Court of Appeals

of the

State of New York

TCR SPORTS BROADCASTING HOLDING, LLP,

Petitioner-Appellant,

– against –

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

Respondents-Respondents,

– and –

THE COMMISSIONER OF MAJOR LEAGUE BASEBALL,

Respondent,

– and –

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

Nominal Respondents-Appellants.

OPPOSITION TO MOTION FOR LEAVE TO APPEAL

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STATE OF NEW YORK
COURT OF APPEALS

TCR SPORTS BROADCASTING HOLDING, LLP, Appellant, -against- WASHINGTON NATIONALS BASEBALL CLUB, LLC; WN PARTNER, LLC; NINE SPORTS HOLDING, LLC; THE OFFICE OF THE COMMISSIONER OF BASEBALL; and THE COMMISSIONER OF MAJOR LEAGUE BASEBALL, Respondents, -and- THE BALTIMORE ORIOLES BASEBALL CLUB and BALTIMORE ORIOLES LIMITED PARTNERSHIP, in its capacity as managing partner of TCR SPORTS BROADCASTING HOLDING, LLP, Appellants.	New York County Index No. 652044/2014 **SECTION 500.1(f) CORPORATE DISCLOSURE STATEMENT**

Pursuant to Section 500.1(f) of the Rules of Practice of the Court of Appeals (22 NYCRR § 500.1(f)), Respondents Washington Nationals Baseball Club, LLC, WN Partner, LLC, and Nine Sports Holding, LLC, state as follows:

Respondent Washington Nationals Baseball Club, LLC (the "Washington Nationals") is 100% owned by Nine Sports Holdings, LLC ("Nine Sports Holdings"). The Washington Nationals hold a 50% ownership interest in HW

Spring Training Complex, LLC, and own 100% of WNDR Holdings, LLC and WNDR, LLC, WNDR One, LLC, and WNDR Two, LLC.

Named Respondent WN Partner, LLC ("WN Partner") is 100% owned by Nine Sports Holdings, LLC. WN Partner holds a 22% ownership interest in Appellant TCR Sports Broadcasting Holding, LLP.

Named Respondent Nine Sports Holdings owns 100% of each of the Washington Nationals, WN Partner, and Washington Nationals Stadium, LLC.[1]

DATED: New York, New York
February 22, 2021

QUINN EMANUEL URQUHART & SULLIVAN, LLP

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[1] Named Respondents WN Partner and Nine Sports Holding were not parties to the arbitration underlying this case. They therefore are not proper parties to this case.

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Respondent Washington Nationals Baseball Club, LLC (the "Nationals") respectfully submits this memorandum of law in opposition to the motion ("Mot.") by Appellants TCR Sports Broadcasting Holding, LLP (d/b/a "MASN") and the Baltimore Orioles Baseball Club and Baltimore Orioles Limited Partnership (together, the "Orioles") for leave to appeal the unanimous decision and order of the Appellate Division, First Department (Renwick, J.P., Kern, Scarpulla, & Shulman, JJ.) dated and entered October 22, 2020, which affirmed the December 9, 2019 judgment of Supreme Court, New York County (Cohen, J.), confirming an arbitration award and awarding certain interest thereon. *See TCR Sports Broad. Holding, LLP v. WN Partner, LLC*, 187 A.D.3d 623 (1st Dep't 2020).

INTRODUCTION

Applying well-settled legal principles for confirmation of an arbitration award and entry of monetary judgments to the unique facts of this commercial dispute, the First Department unanimously rejected the Orioles' meritless attempts to vacate an arbitration award by Major League Baseball's Revenue Sharing Definitions Committee (the "RSDC") setting the fair market value of the rights to televise Nationals baseball games during the years 2012-2016. The Appellate Division affirmed a comprehensive Supreme Court order that (1) confirmed the RSDC's award and specifically found that the second arbitration between these parties did not involve any evident partiality (including because of any purported MLB

financial interest in the second arbitration) and that the RSDC acted well within its discretion to deny certain discovery in the arbitration proceeding, and (2) then issued a monetary judgment in the Nationals' favor by performing simple, ministerial mathematical computations based on monetary amounts expressly set forth in the RSDC's arbitration award.

Notwithstanding that each of MASN's and the Orioles' arguments for vacatur of the award have been resoundingly rejected by mere application of settled law, MASN and the Orioles now move, as a last ditch effort, for leave to appeal from the First Department's unanimous October 2020 order affirming confirmation of the RSDC award. MASN and the Orioles have no ground to appeal to this Court as of right.[1] And MASN and the Orioles now fail to show any basis why this Court should grant leave.

This proposed appeal does not involve any unsettled legal questions. Indeed, as this Court has recognized, "[i]t is well settled that judicial review of arbitration

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[1] MASN and the Orioles previously filed a purported appeal as of right, under C.P.L.R. § 5601(d), from the First Department's unanimous October 2020 order to bring up for review a prior nonfinal First Department order that had remanded the parties to arbitration before the RSDC on the basis of the express and unambiguous arbitration clause in the parties' underlying agreement. *See TCR Sports Broad. Holding, LLP v. WN Partner, LLC*, 153 A.D.3d 140 (1st Dep't 2017); *see also id.* at 143 (per curiam). The Nationals have moved to dismiss that purported appeal for lack of jurisdiction. *See* Mot. No. 2020-913, *pending undecided*.

awards is extremely limited." *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471, 479-480 (2006). Nor does the proposed appeal involve any "issues [that] are novel or of public importance, present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division" (22 N.Y.C.R.R. § 500.22(b)(4)). Rather, MASN's and the Orioles' motion should be denied, because the Appellate Division's unanimous decision involves only the application of settled law to the unique facts here.

First, the First Department's unanimous affirmance of Supreme Court's fact findings – namely, that none of the RSDC's or Major League Baseball's purportedly biased acts gave rise to "evident partiality" in the 2019 RSDC hearing – is not reviewable by this Court. *See Rochester Urban Renewal Agency v. Patchen Post, Inc.*, 45 N.Y.2d 1, 7 (1978) (this Court lacks the "power to weigh the evidence or review the findings of fact" in a case "with affirmed findings"); *Glenbriar Co. v. Lipsman*, 5 N.Y.3d 388, 392 (2005) ("But where, as here, there are affirmed findings of fact supported by the record, even though the original Civil Court was reversed by Appellate Term, this Court cannot review those facts and substitute its own findings."); *Cannon v. Putnam*, 76 N.Y.2d 644, 651 (1990) ("Since that finding has now been affirmed by the Appellate Division, the question is beyond our Court's power to review."). Because the Orioles' first proposed issue for review assumes that the arbitrators had a financial interest in the underlying arbitration proceedings,

and this Court is bound by the affirmed finding that they did not, that issue is not leaveworthy.

Second, the RSDC's ruling denying MASN's and the Orioles' extreme discovery request for "all" communications between MLB and the RSDC related to the parties' dispute is an issue of fact "lacking general significance," which is outside of this Court's jurisdiction to review. C.P.L.R. § 5602, Practice Commentaries C5602:1. Even if the Court could reach it, the Appellate Division properly affirmed Supreme Court's decision to defer to the arbitrators' discretion to control discovery in the proceeding. Although MASN and the Orioles claim that this Court should review arbitrators' disclosure obligations, the only legal issue is whether the denial of a particular blanket discovery request was an abuse of the arbitrators' wide discretion. The ordering of discovery in arbitration simply is not an issue worthy of this Court's review.

Third, MASN's and the Orioles' contention that the RSDC lacked the authority to determine the monetary amount owed to the Nationals, or that Supreme Court erred by performing ministerial computations based on monetary amounts expressly set forth in the RSDC award, is completely meritless. And MASN's and the Orioles' argument that the First Department somehow made "new law" (Mot. 26) in this regard lacks any basis. Indeed, the First Department cited its decision in *Morgan Guarantee Trust Company of N.Y. v. Solow*, 114 A.D.2d 818 (1st Dep't

1985), which stands for the well-settled principle that courts may enter monetary judgments on the basis of a "final and binding" arbitration award if the formula for calculating the "amounts owing" is "clear and specific." *Id.* at 822 (citation omitted). No basis exists for this Court to review the simple entry of a monetary judgment based on the fair market value calculations in the RSDC's award.

Finally, after all these years, what MASN and the Orioles once again seek in this motion for leave to appeal from the First Department's unanimous October 2020 order is for the parties to re-arbitrate their dispute for yet a third time – and in a different venue from the one that the parties unambiguously agreed, as the First Department and Supreme Court have repeatedly confirmed, would be the *exclusive* venue for this dispute. MASN and the Orioles, however, provide no jurisdictional basis for this Court to reach that issue, which was decided in the prior nonfinal November 2017 Appellate Division decision. For the independent reasons set forth in the Nationals' pending motion to dismiss MASN's and the Orioles' separate putative appeal as of right to bring up for review the First Department's 2017 decision (*see* Mot. No. 2020-913, *pending undecided*), this Court lacks any jurisdiction to review that 2017 decision, including (among other things) because

that 2017 decision does not "necessarily affect[]" the final judgment in 2019.[2] Thus, contrary to MASN's and the Orioles' argument on the present motion for leave to appeal, granting leave to appeal from the First Department's October 2020 order would *not* permit this Court to bring the full case up for review and reach the prior nonfinal November 2017 First Department order, because that 2017 order does not necessarily affect the final judgment here, as required under C.P.L.R. § 5501(a)(1) (which requires that the prior nonfinal Appellate Division order necessarily affect the final judgment before it can be brought up for review on appeal from that final judgment).

Because MASN and the Orioles fail to provide any legitimate basis for this Court to grant leave to appeal – instead appearing intent on delaying, as long as possible, any opportunity for the Nationals to receive the fair market value of telecast rights owed for the 2012-2016 time period that is the subject of this dispute – this Court should deny MASN's and the Orioles' motion.

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[2] The pending motion to dismiss also demonstrates that the dissent in the Appellate Division's 2017 decision was not on a legal question.

COUNTERSTATEMENT OF FACTS

A. The Arbitration Agreement

On March 28, 2005, the Office of the MLB Commissioner, the Nationals, MASN (the regional sports television network that until then had been televising only Orioles games) and the Orioles entered an agreement (the "2005 Agreement"). A.535. That 2005 Agreement gives the Orioles super-majority ownership (beginning with a 90% ownership stake that decreases by 1% per year until reaching 67% in 2032), and complete control, of MASN, and in turn gives MASN the exclusive right to televise both Orioles and Nationals games. A.539-546. The Nationals have only a minority ownership stake (beginning with a 10% ownership stake that increases 1% per year until reaching 33% in 2032). A.543. The 2005 Agreement is governed by Maryland law. A.549. In 2006, MLB sold the Nationals to the team's current owners. *See TCR Sports Broad. Holding, LLP v. WN Partner, LLC*, 2019 WL 9362629, *2 (Sup. Ct. N.Y. Cnty. Aug. 22, 2019).

The 2005 Agreement sets forth a fixed schedule of below-market fees ("rights fees") that MASN would pay the Nationals from 2005-2011 for the exclusive right to televise Nationals games. A.541. These below-market fees were a massive benefit to the Orioles: the lower the rights fees paid to the clubs, the greater the profits for MASN, and the Orioles (as supermajority owners of MASN) received a supermajority of those profits. A.543.

