. 55-57.[2]

The Nationals also claim MASN and the Orioles knew about and supported the $25 million payment. Resp. Br. 49. That's half true. MASN and the Orioles knew MLB was making a payment, which they supported because MLB promised in writing to "fund the entire" payment itself. A.2496. They had no idea MLB had decided to repay itself out of the proceeds of a decision favoring the Nationals. The Nationals rely on Manfred's assertion that "MASN and the Orioles were advised of the ad-

[2] The Nationals err by relying (at 53) on Justice Cohen's statements about the repayment terms. Justice Cohen made no factual findings, *infra* p. 35, and in any event, his conclusions *in 2019* do not restrict this Court's review of the First Department's *2017* order.

vances," but he cagily avoided saying that they knew the amount or repayment terms. A.1770. Thus, no evidence contradicts the sworn attestations that they did *not* know these key facts. *See* A.2408-10.[3]

The Nationals say the payment "benefitted both sides" by preserving the status quo. Resp. Br. 49. But MLB could have preserved the status quo *without* tying repayment to the outcome of the still-pending arbitration. In any event, MLB's motivation is irrelevant. An arbitral actor cannot have a significant financial stake in the outcome, period. The Nationals nowhere dispute that principle.

Finally, the Nationals point to their out-of-the-blue oral-argument promise to post a "bond" to "guarantee repayment" of the $25 million. Resp. Br. 50-51. But the Nationals broke their promise—they never posted a bond. And this promise underscores how improper MLB's conduct was. Once the RSDC's first decision was vacated, MLB knew it could recover the $25 million only if another RSDC arbitration awarded the

[3] The Nationals also selectively quote MASN's counsel saying "we knew" about the payment, Resp. Br. 49—omitting his explanation in the next breath that MASN knew nothing about the repayment terms, A.2866. And they claim the "terms" were discussed with MLB's executive council, including the Orioles' owner, Resp. Br. 49, but their cited documents do not say that, *see* A.1770, 1784-85, 1787.

Nationals at least as much as the first decision. *See* Br. 57-58. MLB thus had a $25 million incentive to both steer the matter back to its RSDC and produce the same result again. That is blatantly improper. Yet instead of trying to cure the impropriety, MLB tried to hide it, falsely telling the First Department that a remand to its RSDC was appropriate because repayment was guaranteed "irrespective" of the outcome, C.387—despite having told Justice Marks the opposite, A.3651-52. An honest, neutral party does not act like this. The Nationals' belated, broken promise cannot cure MLB's biased behavior.

3. Finally—in the plurality's words, which the Nationals endorse—MLB has "significant influence over the arbitration process." Resp. Br. 45 (quoting A.3779). This power gives MLB every chance to bend an RSDC proceeding toward its preferred result.

The Nationals concede that Manfred sat "alongside the RSDC members and question[ed] witnesses, and MLB staff play[ed] the role of law clerk by assisting with data analysis and preparing a draft of the award." *Id.* And they do not dispute that Manfred personally ruled on various issues, including the Proskauer conflict, without involving the RSDC members; described the RSDC's staff as "my people"; boasted that "we

wrote the whole" decision; and repeatedly claimed the power to "instruct" the RSDC members. *See* Br. 18-20, 62. As Presiding Justice Acosta concluded, MLB "controls nearly every facet of the RSDC." A.3817; Br. 59-63.

Although the Nationals decry as "speculation" that Manfred "hand-picked" the current RSDC members, Resp. Br. 43, the record is unequivocal. During the litigation, after the first award was vacated, Manfred wrote: "I have selected" three new RSDC members. A.3670. The RSDC's new members were thus picked by a partial actor in the midst of the dispute—and then offered to the courts as a reason to trust the RSDC again. *E.g.*, C.401.

The Nationals cannot brush aside these undisputed facts by pointing to the original RSDC members' identical, boilerplate declarations asserting their own independence—much less Manfred's own assertion to the same effect. Resp. Br. 42, 45. Nor do they get anywhere by claiming that MLB's RSDC "retained its own counsel for the second arbitration" after the 2017 remand order. *Id.* at 43. In fact, *MLB* retained counsel for its RSDC—and not independent counsel. MLB tried to pass off its own outside lawyer, *who had advocated on MLB's behalf in the dispute*,

as the RSDC's neutral "legal advisor." *See* A.4439-42. This behavior confirms both MLB's partiality and its control over the RSDC.

Lastly, the Nationals cannot avoid this problem by emphasizing that MLB's involvement was "expected." Resp. Br. 45. Again: Involvement was expected; evident partiality was not. Because both exist here, MLB has the desire and the means to influence the outcome of any RSDC arbitration between these parties.