The 2005 Agreement provided that, beginning in 2012, the rights fees paid to the Nationals would be determined for "each successive five year period" based on "the fair market value of the telecast rights." A.541-42. If a dispute arose regarding rights fees, the 2005 Agreement provides for negotiation, then mediation, and then, if no agreement is reached between the parties, "the fair market value of the Rights shall be determined by the Revenue Sharing Definitions Committee ('RSDC') using the RSDC's established methodology for evaluating all other related party telecast agreements in the industry." A.542. The Agreement further provides that the "fair market value of the rights established" by the RSDC "shall be final and binding on the Nationals and [MASN]." A.542.

The RSDC is a rotating panel of MLB club owners and executives that regularly hears disputes concerning revenue-sharing and related issues, including valuation of television broadcast rights. *See TCR Sports*, 2015 WL 6746689 at *2. RSDC proceedings are generally informal proceedings, and the RSDC openly receives administrative support from MLB. *See id.*; A.696. From the outset of the 2005 Agreement, MASN and the Orioles were aware that the RSDC had a relationship with MLB and that MLB plays a role in RSDC proceedings. The Orioles had used the RSDC in 2004 to determine the fair market value of their telecast rights, and Peter Angelos, owner of the Orioles, testified before Congress in 2006 as to the advantages of using the RSDC to determine the fair market value of

the rights fees under the 2005 Agreement. *See TCR Sports Broad. Holding, LLP v. WN Partner, LLC*, 153 A.D.3d 140, 156-57 (1st Dep't 2017). As MASN's counsel acknowledged to Supreme Court, MASN expressly "bought into," "agreed to," and "had to live with" the structure of the RSDC proceeding set forth in the 2005 Agreement. *See id.* at 156.

B. The First RSDC Arbitration

In late 2011, the Nationals and MASN were unable to agree on the fair market value of the Nationals' telecast rights for 2012-2016. The parties jointly waived mediation and submitted the dispute directly to the RSDC in January 2012. *See TCR Sports*, 2019 WL 9362629, at *2. At the time, the RSDC was composed of owners/executives from the New York Mets, the Pittsburgh Pirates, and the Tampa Bay Rays. *Id*. Proskauer Rose LLP represented the Nationals in the proceedings, while concurrently representing MLB and other teams in unrelated matters. *Id.* at *2.

The RSDC held a hearing on April 3, 2012 at MLB headquarters in New York City. A.236. The RSDC reached its determination by mid-2012, and the parties were informally told the approximate amount of rights fees that MASN owed the Nationals, but the panel delayed issuing a formal written award until June 30, 2014, to allow for further party negotiations. A.151; A.296; A.534. In the interim, MLB sought to encourage the Nationals' participation in settlement discussions by

advancing the Nationals $25 million on August 26, 2013 (A.1134-37), which was meant to address the shortfall in 2012 and 2013 between the amount of rights fees the RSDC had determined MASN should pay the Nationals and the fraction of that amount that MASN actually paid the Nationals. *TCR Sports*, 2015 WL 6746689, at *8; A.296; A.968. The advance was non-recourse to the Nationals: the Nationals were not required to repay the advance. *See* Ex. 1.[3] Rather, the terms of the advance stated 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 the Commissioner's Office to cover" the advance, and "[a]ny excess amounts would go to the Nationals." A.1135. The Orioles were aware that MLB made an advance to the Nationals to encourage the Nationals' participation in settlement discussions. A.704.

C. Vacatur Of The First RSDC Award

The RSDC issued its first award on June 30, 2014 (the "First Award"). A.534. The First Award valued the Nationals' telecast rights fees in 2012 at roughly $53 million, which was far closer to MASN's and the Orioles' proposed valuation for 2012 ($34 million) than the valuation proposed by the Nationals ($109 million).

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[3] "Ex." as used herein refers to the Exhibits to the Affirmation of Patrick D. Curran submitted in opposition to the motion for leave to appeal, dated February 22, 2021.

TCR Sports, 2015 WL 6746689, at *4. MASN and the Orioles nevertheless petitioned Supreme Court to vacate the award in July 2014, and sought an order compelling a new arbitration in a forum other than the RSDC. *Id*. The Nationals cross-petitioned to confirm the First Award. *Id.* at *1.

On November 4, 2015, Supreme Court (Marks, J.) vacated the RSDC's 2014 award, solely for reasons concerning the Nationals' arbitration counsel's (*i.e.*, Proskauer's) concurrent representation of MLB and certain interests of the RSDC members. *TCR Sports*, 2015 WL 6746689, at *9-13. Supreme Court rejected MASN's and the Orioles' other arguments in support of vacatur, including the argument that MLB's $25 million advance to the Nationals in 2013 created evident partiality. *Id.* at *8-9. Supreme Court concluded that "MASN and the Orioles have not demonstrated that the circumstances of the advance raise any serious questions about the fairness of the arbitration process," explaining that "the Court cannot see how MASN or the Orioles were actually prejudiced by MLB's financial arrangement with the Nationals, even assuming there was insufficient disclosure of the precise nature of the arrangement." *Id*. Supreme Court found that "the advance was not undertaken in secret," noting that the amount was set by MLB "with full knowledge of the amount of the planned RSDC award" and that MASN and the Orioles "knew that an advance was to be made from MLB to the Nationals during that time frame." *Id*.

Supreme Court also found that MLB and the RSDC did not engage in any prejudicial misconduct, rejecting MASN's and the Orioles' speculation that MLB could have improperly influenced the outcome of the proceedings. *Id.* at *7. Supreme Court explained:

> MLB provided the sort of support that the parties must necessarily have expected when they entered into the Agreement and there is no evidence that MASN and the Orioles had any expectation that the three Club representatives, when acting in their capacity as members of MLB's standing committee, would eschew assistance from MLB's support staff to the extent customary and appropriate.

Id. The court concluded that "Petitioners have not shown any denial of fundamental fairness based on MLB's support role or the informality of the procedures used." *Id*. Supreme Court also rejected MASN's and the Orioles' argument that the RSDC's interpretation of the 2005 Agreement exceeded the scope of the arbitrators' authority or constituted manifest disregard of the law, and that MLB and the RSDC engaged in prejudicial misconduct by, among other things, denying the Orioles' discovery requests. *Id.* at *5-6.

Supreme Court also denied MASN's and the Orioles' request to remand the matter for rehearing before a different arbitral body unrelated to MLB, noting that "re-writing the parties' Agreement is outside of its authority." *Id.* at *13 n.21. Supreme Court explained that if the Nationals retained new counsel who did "not

concurrently represent MLB or the individual arbitrators and their clubs," the parties could "return to arbitration by the RSDC, however currently constituted, pursuant to the parties' Agreement." *Id*.

MASN and the Orioles appealed Supreme Court's rejection of their argument that a new arbitration should be conducted in a different forum to the First Department. *TCR Sports*, 153 A.D.3d at 150. The Nationals and MLB cross-appealed the vacatur of the original RSDC award. *Id*. On July 13, 2017, the First Department affirmed vacatur of the First Award based solely on Proskauer's involvement in the proceedings. *TCR Sports*, 153 A.D.3d at 153.

The First Department also upheld Supreme Court's denial of MASN's and the Orioles' argument "that the parties' agreement should be disregarded and the matter remanded to an arbitral forum unaffiliated with MLB," as "MASN, the Orioles and the Nationals expressly chose to carve out disputes over telecast fees for arbitration before the RSDC, an industry-insider committee with specialized knowledge on the complex issue of how to calculate the appropriate fees that television networks should pay to teams for broadcast rights." *Id.* at 153-54, 156 (plurality).

The plurality rejected the argument that MLB's outstanding $25 million advance to the Nationals rendered MLB and the RSDC biased against the Orioles, particularly after the Nationals "offered to post a bond to guarantee repayment of the advance to MLB regardless of the outcome of the arbitration." *Id.* at 157-59. The

plurality found that "[t]o allow the Orioles to now use the advance, which maintained the status quo, as a sword to disqualify the RSDC *defies logic and mischaracterizes MLB's efforts* to have the parties negotiate their differences without undue financial pressure on either side." *Id.* at 158 (emphasis added).

The plurality also rejected as "pure conjecture" the contention that the second RSDC panel – which would be composed of entirely new members who did not participate in the first 2012 arbitration – "will remain puppets of MLB." *Id.* at 157. Notably, the plurality made clear that "we need not" and "do not" rule on whether courts have the inherent power to send an arbitration to a different forum, instead holding that, even assuming "the dissent is correct" that "such inherent power exists, MASN and the Orioles have not established that remand to the RSDC will be fundamentally unfair *under the particular circumstances before us*." *Id.* at 154 n.3 (emphasis added). Justice Kahn issued a concurrence joining the plurality in holding the new arbitration must be before the RSDC, *i.e.* the forum selected by the parties. *Id.* at 161.

The dissenting opinion's disagreement with the majority and plurality was on *facts* – not law. As the dissent explained, it *agreed* with the plurality on the legal standard: "this Court may have the power to refer the matter to a neutral arbitral forum other than that chosen by the parties under the appropriate circumstances," *id*. at 163 (dissent), and the Agreement "could be reformed if only MASN and the

Orioles had 'made the extraordinary showing of grounds needed to reform the agreement or disqualify the RSDC.'" *Id*. at 178 (*quoting id*. at 160 (plurality)). The dissent also *agreed* with the majority that "general contract principles" govern the question whether to reform the Agreement and thus to remand the parties to a different arbitral body. *Id*. at 173. Thus, at least four Justices (two in the plurality, two in dissent) agreed the court could disqualify the RSDC on an "extraordinary showing." *Id*. at 160 (plurality); *id*. at 178 (dissent). And all five Justices agreed that an arbitration agreement may be reformed if there is an "established ground" to do so under "general contract principles." *See id*. at 159-60 (plurality); *id*. at 161 (concurrence); *id*. at 173 (dissent).

The dissent instead concerned a *factual* disagreement: whether the Orioles and MASN made the "extraordinary showing" necessary to invoke the courts' general power of reformation. *Id*. at 178. A majority of the panel ruled that they had not done so. As the plurality summarized: "Contrary to the view of the dissent, there has been no showing of bias or corruption on the part of the members of the reconstituted RSDC, and the Nationals will use new counsel at the second arbitration. Speculation that MLB will dictate the outcome of the second arbitration … does not suffice to establish that they will not exercise their independent judgment or carry out their duties impartially, or that the proceedings will be fundamentally unfair." *Id*. at 143-44 (plurality). The dissent, however, felt

that the Orioles and MASN *had* shown that they "would be unable to obtain a fundamentally fair arbitration if the RSDC were to rehear the matter," *id*. at 174 (dissent), and *had* "'made the extraordinary showing of grounds needed to reform the agreement or disqualify the RSDC,'" *id*. at 178 (*quoting id*. at 160 (plurality)); *see also id.* at 163 ("I dissent because *this particularly egregious set of circumstances* warrants the referral of the case to a neutral arbitral forum." (emphasis added)).

D. This Court Denies MASN's and the Orioles' Appeal for Lack of Jurisdiction, and the First Department Unanimously Denies Leave To Appeal

In July 2017, MASN and the Orioles noticed an appeal to this Court from the First Department's order under C.P.L.R. § 5601(a). A.489. On November 16, 2017, this Court dismissed the appeal "sua sponte, upon the ground that the order appealed from does not finally determine the proceeding within the meaning of the Constitution." *TCR Sports Broad. Holding, LLP v. WN Partner, LLC*, 30 N.Y.3d 1005 (2017).[4] MASN and the Orioles then moved the First Department for leave to appeal to the Court of Appeals under C.P.L.R. § 5602(b)(1), and the same panel that had rendered the underlying decision unanimously denied the motion. *TCR Sports Broad. Holding, LLP v. WN Partner, LLC*, 2018 WL 457101 (1st Dep't 2018).