Presiding Justice Acosta was thus correct: MLB's bias "permeates the entire arbitral forum." A.3817 (cleaned up). In other words, when the forum undisputedly has "significant influence over the arbitration process," Resp. Br. 45—when it chooses the arbitrators, makes rulings in their absence, acts as their law clerk, claims the power to "instruct" them, chooses their counsel, and drafts the actual decision—the forum's partiality *is* "attributable to the *arbitrators*." *See id.* at 46. Under Section 10(b) or Section 2, and on any standard of review, these facts require MLB's disqualification.

II. MLB's second RSDC decision should be vacated.

Even if the remand to MLB's RSDC could be justified, its second decision—reaching a near-identical result to the first—should be vacated. Br. 69-76. The Nationals protest that the result was not *exactly* the same, Resp. Br. 55, but they do not dispute that it was within 0.2%. They also emphasize that the second decision used "a *different* methodology," *id.* at 54, but that just confirms that MLB's RSDC was working backwards from Manfred's declared outcome—not applying the "established methodology for evaluating all other related party telecast agreements in the industry." A.203. Nor does it matter that the RSDC's written decision was supposedly thorough; Resp. Br. 22-23; courts police "the integrity of the process," not "the correctness of the individual decision." *Goldfinger*, 68 N.Y.2d at 231. And the second process was evidently partial too—to the Nationals' dramatic benefit, and at the expense of MASN, the Orioles, Baltimore and Maryland. *See* Br. 14, 23. Indeed, armed with the RSDC's second decision, the Nationals' owners are now considering

selling the club, possibly for $2 billion or more—over $1.5 billion more than they paid in 2006.[4]

1. On remand, instead of posting the promised bond, the Nationals agreed to repay MLB the $25 million—*if* MLB convened another RSDC hearing. This agreement gave MLB a $25 million stake in the outcome of MASN's and the Orioles' recusal motion. That is improper. An arbitral actor cannot hold a financial stake in the proceeding—even if the stake does not "depend[] on whether [the tribunal] decide[s] for one side or the other." *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 148 (1968); Br. 70-73.

The Nationals say there is no "categorical" rule against having a "financial incentive" in "whether to recuse." Resp. Br. 57 n.13. If no such rule exists, this Court should announce one. It is wildly inappropriate for an adjudicator to have a financial stake in a recusal motion—or any substantive matter. None of the cases in the Nationals' unexplained string-cite suggests otherwise. *See id.*

[4] Barry Svrluga, *The Lerner family will explore selling the Washington Nationals*, WASH. POST (Apr. 11, 2022), https://wapo.st/3PbA9mB.

Nor can the Nationals brush aside the cases rejecting their position. They declare *Commonwealth Coatings* "inapposite" because it "concerns vacatur," Resp. Br. 40, 59, but the issue here *is* vacatur. They do not try to distinguish *Pitta*'s ruling that the arbitrator was evidently partial because he had a direct financial stake in whether to continue in the arbitral role. *See id.* at 40 n.6, 59. And they say *Coty Inc. v. Anchor Construction, Inc.* was a state-law case and involved "the arbitrators themselves," *id.* at 59, but they do not try to explain why an arbitral forum can ever hold such "a direct financial interest" in the proceeding when an arbitrator cannot. *See* 7 A.D.3d 438, 439 (1st Dep't 2004).

The Nationals also dispute that MLB held a stake in recusal. They say the new side-deal "did not make MLB's recovery" of the $25 million "contingent" on recusal. Resp. Br. 56. But it did: If an RSDC hearing did not "commence," the $25 million would "promptly be returned in full." A.4813. The Nationals rejoin that MLB "would have still recovered the money" under the original $25 million side-deal. Resp. Br. 56-57, 59 n.14. Not true. The original side-deal expressly conditioned repayment on "the RSDC issu[ing] a decision." A.2918. So had MLB's RSDC recused itself,

MLB could not have recovered under *either* side-deal. *See* Br. 55-57, 74. Again, the opening brief explained this, but the Nationals ignore it.

That MLB's RSDC offered reasons for refusing to recuse itself, *see* Resp. Br. 58, does not eliminate the $25 million thumb on the scale. That is true especially since the panel wrongly (i) asserted that the "issue that led to vacatur" had been "cured," A.4451, and (ii) treated the plurality's reasons for not disqualifying MLB as grounds not to recuse, despite the wholly different standards governing those inquiries, Br. 73. The Nationals now double down on this error, arguing that the RSDC members *lacked the power* to recuse themselves. Resp. Br. 59. But arbitrators "have an unqualified right to recuse themselves." *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 174 (2d Cir. 1984).