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[4] Chief Judge DiFiore and Judge Garcia took no part in the decision. *Id*.

E. The Second RSDC Arbitration

In November 2018, the parties had a new arbitration before the RSDC, which was now composed of entirely new members: the principal owner of the Milwaukee Brewers, and the presidents of the Seattle Mariners and Toronto Blue Jays. A.1816; A.489-490. The Nationals were represented by new counsel, Quinn Emanuel, that was not representing MLB, the RSDC members, or their clubs. A.555.

1. The Nationals Repay the $25 Million Advance Request For The RSDC's Recusal And For All Of Its Communications With MLB

Given the Orioles' position that the outstanding $25 million advance purportedly compromised the impartiality of MLB and the RSDC, *see, e.g.*, A.1140, the Nationals on February 9, 2018 agreed to repay MLB the $25 million advance, with interest, ten days prior to the scheduled start of the new RSDC arbitration (the "Prepayment Agreement"). A.559-560. Per the Prepayment Agreement, which did not supersede the terms of the original advance, the money would be returned to the Nationals if the hearing did not go forward when scheduled, after which the Nationals would again need to repay the amount in advance of a new hearing date once scheduled. A.559. The Nationals informed MASN and the Orioles of the Prepayment Agreement on March 12, 2018. A.555.

2. The RSDC Declines MASN's and the Orioles' Requests That the RSDC Recuse Itself and that the RSDC and MLB Produce All Communications Between Them

The Orioles then asked the RSDC to recuse itself from the new arbitration, for reasons including both MLB's original $25 million advance to the Nationals and the Prepayment Agreement. A.561-64; A.944. The Orioles' argument regarding the Prepayment Agreement was that "[i]t is intolerable for MLB to have skin in a game refereed by an MLB lawyer and an MLB committee." A.563. On May 10, 2018, the RSDC rejected that request in a comprehensive written decision, noting, among other things, that the Orioles' "grounds articulated for recusal … were largely rejected by the First Department as grounds for disqualification of the RSDC," and that the "First Department also granted the Nationals' motion to compel arbitration before the RSDC." A.577-78. In that procedural order, the RSDC clearly set forth the factors it considered, including, among other things, that: (1) "No RSDC member is aware of any fact or circumstance, past or present, that would call into question his independence or give rise to reasonable doubts about his impartiality"; (2) "The RSDC members had no role in the previous RSDC hearing or subsequent judicial proceedings, and no RSDC member has prejudged the outcome of the present proceeding"; (3) "The issue that led to vacatur of the June 30, 2014 RSDC decision has been cured"; and (4) "None of the RSDC members has any personal relationship with any of the parties beyond the normal interactions that occur in connection with

MLB business," with two minor exceptions not relevant here (and which favored the Orioles regardless). A.577-78. The RSDC further noted that the $25 million advance "will be repaid before the hearing in this matter on August 15 and, if necessary, August 16, 2018, thereby mooting any concerns that the fact this loan remained outstanding would influence the outcome of this proceeding or give MLB an economic stake in the outcome of this proceeding." A.578.

During discovery, the RSDC permitted each party to submit requests for information to MLB. A.584. The RSDC granted many of MASN's and the Orioles' requests, including some untimely ones (*see* A.584; A.590; A.600-07), but did deny MASN's and the Orioles' requests for "all" communications between the RSDC and MLB. The RSDC found that the "stated reasons" for such discovery were "not to explore the merits of this dispute but rather to explore the impartiality of the RSDC," and that MASN and the Orioles had failed to make any "threshold showing of a lack of independence or impartiality on the part of any member of the RSDC." A.579; A.955. The RSDC determined that such discovery was "irrelevant and inappropriate." A.579.

3. The Nationals Repay The Advance Before The Hearing

The Nationals, as agreed, repaid the $25 million advance, plus interest (A.556), ten days before the RSDC held a two-day evidentiary hearing on November 15-16, 2018 (A.1769). That hearing followed substantial pre-hearing submissions

by the parties, as well as eleven procedural orders – many in favor of MASN and the Orioles – on matters raised by the parties in advance of the hearing. *See, e.g.*, A.577; A.600; A.614; A.640; A.654; A.660; A.664; A.668. Indeed, at the Orioles' request, the RSDC allowed for hearing procedures that went well beyond the RSDC's normal informal approach, permitting opening statements, six sworn fact and expert witnesses, direct and cross-examinations, closing arguments, transcription by a professional court reporter, and written post-hearing submissions. A.664-67; *see* A.1767-1816.

4. The 2019 RSDC Award

On April 15, 2019, the RSDC issued its 2019 Award in a 48-page written decision. A.1767-1816. In its decision, the RSDC explained in great detail its interpretation of the 2005 Agreement's requirement that the RSDC apply its "established methodology" (A.1786-797), and found that "the license fees to be paid by MASN to the Nationals for each of the years 2012-2016 are:

Year	**License Fee**
2012	$54,878,272.63
2013	$57,767,546.52
2014	$60,410,594.11
2015	$61,363,965.13
2016	$62,414,285.75
Average Annual Value	$59,366,932.83"

(A.1769). The 2019 Award also expressly set forth that MASN previously paid the Nationals rights fees of $34.0 million for 2012, $36.6 million for 2013, $39.3 million for 2014, $42.0 million for 2015, and $45.7 million for 2016. A.1776.

F. Supreme Court's Confirmation and Enforcement of the 2019 RSDC Award

On April 15, 2019, the Nationals moved in Supreme Court, pursuant to C.P.L.R. §§ 7502(a)(iii), 7510, to confirm the RSDC's 2019 Award. A.476.

1. This Court Dismisses MASN's and the Orioles' Attempt to Appeal From the First Department's 2017 Decision

In May 2019, while the Nationals' motion in Supreme Court to confirm the RSDC's 2019 Award was pending, MASN and the Orioles noticed an appeal to this Court from the RSDC's 2019 Award seeking review of the First Department's 2017 decision pursuant to C.P.L.R. § 5601(d), which the Nationals moved to dismiss on grounds that this Court lacked jurisdiction. This Court on November 25, 2019, granted the Nationals' motion to dismiss that purported appeal, "upon the ground that the arbitration award appealed from does not finally determine the proceeding within the meaning of the Constitution." *TCR Sports Broad. Holding, LLP v. WN Partner, LLC*, 34 N.Y.3d 1011 (2019).[5]

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[5] Chief Judge DiFiore and Judge Garcia took no part in the decision. *Id*.

2. Supreme Court Confirms The RSDC 2019 Award

On August 22, 2019, Supreme Court (Cohen, J.) issued its decision and order confirming the 2019 Award. *TCR Sports Broad. Holding, LLP v. WN Partner LLC*, 2019 WL 9362629 (Sup. Ct. N.Y. Cnty. Aug. 22, 2019). Supreme Court rejected each of MASN's and the Orioles' arguments in support of vacatur. *Id.* at *8-11. Supreme Court also rejected MASN's and the Orioles' request to be remanded to a new venue for yet another re-arbitration of the dispute. *Id.* at *1, *6.

Specifically, Supreme Court ruled MASN and the Orioles failed to establish "evident partiality" under the FAA, finding that MASN and the Orioles had offered merely "rehashed versions of arguments that were rejected by Judge Marks and not disturbed on appeal." *Id.* at *7.

Supreme Court also rejected MASN's and the Orioles' argument that the Nationals' Prepayment Agreement to repay a $25 million advance made by MLB created a "glaring conflict of interest." *Id.* at *7-8. And Supreme Court disagreed with MASN's and the Orioles' argument that the Prepayment Agreement created a "financial disincentive for the RSDC to recuse itself from the arbitration" or satisfied "the heavy burden of proving evident partiality," particularly after "two court decisions finding that it did not have to do so." *Id.* at *8-9. To the contrary, Supreme Court found that the Prepayment Agreement was "***one better***" than the bond previously offered by the Nationals that would be repaid after an award was issued,

and that the Prepayment Agreement "if anything ***alleviated*** the substantive concerns expressed by the Orioles in connection with the First Award – *i.e.*, that the loan purportedly gave MLB a financial stake in the *outcome* of the arbitration." *Id.* at *8 (emphasis in original). Supreme Court further found that the Prepayment Agreement posed no risk that MLB would lose the opportunity to have the $25 million advance repaid were the RSDC to recuse itself (meaning, according to MASN and the Orioles, that the Prepayment Agreement purportedly disincentivized the RSDC from seriously considering MASN's and the Orioles' recusal requests). *Id.* at *9. Indeed, Supreme Court observed that the RSDC was expressly "mandated to be the forum under the 2005 Agreement," as the parties had agreed that rights fees disputes "'shall be determined' by RSDC, full stop." *Id.* at *8.

Supreme Court also rejected MASN's and the Orioles' "repackaged" argument that there was evident partiality purportedly because the RSDC failed to grant MASN's and the Orioles' requests for discovery into MLB's role in the proceedings and MLB's communications with the RSDC – an argument that Supreme Court noted had previously been "soundly rejected by Judge Marks." *Id.* at *9-10. Supreme Court explained that the parties' agreement "expressly mandates that disputes regarding telecast rights would be resolved by the RSDC, which all parties understood is composed of *MLB-chosen* executives from other MLB teams – that is, 'industry insiders, with specialized expertise.'" *Id.* at *9 (emphasis in

original) (citations omitted). In addition, citing the First Department's 2017 decision, Supreme Court rejected MASN's and the Orioles' argument that public statements made by the MLB Commissioner evinced bias:

> The plurality opinion in *TCR II* addressed similar allegations and found them insufficient to warrant removing the MLB-appointed RSDC from the arbitration process: "Nor does the fact that MLB has made certain public statements expressing the view that the RSDC acted within the scope of its authority in setting the rights fees, and that MASN would have to abide by that determination 'sooner or later,' warrant transfer to a new forum. Again, it is the RSDC, not MLB or its Commissioner that will render a final decision in this matter."

Id. at *10 (quoting *TCR Sports*, 153 A.D.3d at 158 (plurality)). Supreme Court flatly rejected MASN's and the Orioles' contention "that public statements such as those referenced by the Orioles are sufficient to throw into doubt the fairness of a process that was handled and resolved by the RSDC with obvious thoroughness and care." *Id*.

Supreme Court also rejected MASN's and the Orioles' claim that they were denied the right, under Section 10(a)(3) of the FAA, to present their case, as "the 2005 Agreement did not provide a right to *any* discovery in a dispute regarding rights fees," and the RSDC exercised its "broad discretion" to reject the discovery requests "in a formal, reasoned order on the ground that they did not relate to the merits of the dispute." *Id.* (emphasis in original). In fact, Supreme Court observed that "[e]ven a cursory review of the voluminous record in this case shows that these

parties have suffered through many things over the course of seven years, but one of them was ***not*** the absence of an adequate opportunity to present their evidence and arguments." *Id.* (emphasis in original). And Supreme Court rejected MASN's and the Orioles' argument that the RSDC exceeded its powers under Section 10(a)(iv) of the FAA, explaining that "the RSDC obviously had the authority to consider the interpretation of relevant language in the agreement and the application of the facts to that language." *Id.* at *11.

3. Supreme Court's Monetary Judgment

Supreme Court also rejected MASN's and the Orioles' argument that the RSDC's 2019 Award was merely "declaratory," finding instead that the RSDC's determination of the rights fees owed to the Nationals "constitutes a monetary 'sum awarded' upon which the court may grant interest." *Id.* at *11. The court explained: "The RSDC made its determination, which clearly was a monetary award of what 'shall be paid' to the Nationals, down to the single dollar, subject only to deducting the amount previously paid by MASN to the Nationals in respect of the rights fees." *Id*.

On November 14, 2019, Supreme Court denied MASN's motion to resettle or reargue, and Supreme Court directed the parties to submit a proposed judgment for "the amount of the television rights fees set forth on page 48 of the April 15, 2019 [RSDC] Award (NYCEF Doc. No. 813) minus the television rights fees already paid

to the Nationals for the same relevant period [which were expressly set forth in the RSDC's 2019 Award], directing the Clerk to calculate statutory interest on the net amount from April 15, 2019 through the date of judgment." A.39. Judgment was entered in favor of the Nationals on December 9, 2019, in the amount of $99,203,339.14, plus statutory interest in the amount of $5,821,741.16 (for the period between the date of the RSDC's 2019 Award and the date of entry of Supreme Court's judgment), for the sum total of $105,025,080.30. A.90.

G. First Department's Unanimous Affirmance

On October 22, 2020, the First Department, in a unanimous 4-0 decision, affirmed Supreme Court's confirmation of the RSDC's 2019 award and Supreme Court's judgment. *TCR Sports Broad. Holding, LLP v. WN Partner, LLC*, 187 A.D.3d 623 (1st Dep't 2020). The First Department ruled that "Petitioner failed to establish evident partiality in the RSDC in the second arbitration," rejecting "petitioner's arguments that the RSDC otherwise violated its obligations, exceeded its powers or denied petitioner a fair hearing." *Id.* at 624. The First Department also rejected MASN's and the Orioles' argument that Supreme Court "unlawfully modified the award in its confirmation order by performing a calculation of the Nationals' damages." *Id.* (citing *Morgan Guar. Trust Co. of N.Y. v. Solow*, 114 A.D.2d 818, 821-822 (1st Dep't 1985), *aff'd* 68 N.Y.2d 779 (1986)).

On November 20, 2020, MASN and the Orioles moved in the First Department for reargument and/or for leave to appeal to this Court. Ex. 2. MASN and the Orioles urged the First Department to reconsider its affirmance of Supreme Court's entry of a monetary judgment, and requested leave to appeal to this Court to address questions related to the financial interests of an arbitral forum in holding an arbitration hearing, an arbitrator's disclosure obligations, and the power of a court to enter a monetary judgment upon confirming an arbitration award. *Id.*

H. MASN And The Orioles File in this Court A Purported Appeal for Review of the First Department's 2017 Decision.

Virtually simultaneously with MASN's and the Orioles' motion in the First Department to reargue, or for leave to appeal from the First Department October 2020 decision, MASN and the Orioles on November 19, 2020, filed in Supreme Court a notice of appeal to this Court, purportedly pursuant to C.P.L.R. § 5601(d), seeking review of the First Department's 2017 determination to remand the parties to a new arbitration before the RSDC. Ex. 3. On November 25, 2020, MASN and the Orioles filed their Preliminary Appeal Statement with this Court. Ex. 4.

In a letter dated December 3, 2020, the Chief Clerk of this Court notified the parties that the Court will examine its subject matter jurisdiction over the appeal. Ex. 5 at 1. Also on December 3, 2020, the Nationals moved to dismiss the appeal for lack of subject matter jurisdiction under C.P.L.R. § 5601(d), because the First

Department's 2017 order did not "necessarily affect[]" the final judgment, and because the two-Justice dissent from that order was not on a question of law. Ex. 6. MASN's and the Orioles' putative appeal seeking review of the First Department's 2017 order is presently being held in abeyance pending this Court's decision as to whether it satisfies the requirements of C.P.L.R. § 5601(d). Ex. 5 at 2.

I. The First Department Denies MASN's and the Orioles' Motion to Reargue or For Leave to Appeal to this Court.

On January 7, 2021, the First Department unanimously denied in its entirety MASN's and the Orioles' motion to reargue the First Department's October 2020 decision or, in the alternative, for leave to appeal from that October 2020 decision to this Court. Ex. 7.

J. MASN and the Orioles Move This Court for Leave to Appeal from the First Department's October 2020 Decision.

On February 10, 2021, MASN and the Orioles filed the present motion seeking leave to appeal to this Court from the First Department's October 2020 decision, seeking "this Court's review of the *additional* issues of MLB's evident partiality, bias, and prejudgment of this dispute that occurred *after* the 2017 First Department Order remanded the proceeding to MLB." Mot. 2 (emphasis in original). MASN and the Orioles argue that there is a "close relationship" between the issues raised in their proposed appeal from the First Department's October 2020 decision and their putative appeal from the First Department's 2017 decision. Mot.

3. In so doing, MASN and the Orioles disregard that their putative appeal from the First Department's 2017 decision is the subject of this Court's pending *sua sponte* jurisdictional inquiry and the Nationals' pending motion to dismiss.

STATEMENT OF JURISDICTION

As demonstrated herein, MASN and the Orioles do not – and could not – demonstrate any basis for this Court to hear, pursuant to C.P.L.R. § 5602(a)(1)(i), an appeal from the First Department's unanimous October 2020 decision confirming the 2019 arbitration award and Supreme Court's entry of judgment thereon.

For the independent reasons set forth in the Nationals' pending motion to dismiss MASN's and the Orioles' putative appeal appeal as of right, under CPLR C.P.L.R. § 5601(d), to bring up for review the First Department's prior nonfinal 2017 decision remanding the parties for a new arbitration before the RSDC (*see* Ex. 6), this Court also lacks any jurisdiction to review that 2017 decision, including because that decision did not "necessarily affect[]" the final judgment in 2019. *See* Ex. 6 at 24-30. Thus, MASN and the Orioles have no right under C.P.L.R. § 5601(d) to this Court's review of November 2017 Appellate Division order. Nor would granting MASN and the Orioles leave to appeal from the October 2020 Appellate Division order bring up for review the November 2017 Appellate Division order under C.P.L.R. § 5501(a)(1). *See* C.P.L.R. § 5501(a)(1) (requiring that the prior

nonfinal Appellate Division order necessarily affect the final judgment before it would be brought up for review on appeal from that final judgment).

REASONS FOR DENYING LEAVE TO APPEAL

"The primary function of the Court of Appeals" is "that of declaring and developing an authoritative body of decisional law for the guidance of the lower courts, the bar and the public." *People v. Grimes*, 32 N.Y.3d 302, 315 (2018) (quoting Karger, *Powers of the New York Court of Appeals* § 1:1 at 3-4 (rev. 3d ed. 2005)). Accordingly, this Court generally grants leave to appeal only where a case presents issues that are "novel or of public importance, present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division." 22 N.Y.C.R.R. § 500.22(b)(4).

And where, as here, the Appellate Division has affirmed the factual findings of a judgment below, "[t]he court of appeals shall review questions of law only," and may not consider factual disputes. C.P.L.R. § 5501(b); *see also* N.Y. Const. art. 6, § 3(a) ("The jurisdiction of the court of appeals shall be limited to the review of questions of law," subject to exceptions not relevant here.); *Hylan Flying Serv., Inc. v. State*, 49 N.Y.2d 840 (1980) (factual finding affirmed by Appellate Division was "not subject to review" by Court of Appeals) (citing C.P.L.R. § 5501(b)). That is because this Court lacks the "power to weigh the evidence or review the findings of fact" in a case "with affirmed findings." *Rochester*, 45 N.Y.2d at 7; *Glenbriar*, 5

N.Y.3d at 392 ("But where, as here, there are affirmed findings of fact supported by the record, even though the original Civil Court was reversed by Appellate Term, this Court cannot review those facts and substitute its own findings."); *Cannon*, 76 N.Y.2d at 651 ("Since that finding has now been affirmed by the Appellate Division, the question is beyond our Court's power to review.").

Moreover, as this Court has recognized, there is a "well-established rule that an arbitrator's rulings, unlike a trial court's, are largely unreviewable." *Matter of Falzone (New York Cent. Mut. Fire Ins. Co.)*, 15 N.Y.3d 530, 534 (2010). "It is well settled that judicial review of arbitration awards is extremely limited. An arbitration award must be upheld when the arbitrator 'offer[s] even a barely colorable justification for the outcome reached.'" *Wien*, 6 N.Y.3d at 479 (citation omitted). "[A]n arbitrator's award should not be vacated for errors of law and fact committed by the arbitrator and the courts should not assume the role of overseers to mold the award to conform to their sense of justice." *Id*. at 479-480. And under the FAA, which undisputedly applies here, the "'party moving to vacate an arbitration award has the burden of proof, and the showing required to avoid confirmation is very high.'" *U.S. Elecs., Inc. v. Sirius Satellite Radio, Inc.*, 17 N.Y.3d 912, 915 (2011) (quoting *Ecoline, Inc. v. Local Union No. 12 of Int'l Ass'n of Heat & Frost Insulators & Asbestos Workers, AFL-CIO*, 271 F. App'x 70, 72 (2d Cir. 2008)).

MASN's and the Orioles' motion for leave to appeal presents no legal question that merits this Court's review. The motion seeks review of the First Department's October 22, 2020 decision that unanimously affirmed Supreme Court's August 2019 order confirming the RSDC's 2019 Award and entry of a monetary judgment based on the fair market value findings in the confirmed award. The First Department's order involved only straightforward application of the well-settled law of confirming arbitration awards and entry of monetary judgments to the unique facts of this case. And MASN and the Orioles have not identified any conflict with this Court's precedents on confirmation of arbitration awards or entry of judgments, or with any Appellate Division order of a different department, that could warrant this Court's review. Indeed, the mere involvement of Major League Baseball does not somehow transform this legally uninteresting case into one of statewide import.

Rather, the fact-bound issues that MASN and the Orioles seek to raise would not have precedential impact beyond these parties and "can be expected to arise only rarely or in exceptional cases." *See* C.P.L.R. § 5602, Practice Commentaries C5602:1. As this Court recently recognized, it "does not sit 'to correct errors in individual cases, but to decide matters of larger public import.'" *Grimes*, 32 N.Y.3d at 315 (quoting *Halbert v. Michigan*, 545 U.S. 605, 618 (2005)). No such issues exist here warranting leave to appeal.

Nor does MASN's and the Orioles's pending C.P.L.R. § 5601(d) appeal to bring up for review only the First Department's prior nonfinal November 2017 order remanding the parties to arbitration before the RSDC provide any basis to grant leave here from the First Department's October 2020 order of affirmance. Not only have MASN and the Orioles failed to satisfy the requirements for a C.P.L.R. § 5601(d) appeal as of right, *see generally* Ex. 6, the November 2017 nonfinal Appellate Division order remanding the parties for a new plenary hearing does not "necessarily affect[]" the final judgment here and, thus, would not be brought up for review, even if this Court were to grant leave from the October 2020 Appellate Division order. *See* Ex. 6 at 26-38. The only issues that would be reviewable would be those that have now been twice rejected by Supreme Court and the Appellate Division, and concern only the application of settled law to the confirmation of the 2019 RSDC award and the entry of monetary judgment.

Certainly, MASN's and the Orioles' recycled litany of contrived grievances, each of which has been repeatedly rejected by the courts below, is not "novel or of public importance" to merit this Court's review. Rather, MASN's and the Orioles' proposed appeal from the First Department's October 2020 order is a textbook example of an appeal that only requires consideration of "the rights of the parties under a very peculiar state of facts – a state of facts not likely to be repeated." *Martin v. City of New York*, 152 N.Y.S. 8, 10 (1st Dep't 1915) (denying leave to appeal).