At bottom, it was highly improper for MLB to operate as the arbitral forum—with "significant influence over the arbitration process," Resp. Br. 45 (quoting A.3779)—while holding a $25 million stake in recusal.

2. During the second proceeding, MLB's RSDC also failed to disclose facts directly relevant to bias: the panel's communications with MLB about this dispute. Br. 74-75. The Nationals' response has three problems.

First, the Nationals say evident partiality generally requires more than the "appearance of bias." Resp. Br. 60. But that does not address the RSDC's disclosure obligations. This Court and the Second Circuit have endorsed "a rule requiring maximum prehearing disclosure," *J.P. Stevens & Co. v. Rytex Corp.*, 34 N.Y.2d 123, 128 (1974), so "dealings [that] might create an impression of possible bias … must be disclosed," *Sanko S.S. Co. v. Cook Indus., Inc.*, 495 F.2d 1260, 1263 (2d Cir. 1973) (cleaned up). And given MLB's proven partiality, behind-the-scenes communications about this dispute between the RSDC members and MLB personnel—including Manfred— could "create an impression of possible bias." The RSDC was thus required to disclose those communications. It refused.

Second, the Nationals say MLB's relationship with the RSDC did not need to be disclosed because everyone knew about it. Resp. Br. 60-62. But the relationship is not the point. MASN and the Orioles sought MLB's communications with the arbitrators about this dispute, which could have influenced the arbitrators' decision. Because MLB is evidently partial, the arbitrators had a duty to disclose the fact of, and the content of, any communications with MLB about this matter, which are

like *ex parte* contacts with a litigant. Br. 75; *see Goldfinger*, 68 N.Y.2d at 232-33.

Third, the Nationals describe this issue as a "discovery dispute" within the arbitrators' discretion. Resp. Br. 62-63. But while arbitrators have discretion over ordinary discovery, matters suggesting possible bias "must be disclosed." *Sanko*, 495 F.2d at 1263.

3. Though the Nationals say "factual findings below" bind this Court, Resp. Br. 26, they mostly cite legal conclusions. For example, the "repayment terms" for the $25 million, *see id.* at 59 n.14, are spelled out in the two written side-agreements, *see* A.2917-18, A.4813. And "the construction of an unambiguous written contract is a question of law." *Stone v. Goodson*, 8 N.Y.2d 8, 13 (N.Y. 1960).

In any event, the courts below made no factual findings. They made "summary determination[s]"—*i.e.*, "summary judgment[s]." *See* CPLR 409(b). As the Nationals recognized before, *see* A.3842; Index No. 652044/2014, Dkt. 784 at 14 (Sup. Ct. N.Y. Cnty. July 5, 2019), the "standards of summary judgment" apply "to proceedings governed by CPLR 409." *Matter of Port of N.Y. Auth.*, 18 N.Y.2d 250, 255 (1966). And a court granting summary judgment does not "make … findings of fact,"

Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 505 (2012); it determines that the movant is "entitle[d] to judgment as a matter of law" because no "material issues of fact" exist, *Jacobsen v. N.Y. City Health & Hosp. Corp.*, 22 N.Y.3d 824, 833 (2014). That determination does not create factual findings, and it does not bind this Court. *E.g.*, *id.* at 845.

III. Supreme Court's money judgment should be vacated.

Even if the second RSDC decision stands, Supreme Court's resulting money judgment cannot. The Nationals respond that, so long as it was possible to calculate damages, Supreme Court could enter judgment. Resp. Br. 66-68. This ignores the RSDC's narrow mandate, its actual decision, and the separate contractual process governing money damages. Nor do the Nationals meaningfully dispute that the judgment includes a $30-million double recovery.

The RSDC's mandate under Settlement Agreement § 2.J.3 was solely to "determine[]" "the fair market value" of the telecast rights fees using the prescribed methodology. A.203. This provision sets forth a valuation process; it does not contemplate litigating payment disputes. Br. 78-79. The Nationals rejoin that RSDC decisions are "final and binding," Resp. Br. 63 (emphasis omitted), but that just means the parties

must abide by a decision unless "vacate[d]," A.203. It says nothing about the *scope* of issues the parties agreed to arbitrate.