I. THE FIRST DEPARTMENT'S UNANIMOUS AFFIRMANCE OF SUPREME COURT'S FACT-SPECIFIC APPLICATION OF SETTLED LEGAL PRINCIPLES DOES NOT WARRANT THIS COURT'S REVIEW

MASN's and the Orioles' first "Question Presented" – whether the FAA prohibits "an arbitral forum from entering into an agreement with one party to the arbitration that gives the arbitral forum a direct $25 million financial interest in holding the arbitration hearing" (Mot. 13, 25-31) – is, on its face, "lacking general significance," "concern[s] only these parties," and "can be expected to arise only rarely or only in exceptional cases." C.P.L.R. § 5602, Practice Commentaries C5602:1.

As a threshold matter, this Court lacks any jurisdiction even to consider MASN's and the Orioles' first question, as it seeks review of "affirmed findings of fact supported by the record," *Glenbriar*, 5 N.Y.3d at 392, that MASN's and the Orioles' evidence was insufficient to establish the RSDC's evident partiality. Among other things, Supreme Court found that, under the Prepayment Agreement, the RSDC's recusal decision would "[a]t most" affect *when – not whether* – the Nationals repaid MLB, and that "any purported indirect and modest financial interest" of the RSDC's three members in accelerating that repayment "does not come close to satisfying the heavy burden of proving evident partiality." *TCR*

Sports, 2019 WL 9362629, at *9. The First Department affirmed that finding. *TCR Sports*, 187 A.D.3d at 624.

"The Court of Appeals is a law court" and "cannot review those facts and substitute its own findings," a jurisdictional limitation that "is dispositive here, as the legal sufficiency of the evidence is not before" this Court. *Glenbriar*, 5 N.Y.3d at 392; *see also Rochester*, 45 N.Y.2d at 7 (in a case "with affirmed findings," the Court of Appeals has "no power to weigh the evidence or review the findings of fact"); *Cannon*, 76 N.Y.2d at 651 (similar).

MASN's and the Orioles' first question also is irrelevant to the vast majority of – if not *all* other – arbitrations and, in the context of the actual facts of this particular case, does not create any tension whatsoever on settled law. MASN's and the Orioles' mere disagreement with the First Department's case-specific ruling does not warrant further review.

MASN and the Orioles erroneously assert that the First Department's October 2020 decision sets forth a rule that "an arbitral appointing authority may, in an agreement with one party, take a direct financial stake in an issue before the arbitrator." Mot. 20 (emphasis omitted). The First Department, however, did no such thing. Instead, the First Department unanimously concluded that MASN "failed to establish evident partiality in the RSDC in the second arbitration." *TCR Sports*, 187 A.D.3d at 624. That holding flows from well-established authority that

the "reasonable person standard" for determining evident partiality under the FAA is "settled law." *U.S. Elecs., Inc.*, 17 N.Y.3d at 914 (collecting cases). Under this standard, "evident partiality will be found where a reasonable person would ***have to*** conclude that an arbitrator was partial to one party to the arbitration." *Id.* (emphasis added; quotation marks omitted). Furthermore, "[a] party moving to vacate an arbitration award has the burden of proof, and the showing required to avoid confirmation is very high." *Id.* at 915 (citation omitted). This Court has made clear that to constitute evident partiality, "[t]he interest or bias … must be direct, definite and capable of demonstration rather than remote, uncertain, or speculative." *Id.* (quoting *Transportes Coal Sea de Venezuela C.A. v. SMT Shipmanagement & Transp. Ltd.*, 2007 WL 62715, *3 (S.D.N.Y. Jan. 9, 2007)).

MASN's and the Orioles' suggestion that there could be a "bright line rule" against "an arbitrator or appointing authority [having] a direct financial interest in any matter before it" (Mot. 17) is conjured out of whole cloth. The two cases MASN and the Orioles cite – *Pitta v. Hotel Association of New York City, Inc.*, 806 F.2d 419 (2d Cir. 1986) and *Coty Inc. v. Anchor Construction, Inc.*, 7 A.D.3d 438 (1st Dep't

2004) (Mot. 17-18) – certainly do not stand for that proposition.[6] And, in any event, these cited decisions predate this Court's 2011 adoption of the "reasonable person" standard in *U.S. Electronics*, 17 N.Y.3d at 914.

In fact, contrary to MASN's and the Orioles' assertions, the evident partiality standard involves no "bright line rule." *See* Mot. 17. Rather, the proper question is whether a reasonable person "considering all of the circumstances" would "have to conclude" the arbitrator was biased. *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 137 (2d Cir. 2007) (emphasis in original; citation omitted); *accord Ometto v. ASA Bioenergy Holding A.G.*, 2013 WL

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[6] In *Pitta*, the Second Circuit held that evident partiality clearly existed where "the arbitrator, acting alone, determine[d] the validity of his own dismissal from a lucrative position." 806 F.2d at 424. In doing so, the court explicitly stated it did not intend to announce a bright line rule: "We do not suggest that an arbitrator must recuse himself from every decision that might have any bearing on his compensation." *Id.* In *Coty*, the First Department issued a two-sentence decision affirming the vacatur of an award "in light of the *appearance of impropriety* created by the involvement of the arbitrators in the parties' dispute over prepayment of arbitration fees, a matter in which the arbitrators had a direct financial interest." 7 A.D.3d at 439 (emphasis added). But that case was not governed by the FAA and did not apply the applicable standard here; as this Court has acknowledged, "evident partiality was a stringent standard that could not be satisfied by a mere appearance of bias." *U.S. Elecs.*, 17 N.Y.3d at 914; *see also Coty Inc. v. Anchor Const. Inc.*, 2003 WL 139551, at *8 n.7 (Sup. Ct. N.Y. Cnty. Jan. 8, 2003) (lower court recognizing a "distinction between evident partiality and appearance of impropriety" (citation omitted)), *aff'd*, 7 A.D.3d 438 (2004).

174259, at *3 (S.D.N.Y. Jan. 9, 2013); *797 Broadway Grp., LLC v. BCI Const., Inc.*, 57 Misc.3d 391, 395 (Sup. Ct. Albany Cnty. 2017).

Although the facts of this case are unique, the analysis under the settled standard for evident partiality is straightforward. Pursuant to the Prepayment Agreement, the Nationals repaid the 2013 advance ten days before the second arbitration hearing began in November 2018. A.556. MASN's and the Orioles' only argument – that the agreement gave MLB a "direct financial stake" in whether the RSDC recused itself – also lacks merit. The Prepayment Agreement did not make MLB's recovery of its advance to the Nationals contingent upon whether the RSDC recused itself, and MLB would have still recovered the money under the terms of the advance, which remained in full force. A.1134-35. Thus, as Supreme Court found, the Prepayment Agreement "was not a secret" and "if anything *alleviated*" any risk of bias by "removing any lingering concerns that MLB might have a financial interest in the outcome" of the arbitration. *TCR Sports*, 2019 WL 9362629 at *8 (emphasis in original).

The purpose and effect of the Prepayment Agreement was to alleviate any asserted concern by MASN and the Orioles about MLB's purported financial interests, by ensuring that the Nationals would return the full amount of MLB's advance *before* the RSDC held a hearing and ruled on the merits. *See id*. Far from "continued misconduct" as MASN and the Orioles claim (Mot. 4), the Prepayment

Agreement fully resolved MASN's and the Orioles' oft-repeated assertion that the outstanding advance would have influenced the RSDC's determination in the arbitration. Supreme Court found that compared to the solution originally offered by the Nationals and endorsed by the plurality in the First Department's 2017 decision (*see TCR Sports*, 153 A.D.3d at 158) – that is, to post a bond guaranteeing repayment of the advance regardless of the arbitration's outcome – the Prepayment Agreement "does that one better" by guaranteeing "MLB would be fully repaid *before* the second arbitration," *TCR Sports*, 2019 WL 9362629 at *8 (emphasis in original).

There is nothing anomalous about the RSDC's decision not to recuse itself: the RSDC's written decision reflected consideration of MASN's and the Orioles' arguments. As the RSDC noted, its decision was consistent with the First Department's November 2017 order remanding the parties to arbitration before the RSDC. *See* A.577-78 (citing *TCR Sports*, 153 A.D.3d at 143 ("there is no basis, in law or in fact, to direct that the second arbitration be heard in a forum other than the industry-insider committee that the parties selected in their agreement to resolve this particular dispute, fully aware of the role MLB would play in the arbitration process")). As the First Department also recognized, public comments by the MLB commissioner were insignificant, as "it is the RSDC, not MLB or its Commissioner that will render a final decision in this matter." *TCR Sports*, 153 A.D.3d at 158

(plurality). And the members of the RSDC affirmed that they had no conflicts that would render them biased in favor of the Nationals. A.577-78.

The First Department's unanimous holding that MASN and the Orioles failed to establish evident partiality thus does not remotely undermine the public policy behind the arbitration regime, nor does it threaten, as MASN and the Orioles assert, "New York's global reputation as one of the leading centers of business arbitration." Mot. 20-21.[7] MASN's and the Orioles' first proposed issue is not leaveworthy.

II. THE RSDC'S DISCOVERY DECISION DOES NOT PRESENT A QUESTION OF LAW OR AN ISSUE OF NOVEL OR STATEWIDE IMPORTANCE

MASN's and the Orioles' second "Question Presented" – whether arbitrators should be required to "disclose the communications they had with officials of the arbitral forum about the dispute" – seeks further judicial review of the RSDC's denial of MASN's and the Orioles' discovery request during arbitration for "all" communications between MLB and the RSDC concerning the parties' rights fee dispute. *See* Mot. 13.

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[7] Rather, it would actually undermine public policy, and perhaps even the reputation of New York as a forum that respects agreements to arbitrate, to allow MASN and the Orioles the extraordinary relief of this Court's review, unduly prolonging an arbitration whose purpose was "to 'conserve the time and resources of the courts and the contracting parties.'" Mot. 18 (quoting *Marracino v. Alexander*, 73 A.D.3d 22, 26 (4th Dep't 2010)).

Like the first "Question Presented," this question seeks review of a Supreme Court factual finding – namely, that there was no evidence of MLB's interference with the arbitration to justify the discovery sought – affirmed by the First Department and beyond this Court's power of review. *See Rochester*, 45 N.Y.2d at 7; *Glenbriar*, 5 N.Y.3d at 392; *Cannon*, 76 N.Y.2d at 651 (similar). Specifically, the First Department affirmed, *TCR Sports*, 187 A.D.3d at 624, Supreme Court's finding that MLB's role in the second arbitration was not "materially more significant" than the permissible and unsurprising role MLB played in the first one, and that the public statements of MLB's Commissioner were not "sufficient to throw into doubt the fairness of a process that was handled and resolved by the RSDC with obvious thoroughness and care," *TCR Sports*, 2019 WL 9362629 at *9-10.

This also is a question clearly "lacking general significance." C.P.L.R. § 5602, Practice Commentaries C5602:1. Indeed, MASN and the Orioles are essentially seeking review of the RSDC's well-reasoned written decision (A.577-79) denying their discovery request – a request that was based on pure speculation that MLB had secret "behind-the-scenes involvement" in the second RSDC arbitration (Ex. 8 at 37). The RSDC affirmed that "[n]o RSDC member is aware of any fact or circumstance, past or present, that would call into question his independence or give rise to reasonable doubts about his impartiality" and that, with two exceptions that would only create a risk of bias against the Nationals, "[n]one

of the RSDC members has any personal relationship with any of the parties beyond the normal interactions that occur in connection with MLB business." A.577-78.

Here, again, the applicable FAA jurisprudence is well-settled: arbitrators have "wide discretion" in procedural matters, including discovery. *Glen Rauch Sec., Inc. v. Weinraub*, 2 A.D.3d 301, 302 (1st Dep't 2003); *Supreme Oil Co. v. Abondolo*, 568 F. Supp. 2d 401, 408 (S.D.N.Y. 2008) (arbitrators have "great latitude to determine the procedures governing their proceedings and to restrict or control evidentiary submissions, without the need to follow all the niceties observed by the federal courts" (quotation omitted)); *Matter of Merrill Lynch, Pierce Fenner & Smith, Inc.*, 198 A.D.2d 181 (1st Dep't 1993); *Hyatt Franchising, L.L.C. v. Shen Zhen New World I, LLC*, 876 F.3d 900, 901-02 (7th Cir. 2017) ("Indeed, nothing in the Federal Arbitration Act requires an arbitrator to allow *any* discovery." (Emphasis in original)); *Abu Dhabi Inv. Auth. v. Citigroup, Inc.*, 2013 WL 789642, at *9 (S.D.N.Y. Mar. 4, 2013) ("ADIA cites no federal case – and this Court could find none – where a court vacated an arbitral award because the panel denied one party a document request.").

The only legal question is thus whether the RSDC abused its wide discretion. Whether a specific arbitration panel in this factually unique, and likely unrepeatable, arbitration abused its discretion in denying certain particular discovery is certainly not the type of issue of statewide import that this Court should review.

MASN and the Orioles attempt to sidestep this absence of an important legal issue by claiming that this case is really about "disclosures" (Mot. 22-23), and they cite *Sanko S.S. Co. v. Cook Industries, Inc.*, 495 F.2d 1260 (2d Cir. 1973). In *Sanko*, however, the Second Circuit ordered an evidentiary hearing to ascertain the "extent and nature of the relationships" an arbitrator had failed to disclose – the arbitrator's "business connections" that could have created an impression that he was biased. 495 F.2d at 1262-63 (emphases added). The court found that "the record … does not justify a holding that [the complaining party] knew or should reasonably have known[] of [the arbitrator's] undisclosed dealings." *Id.* at 1265.

On that basis, the Second Circuit distinguished two prior cases in which it had rejected challenges to arbitration awards, because the complaining party "should have known" or "must have known" about the relationships the arbitrators had not disclosed. *Id*. at 1264-65 (citing *Garfield & Co. v. Wiest*, 432 F.2d 849 (2d Cir. 1970); *Cook Industries v. C. Itoh & Co.*, 449 F.2d 106 (2d Cir. 1971)). In light of those two cases, *Sanko* directed the district court on remand to "give full consideration to any further evidence" that the complaining party "did, in fact, know or have reason to know of [the arbitrator's] undisclosed business relationships." *Id.* at 1265.

Sanko does not apply here, however, because MASN and the Orioles have always been well aware of the relationship between the RSDC and MLB. MASN

and the Orioles expressly agreed to insider arbitration before the RSDC, an MLB committee composed of "industry insiders, with specialized expertise." *TCR Sports*, 153 A.D.3d at 161 (plurality). MASN and the Orioles made this agreement with MLB, a party to the 2005 Agreement. A.535. MASN and the Orioles have acknowledged that they "bought into whatever the structure was, whatever [MLB]'s role was; we agreed to that, we had to live with that.'" *TCR Sports*, 153 A.D.3d at 156 (plurality). As Supreme Court correctly found, "MLB's role should not have been a surprise in the first arbitration and certainly was not in the second one." *TCR Sports*, 2019 WL 9362629, at *9; *see also TCR Sports*, 187 A.D.3d at 624 (First Department reiterating that its 2017 decision "found no basis for directing that the second arbitration be heard in a forum other than the industry-insider committee that the parties selected in their agreement to resolve this particular dispute, fully aware of the role MLB would play in the arbitration process").

This case is much more similar to those cited in *Sanko*, where arbitrators were not required to make disclosures about their relationships of which the parties were aware. *See Garfield*, 432 F.2d at 853-54 (addressing "when parties have agreed to arbitration with full awareness that there will have been certain, almost necessary, dealings between a potential arbitrator and one of the opposing parties"; finding the "exact extent of th[ose] dealings" need not be disclosed); *Cook*, 449 F.2d at 108 ("the obligation to which arbitrators are subject [is] to disclose dealings of which the

parties cannot reasonably be expected to be aware"). But, even if *Sanko* somehow applied, the legal issue that the denial of certain particular disclosure presents here – whether that denial was an abuse of discretion – is simply unworthy of this Court's review.

Contrary to MASN's and the Orioles' argument (Mot. 22, 28), vacatur of the RSDC's First Award did nothing to justify suspicion of foul play in the RSDC's second proceeding. The sole ground upon which the First Award was vacated was that the law firm representing the Nationals had been concurrently representing MLB and certain interests of the RSDC members, *TCR Sports*, 153 A.D.3d at 151-53, and that problem was cured in the second arbitration. The Nationals were represented by new counsel from a different law firm with no such concurrent representations. A.555. Moreover, in the second arbitration, the RSDC had all new members, none of whom had been panel members in the first arbitration. Nothing was improper about the RSDC's decision not to recuse itself from the second arbitration, particularly in light of the "two court decisions finding that it did not have to do so." *TCR Sports*, 2019 WL 9362629, at *9.

Nor were MASN's and the Orioles' demands for the RSDC's communications with MLB justified by the MLB Commissioner's public comments. *See* Mot. 21-22. That argument was rejected by the First Department in its 2017 decision, *TCR Sports*, 153 A.D.3d at 158 (plurality), then again by Supreme Court in 2019, *TCR*

Sports, 2019 WL 9362629, at *10, and yet a third time in the First Department's unanimous October 2020 decision, *TCR Sports*, 187 A.D.3d at 624. Any suspicion that MLB secretly was pulling the RSDC's strings is entirely speculative, and such speculation cannot establish evident partiality. *See TCR Sports*, 2019 WL 9362629, at *9 (citing *U.S. Elecs.*, 17 N.Y.3d at 914-15; *797 Broadway Grp.*, 59 N.Y.S.3d at 665; *Siemens Transp. Partnership Puerto Rico, S.E. v. Redondo Perini Joint Venture*, 13 Misc. 3d 1208(A) (Sup. Ct. N.Y. Cnty. Sept. 15, 2006); *Areca, Inc. v. Oppenheimer & Co.*, 960 F. Supp. 52, 57 (S.D.N.Y. 1997)).

III. THE FIRST DEPARTMENT'S AFFIRMANCE OF THE MONETARY JUDGMENT AND SUPREME COURT'S MINISTERIAL CALCULATIONS THEREIN DO NOT PRESENT ANY ISSUE OF STATEWIDE IMPORTANCE ON THE POWER OF THE COURTS

MASN's and the Orioles' third "Question Presented," regarding the power of a court to calculate and enter a monetary judgment upon confirming an arbitration award, raises no significant legal question. *See* Mot. 13, 24-27. MASN and the Orioles urge this Court to review whether Supreme Court lacked the authority to enter a monetary judgment upon confirming the RSDC award, because: (1) the 2005 Agreement allegedly did not authorize the RSDC to award damages, but only to declare the fair market value of the rights fees at issue; and (2) the RSDC's 2019 Award did not contain an express formula for calculating a monetary award. But these arguments fail under well-settled legal principles as well.

As a threshold matter, it is misleading for MASN and the Orioles to characterize the 2005 Agreement as authorizing the RSDC to determine the fair market value of the telecast rights fees, but not to reach any conclusion on the amounts owed. The parties' 2005 Agreement provides that the "fair market value of the rights established" by the RSDC pursuant to Subsection 2.J.3 of the Agreement "*shall be final and binding* on the Nationals and [MASN], and the Nationals and [MASN] may seek to vacate or modify such fair market valuation as established by the RSDC only on the grounds of corruption, fraud or miscalculation of figures." A.542 (emphasis added). By authorizing the RSDC to determine the fair market value of the telecast rights, the 2005 Agreement authorized the RSDC to *finally establish* the amount that MASN was *bound* to pay the Nationals for those telecast rights. The RSDC properly exercised that authority when it issued its award, holding that "the license fees *to be paid* by MASN to the Nationals for each of the years 2012-2016 are:

Year	**License Fee**
2012	$54,878,272.63
2013	$57,767,546.52
2014	$60,410,594.11
2015	$61,363,965.13
2016	$62,414,285.75
Average Annual Value	$59,366,932.83"

A.1769 (emphasis added).

By the same token, the RSDC award cannot be characterized as merely "declaratory." Declaratory relief aims to "set controversies at rest *before* they lead to the repudiation of obligations, invasion of rights, and the commission of wrongs," and is not "intended to remedy or make compensation for *injuries already suffered*." 24C Carmody-Wait 2d § 147:1 (emphasis added). Since the purpose of the RSDC's 2019 Award was to compensate the Nationals for MASN's previous underpayment for the Nationals' telecast rights from 2012 through 2016, the relief granted by the award was not merely "declaratory."

Moreover, MASN and the Orioles ignore that the FAA provides that a court's judgment confirming an arbitration award "shall have the same force and effect" as "a judgment in an action," and "may be enforced as if it had been rendered in an action in the court in which it is entered." 9 U.S.C. § 13. Thus, although the judgment confirming the arbitration award "may not enlarge upon" the terms of that award, "enforcement is not confirmation": "[o]nce confirmed, the [arbitration] awards become enforceable court orders, and, when asked to enforce such orders, a court is entitled to require actions to achieve compliance with them." *Zeiler v. Deitsch*, 500 F.3d 157, 170 (2d Cir. 2007). Such enforcement may entail relief that was not directly granted by the arbitration award itself. *See, e.g.*, C*anada Dry Delaware Valley Bottling Co. v. Hornell Brewing Co.*, 2013 WL 5434623, at *10 (S.D.N.Y. Sept. 30, 2013) (enjoining violations of a confirmed award, even though

the arbitrators had granted only declaratory, not injunctive relief, because the court's failure to do so "would – in effect – render the arbitration panel's declaratory ruling a nullity").

Consistent with those principles, this Court has held that where "no more than a simple arithmetical calculation will be needed to arrive at the amounts to which [the prevailing party] will be entitled, the [arbitration] award meets every requirement of mutuality, finality and definiteness." *States Marine Lines, Inc. v. Crooks*, 13 N.Y.2d 206, 215 (1963). New York courts recognize that a monetary judgment should be entered on the basis of an arbitration award as long as the arbitration award makes the formula for the "calculation of the amount due … so clear and specific that the determination of the amounts owing" is "merely an accounting calculation" and "a mere ministerial act." *Solow*, 114 A.D.2d at 822 (citing *Crooks*, 13 N.Y.2d 206; *Hunter v. Proser*, 274 A.D. 311 (1st Dep't 1948), *aff'd*, 298 N.Y. 828 (1949); *Overseas Distribs. Exch., Inc. v. Benedict Bros. & Co.*, 5 A.D.2d 498 (1st Dep't 1958)); *accord Civil Serv. Employees Ass'n. v. Cty. of Nassau*, 305 A.D.2d 498, 498 (2nd Dep't 2003); *Matter of Civil Serv. Employees Ass'n, Inc., Local 1000, AGSCMS, AFL-CIO on Behalf of Hinton (State of New York)*, 223 A.D.2d 890, 892 (3d Dep't 1996); *Snyder-Plax v. Am. Arbitration Ass'n*, 196 A.D.2d 872, 874 (2d Dep't 1993); *Matter of Vermilya (Distin)*, 157 A.D.2d 1030, 1031 (3d Dep't 1990).