The Nationals also ignore § 2.R's separate process for seeking "money damages" if MASN "does not [timely] pay" the rights fees. *See* A.206-07; Br. 79-80. As the Nationals previously conceded, "all appropriate remedies for nonpayment" fall "under Section 2.R." A.3996. The Settlement Agreement thus allocates rights-fee valuations to § 2.J.3 and "Non-Payment" disputes, including "money damages," to § 2.R. The RSDC has no role under § 2.R. If the Nationals could ignore this clear division and obtain a money judgment based on an RSDC decision under § 2.J.3, then § 2.R would be a dead letter.

The Nationals fare no better with the RSDC's actual decision. They emphasize its reference to "the license fees *to be paid*," Resp. Br. 64, but they ignore the RSDC's explanation that its "power … is defined entirely in § 2.J.3," so its "authority runs no further than determining the fair market value of the rights," A.4625-26. And the RSDC's decretal language in its concluding section is clear: The panel merely determined "the fair market value of MASN's rights." A.4657.

The decision thus contains no "formula for the 'calculation of the amount due.'" *Contra* Resp. Br. 65 (quoting *Morgan Guar. Tr. Co. of N.Y. v. Solow*, 114 A.D.2d 818, 822 (1st Dep't 1985), *aff'd*, 68 N.Y.2d 779 (1986)).[5] The Nationals' attempt to cobble together a formula requires them to combine the RSDC's recitation of prior payments *in the decision's background section* with the panel's final "Conclusion on Fair Market Value"—thirty-nine pages later. *See id.* at 67 (citing A.5671, A.5710); A.5709. And the Nationals' "formula" omits the RSDC's observation that "any net increase in Nationals' license fees" must be "offset" by prior rights-fee payments *and* "profit distributions the Nationals have received." A.4626.

Because the RSDC could not and did not calculate or award damages, Supreme Court's money judgment did indeed "enlarge upon" the decision's terms. *Contra* Resp. Br. 67. MASN and the Orioles do not dispute Supreme Court's ability to "perform mere subtraction," *id.* at 68; the point is that the parties' contract requires that any calculation or

[5] The Nationals rely heavily on *Morgan* (at 65-67) without addressing the opening brief's explanation (at 82-83) that it is distinguishable.

award of damages is governed exclusively by § 2.R's separate process, which does not involve the RSDC.

The Nationals' contrary argument relies on cases about whether arbitral awards are sufficiently final for confirmation. *See* Resp. Br. 64-66. But finality asks merely whether the award resolves all "the issues submitted." *Am. Int'l Specialty Lines Ins. Co. v. Allied Cap. Corp.*, 35 N.Y.3d 64, 72 (2020). It has no bearing on the scope of the arbitrators' authority. And in all these cases, the arbitrators could and did award damages. *See* Resp. Br. 64-66. In *Steinberg v. Goldstein*, for example, the contract's "express language" made clear that the "matter to be arbitrated" was "'the price to be paid', not merely the value of the stock" at issue; the claim sought "an award equal to" that amount; and the arbitral decision granted that "full" relief. 116 N.Y.S.2d 6, 8 (Sup. Ct. Bronx Cnty. 1952). Here, the RSDC could not and did not do any more than determine value.

Finally, even if the money judgment were otherwise proper, it should be modified to eliminate an improper double recovery. Although the RSDC made clear that any payment ultimately due to the Nationals would need to be "offset" by both prior rights-fee payments *and* "profit

distributions," A.4626, Supreme Court subtracted only the fee payments, handing the Nationals a $30 million windfall. Br. 81-82.

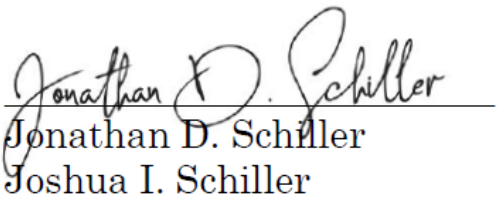
The Nationals respond by parroting Supreme Court's observation that MASN can try to claw back this double recovery in other ways. Resp. Br. 69. But that does not suggest the judgment was proper. And it is incongruous to assert that Supreme Court's judgment was just "ministerial," *id.* at 65, when it effectively triggers another round of litigation and negates the parties' agreed-upon payment-dispute mechanism. The (too-large) judgment cannot stand.

CONCLUSION

The Court should grant the relief described in the opening brief.

May 19, 2022

Respectfully submitted,



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RULE 500.13(c) CERTIFICATION

On April 7, 2022, the Court granted MASN and the Orioles' request under Rule 500.13(c)(4) to file a reply brief of 8,000 words.

I hereby certify, under 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, excluding the material specified in Rule 500.13(c)(3), is 7,991 words.

Dated: May 19, 2022

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