Contrary to MASN's and the Orioles' claim (Mot. 26), none of these cases even suggest that, to allow a court to enter a monetary judgment, an arbitration award must either *expressly* state the precise amount to be awarded or *expressly* state the formula by which that amount can be calculated. Such a rigid, formalistic rule would be inconsistent with this Court's longstanding policy that arbitration should be operated "with all the flexibility which equity can give it," and that "proper relief" should be "granted when the facts warrant." *In re Feuer Transp.*, 295 N.Y. 87, 91-92 (1946). Instead, what matters is not the exact wording of the award, but whether it provides "a clear and definite determination of the rights and obligations of the parties." *Hunter*, 274 App Div at 312, *aff'd*, 298 N.Y. 828 (1949). If it does, then the award is "enforceable as any similar judgment would be in an action," and "[t]he court may do whatever is necessary to enforce the judgment." *Id.*

The monetary judgment entered by Supreme Court in this case does not create any tension with these well-settled principles. MASN and the Orioles cannot legitimately dispute that the RSDC's 2019 Award makes the formula for computing the amount MASN owes the Nationals clear and specific. The RSDC's 2019 Award sets forth the specific dollar amount that MASN was obligated to pay the Nationals in telecast rights fees for each year from 2012 through 2016. A.1769. It also sets forth the specific dollar amounts that MASN previously paid the Nationals in telecast rights fees for each year from 2012 through 2016. A.1776. Thus, all that was left

was "merely an accounting calculation," *Solow*, 114 A.D.2d at 822 (citation omitted), where the amount that MASN previously paid was subtracted from the amount that MASN is now obligated to pay to calculate the money now owed to the Nationals. A.89. That is precisely the calculation that Supreme Court ordered the parties to make, *id.*, and that is exactly how the judgment amount of $99,203,339.14 was calculated. *See* A.39 (directing the parties to submit a proposed judgment for "the amount of the television rights fees set forth on page 48 of the April 15, 2019 [RSDC] Award (NYCEF Doc. No. 813) minus the television rights fees already paid to the Nationals for the same relevant period, directing the Clerk to calculate statutory interest on the net amount from April 15, 2019 through the date of judgment"); A.90 (entering judgment in the amount of $99,203,339.14, plus statutory interest "as computed by the Clerk" running from April 15, 2019 through the date of the judgment, in the amount of $5,821,741.16); A.89 (the $99,203,339.14 amount in the judgment reflected "the amount of the television rights fees set forth on page 48 of the April 15, 2019 [RSDC] Award (NYCEF Doc. No. 813) minus the television rights fees already paid to the Nationals for the same relevant period").

MASN and the Orioles attempt to muddy the waters by claiming "it was undisputed that the rights-fee determination would need to be offset against other payments to determine how much money would eventually change hands." Mot. 25. The so-called "offset" would be changes to the amount of funds MASN gave

the Nationals as profit distributions – an entirely separate issue. Neither side advanced arguments on this issue before the RSDC, and the RSDC did not purport to rule on it. Supreme Court correctly noted that the RSDC's 2019 Award "does not address or adjudicate those issues," and thus left the issue open, stating "MASN and the Orioles and related parties are not foreclosed from seeking adjustments or recalculations of past, current or future MASN profit distributions in the ordinary course of business under the parties' 2005 Agreement, including the dispute resolution mechanisms set forth in that agreement if necessary." A.90. This does not change the finality and enforceability of the RSDC's determination of the precise amount by which MASN had underpaid, and thus now owes, the Nationals in *rights fees*. The Orioles cite no authority to the contrary, and the Nationals are aware of none.

IV. GRANTING LEAVE TO APPEAL FROM THE OCTOBER 2020 APPELLATE DIVISION ORDER WOULD NOT BRING UP FOR REVIEW ANY ISSUE DECIDED IN THE PRIOR NONFINAL NOVEMBER 2017 APPELLATE DIVISION ORDER UNDER C.P.L.R. 5501 § (A)(1)

MASN's and the Orioles' final "Question Presented" (Mot. 13-14) requests review of the First Department's 2017 decision pursuant to C.P.L.R. § 5501(a)(1), which provides that "[a]n appeal from a final judgment brings up for review" "any nonfinal judgment or order which necessarily affects the final judgment." But, as the Nationals argue in their pending motion to dismiss MASN's and the Orioles'

purported appeal as of right from the First Department's 2017 decision (Ex. 6 at 24-30), the First Department's 2017 order requiring a new hearing does not "necessarily affect[]" the final judgment in this case. This is particularly true when MASN and the Orioles were able to re-litigate in the new proceeding those same factual issues addressed in the 2017 decision concerning recusal and alleged bias. *See* Ex. 6 at 29-30. As a result, there is no mechanism by which the First Department's November 2017 order may now be brought up for review by this Court. *See* C.P.L.R. §§ 5501(a)(1), 5601(d), 5602(a)(1)(ii).[8]

In any event, the questions regarding the First Department's 2017 decision for which review is now yet again sought are not worthy of leave. That decision was certainly consistent with the case MASN and the Orioles cite (Mot. 28), *In re Wal-Mart Wage & Hour Employment Practices Litig.*, 737 F.3d 1262 (9th Cir. 2013), which held that "9 U.S.C. § 10(a), the statutory grounds for vacatur in the FAA, may not be waived or eliminated by contract," *id.* at 1268. Indeed, the First Department

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[8] The only possible way this Court could have reviewed the prior nonfinal November 2017 Appellate Division order is if the Appellate Division had granted MASN and the Orioles leave to appeal to this Court from that order upon a certified question (*see* C.P.L.R. 5602 § (b)(1); *see also* C.P.L.R. § 5713). Because the Appellate Division denied that motion (*see TCR Sports Broad. Holding, LLP v. WN Partner, LLC*, 2018 WL 457101 (1st Dep't Jan. 18, 2018)), any issue that MASN and the Orioles now seek to raise with respect to the November 2017 Appellate Division order is beyond this Court's review.

here in 2017 affirmed vacatur of the RSDC's First Award under one such statutory ground. *See TCR Sports*, 153 A.D.3d at 150-53 (plurality).

But the question MASN and the Orioles seek to raise (Mot. 14), whether a court *has the power* to order parties to arbitrate in a *different forum* from the one selected in an arbitration clause, *was not even at issue* in the 2017 decision, as the plurality assumed courts had such a power before concluding based on *the facts* of the first proceeding that such relief was not warranted. *See TCR Sports*, 153 A.D.3d at 153-61. Both Supreme Court and the First Department flatly rejected the argument in 2017 that MLB's supporting role and statements by the Commissioner rendered a new RSDC panel an inherently partial forum, which is an affirmed finding of fact that is not reviewable by this Court. *See Rochester*, 45 N.Y.2d at 7; *Glenbriar*, 5 N.Y.3d at 392.

There is nothing fundamentally unfair (Mot. 2, 14, 28) about courts holding sophisticated parties to their contractual bargains. The issue which led to the vacatur of the First Award – conflicts of the Nationals' counsel in the first arbitration – was fully resolved by the remand for rehearing before an entirely new RSDC panel, with the Nationals to be represented by new, non-conflicted counsel. And contrary to MASN's and the Orioles' mischaracterizations, no court has found that either the RSDC or MLB were partial or biased against MASN and the Orioles. *See, e.g.*, *TCR Sports*, 153 A.D.3d at 143 (First Department plurality acknowledging that "there has

been no showing of bias or corruption on the part of the members of the reconstituted RSDC"). Because the authority of courts to order a new arbitration in a different forum is not a question of law at issue in this case, it cannot serve as a basis for seeking leave to appeal.

CONCLUSION

The motion for leave to appeal should be denied.

DATED: New York, New York
February 22, 2021

Respectfully submitted,

By: 

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Court of Appeals

of the

State of New York

TCR SPORTS BROADCASTING HOLDING, LLP,

Petitioner-Appellant,

– against –

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

Respondents-Respondents,

– and –

THE COMMISSIONER OF MAJOR LEAGUE BASEBALL,

Respondent,

– and –

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

Nominal Respondents-Appellants.

AFFIRMATION OF PATRICK D. CURRAN, ESQ. IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL

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Attorneys for Respondent-Respondent Washington Nationals Baseball Club, LLC

PATRICK D. CURRAN, ESQ., an attorney duly admitted to practice law before the Courts of the State of New York, affirms the following to be true under penalty of perjury:

1. I am counsel to the Washington Nationals Baseball Club, LLC (the "Nationals"), and submit this affirmation in opposition to the motion by Appellants TCR Sports Broadcasting Holding, LLP (d/b/a "MASN") and the Baltimore Orioles Baseball Club and Baltimore Orioles Limited Partnership (together, the "Orioles") for leave to appeal.

2. Attached as Exhibit 1 is a true and correct copy of an e-mail from Jonathan Mariner to Daniel Frey, dated January 15, 2014, as it was filed in Supreme Court on October 20, 2014, NYSCEF Doc. No. 347, Index No. 652044/2014.

3. Attached as Exhibit 2 is a true and correct copy of the Notice of Motion for Leave to Reargue and/or Leave to Appeal to the Court of Appeals and the Memorandum of Law In Support of Motion for Leave to Reargue and/or Leave to Appeal to the Court of Appeals, submitted on November 20, 2020, NYSCEF Doc. No. 29, Index. No. 2019-05390.

4. Attached as Exhibit 3 is a true and correct copy of the Notice of Appeal to the Court of Appeals Pursuant to CPLR 5601(d) submitted on November 19, 2020, NYSCEF Doc. No. 965, Index. No. 652044/2014.

5. Attached as Exhibit 4 is a true and correct copy of the Appellants' Preliminary Appeal Statement submitted on November 25, 2020.

6. Attached as Exhibit 5 is a true and correct copy of the letter from John P. Asiello to Jonathan D. Schiller, with the "Re:" line "TCR Sports Broadcasting v WN Partner," dated December 3, 2020.

7. Attached as Exhibit 6 is a true and correct copy of the Nationals' Notice of Motion to Dismiss Appeal and Memorandum In Support of Motion to Dismiss, dated December 3, 2020, APL-2020-00175, Mot. No. 2020-913.

8. Attached as Exhibit 7 is a true and correct copy of the Order of the Appellate Division, First Department dated January 7, 2021, filed in *TCR Sports Broadcasting Holding, LLP v. WN Partner, LLC*, New York County Clerk's Index No. 652044/14, Appellate Case Nos. 2019-05390, 2019-05458, 2019-05459.

9. Attached as Exhibit 8 is a true and correct copy of the Brief for Petitioner-Appellant and Nominal Respondents Appellants TCR Sports Broadcasting Holding, LLP d/b/a Mid-Atlantic Sports Network, the Baltimore Orioles Limited Partnership, and the Baltimore Orioles Baseball Club, submitted to the Appellate Division, First Department on December 30, 2019, NYSCEF Doc. No. 8, Index. No. 2019-05390.

DATED: New York, New York
February 22, 2021

Respectfully submitted,

QUINN EMANUEL URQUHART
& SULLIVAN, LLP

By: _____
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Stephen R. Neuwirth
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Attorneys for Respondent Washington Nationals Baseball Club, LLC

EXHIBIT 1

From: Mariner, Jonathan [mailto:Jonathan.Mariner@mlb.com]
Sent: Wednesday, January 15, 2014 6:41 PM
To: daniel.c.frey@us.pwc.com
Cc: Lori Creasy
Subject: Re: MASN Confirmation

Daniel,

This note will confirm that Baseball Finance will not look to the Nationals for repayment of the advances made to it pursuant to the letter agreement dated August 26, 2013, as we consider this to be an obligation of MASN; subject to the specific circumstances noted in paragraphs #3 and #4, where any repayment may otherwise be made directly to the Nationals by MASN or another RSN instead of to MLB.

Jonathan

Sent from my iPad

On Jan 15, 2014, at 4:13 PM, "daniel.c.frey@us.pwc.com" <daniel.c.frey@us.pwc.com> wrote:

> Jonathan -
>
> As part of our audit of the Washington Nationals as of and for the year ending December 31, 2013, we would appreciate it if you could confirm that Baseball Finance has no intention of looking to the Washington Nationals for repayment of the advances made to it pursuant to the letter agreement dated August 26, 2013 between MLB and the Washington Nationals. Simply reply back to this email your confirmation. Thank you in advance for your assistance.
>
> Kind regards,
>
> **Daniel C. Frey**
>
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>
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> See how we're connected

EXHIBIT 2

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

TCR SPORTS BROADCASTING HOLDING, LLP,

Petitioner-Appellant,

-against-

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

Respondents-Respondents,

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

Respondents,

-and-

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

Nominal Respondents-Appellants.

Appellate Case Nos.:
2019-05390
2019-05458
2019-05459

New York County Clerk's Index No. 652044/2014

NOTICE OF MOTION FOR LEAVE TO REARGUE AND/OR LEAVE TO APPEAL TO THE COURT OF APPEALS

PLEASE TAKE NOTICE that, upon the annexed affirmation of Jonathan D. Schiller dated November 20, 2020 and its attached exhibits, the accompanying Memorandum of Law dated November 20, 2020, in support of this motion, and all

other papers, pleadings and proceedings in this action, Petitioner-Appellant TCR Sports Broadcasting Holding, LLP d/b/a Mid-Atlantic Sports Network ("MASN"), and Nominal Respondents-Appellants the Baltimore Orioles Baseball Club and Baltimore Orioles Limited Partnership (the "Orioles", and collectively with MASN, "Appellants"), by and through their undersigned attorneys, will move this Court at the Courthouse of the Appellate Division, First Department, 27 Madison Avenue, New York, NY 10010, on December 7, 2020, at 10:00am or as soon thereafter as counsel may be heard, for an Order:

(i) pursuant to CPLR § 2221 and 22 NYCRR § 1250.16(d)(2), granting Appellants leave to reargue this appeal and, upon reargument, modifying the judgment of the Supreme Court, New York County (Cohen, J.) entered December 9, 2019 ("December 9, 2019 Judgment"), by vacating the portions of the December 9, 2019 Judgment that calculate and award monetary damages of a sum total of $105,025,080.30 against MASN and in favor of the Nationals, and/or

(ii) pursuant to CPLR § 5602(a)(1), granting Appellants leave to appeal to the Court of Appeals and certifying that, in the opinion of this Court, questions of law are involved that ought to be reviewed by the Court of Appeals, and/or

(iii) granting any further and different relief as the Court deems proper.

PLEASE TAKE FURTHER NOTICE that, pursuant to CPLR § 2214 and 22 NYCRR § 1250.4(a), opposition papers and affidavits, if any, must be served at least seven (7) days before the return date of this motion.

Dated: New York, New York
November 20, 2020

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(via NYSCEF)

New York Supreme Court

Appellate Division—First Department

TCR SPORTS BROADCASTING HOLDING, LLP,

Petitioner-Appellant,

– against –

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

Respondents-Respondents,

– and –

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

Respondents,

– and –

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

Nominal Respondents-Appellants.

Appellate Case Nos.: 2019-05390 2019-05458 2019-05459

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO REARGUE AND/OR FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

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

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MASN and the Orioles[1] respectfully move: (1) pursuant to CPLR § 2221 and 22 NYCRR § 1250.16(d)(2), for leave to reargue this appeal, and/or (2) pursuant to CPLR § 5602(a)(1), for leave to appeal to the New York Court of Appeals.

PRELIMINARY STATEMENT

1. Reargument is Warranted. A court cannot modify an arbitration award in an order confirming it absent an express statutory ground for modification such as "miscalculation of figures." CPLR § 7511(c); *Weiss v. Metalsalts Corp.*, 15 A.D.2d 46, 47-48 (1st Dep't 1961). A court cannot *add* money damages or any other remedy that the arbitrators did not *expressly* award in the written award. The April 15, 2019 arbitration award at issue in this appeal ("April 15, 2019 Award") *did not* award money damages to the Nationals. A.785. The award is limited to a statement of the "fair market value" of the Orioles' and Nationals' telecast rights. A.754, 784-85. That statement of value is *not* an award of money *damages* to either the Orioles or the Nationals, as a review of the award demonstrates. The award gave an "estimate" of the total money the arbitrators estimated each team would receive for 2012-2016, which included hundreds of millions of dollars *already paid* by MASN. A.784. The award noted that each team had received hundreds of millions of dollars in rights

[1] The parties to this motion are Petitioner-Appellant TCR Sports Broadcasting Holding, LLP, d/b/a Mid-Atlantic Sports Network ("MASN"), Nominal Respondents-Appellants Baltimore Orioles Baseball Club and Baltimore Orioles Limited Partnership, in its capacity as managing partner of MASN (collectively the "Orioles" and together with MASN, "Appellants").

fees and profit distributions during 2012-2016 that would reduce any incremental amount due from MASN. A.745, 784-85. But the award did not purport to calculate or award any incremental sum to either team. A.785. This was precise and intentional. As the RSDC (represented Gregory Joseph) explained, the RSDC's mandate in the arbitration provision is narrow, and it is limited to issuing a statement of the fair market value of the telecast Rights in 2012-2016. A.753-54, 771.

Reargument is warranted under CPLR § 2221 and 22 NYCRR § 1250.16(d)(2). This Court's October 22, 2020 Order ("October 22, 2020 Order")[2] misapprehended the award and misapplied *Morgan Guaranty Trust Co. v. Solow*, 114 A.D.2d 818 (1st Dep't 1985), when affirming the $105,025,080.30 money judgment (A.90) that Supreme Court entered when confirming the award. Contrary to the Court's conclusion in the October 22, 2020 Order, the April 15, 2019 Award contains *no formula* for the calculation of any damages. A.785. The Court erred in relying on *Morgan Guaranty*, a case that held that when an award "fixed the formula upon which" the damages calculation was based, and that formula was "so clear and specific that the determination of the amounts owing is merely an accounting calculation," the court can *apply* that formula to calculate damages. 114 A.D.2d at

[2] The October 22, 2020 Order is attached as Exhibit 1 to the Affirmation of Jonathan D. Schiller in Support of Motion for Leave to Reargue and/or Leave to Appeal, dated November 20, 2020 ("Affirmation" or "Schiller Aff."). The December 9, 2019 Judgment is attached to the Affirmation as Exhibit 2, and the April 15, 2019 Award is attached to the Affirmation as Exhibit 3.

821-22. The April 15, 2019 Award shows that *Morgan Guaranty* is not applicable here. *There is no formula* anywhere in the award. This was deliberate because the arbitrators lacked the authority to award damages. The Court should grant leave to reargue this appeal and vacate the money judgment entered by Supreme Court.

2. Leave to Appeal is Warranted. Pursuant to CPLR § 5602(a)(1), the Court should grant leave to appeal the October 22, 2020 Order to the Court of Appeals. The prior non-final order of this Court in this proceeding of July 13, 2017 ("July 13, 2017 Order"), which remanded proceedings to MLB's RSDC and resulted in the April 15, 2019 Award, is now before the Court of Appeals as of right under CPLR § 5601(d). Schiller Aff. Ex. 4. In the July 13, 2017 Order, this Court affirmed vacatur of the first arbitration award in this dispute ("June 30, 2014 Award"), but by a vote of 3-2 (with a two-Justice dissent) remanded the proceedings back to MLB's RSDC. July 13, 2017 Order, *TCR Sports Broadcasting Holding, LLP v. WN Partner, LLC*, 153 A.D.3d 140 (1st Dep't 2017), *appeal dismissed* 30 N.Y.3d 1005 (2017). The subsequent proceedings resulted in the April 15, 2019 Award. In the October 22, 2020 Order, this Court rejected MASN's and the Orioles' challenges to the April 15, 2019 Award, citing to the Court's July 13, 2017 Order in this proceeding.

As the Court of Appeals will *already* be reviewing whether the July 13, 2017 Order's remand decision was correct, the Court of Appeals should also hear Appellants' appeal regarding the arbitrators' evident partiality during the

proceedings after the remand—issues this Court held in the October 22, 2020 Order lacked merit while citing to the prior July 13, 2017 Order. That review will impose no significant additional burden on the Court of Appeals in this proceeding.

The events that occurred during the second arbitration, after the July 13, 2017 Order remanded proceedings back to MLB, raise fundamental issues of law under the Federal Arbitration Act and New York law. They are: (1) whether an arbitral appointing authority (here, MLB) may take a $25 million financial interest in holding the hearing in an agreement with one party, even though an arbitrator's financial interest is quintessential evident partiality warranting vacatur of the arbitration award; (2) whether arbitrators must disclose their communications with the head of, and officials of, the appointing authority, when these officials have litigated and publicly argued in favor of one party and against another on the issues to be arbitrated; and (3) if the Court does not grant reargument, whether a court can calculate money damages and enter a money judgment in a proceeding confirming an arbitration award when the award did not award damages or contain a formula.

These are novel issues of law of public importance in New York that warrant review, 22 NYCRR § 500.22(b)(4), because they go to the core of the fairness and impartiality obligations that arbitrators and arbitral appointing authorities must adhere to. Review of these issues by the Court of Appeals is particularly warranted in this case because this Court's prior July 13, 2017 Order remanding the arbitration

proceedings back to MLB is now before the Court of Appeals as of right.

QUESTIONS FOR REARGUMENT

1. Whether this Court's October 22, 2020 Order misapprehended the April 15, 2019 Award, which did not award money damages and did not specify a formula for calculating damages, and misapplied *Morgan Guaranty Trust Co. v. Solow*, 114 A.D.2d 818 (1st Dep't 1985), a case that only held that a court may calculate and award money damages when confirming an arbitral award when the award "fixed the formula upon which" to calculate damages that was "clear and specific"?

QUESTIONS FOR COURT OF APPEALS REVIEW

The following issues warrant Court of Appeals review:

1. Where a court has vacated an arbitral award because of the evident partiality of the arbitral forum, and remanded the proceedings back to the same arbitral forum, does the Federal Arbitration Act permit the arbitral forum to enter into an agreement with one party to the arbitration that gives the arbitral forum a direct $25 million financial interest in holding the arbitration hearing?

2. Where a court has vacated an arbitral award because of the evident partiality of the arbitral forum, and remanded the proceedings back to the same arbitral forum, and officials of the arbitral forum have previously publicly advocated and litigated, prior to remand, in favor of one party and against another party about

the issues to be arbitrated, are the new arbitrators required to disclose the communications they had with officials of the arbitral forum about the dispute?

3. If Appellants' motion for reargument on this question is denied, where the arbitrator's authority under an arbitration provision is limited to issuing a statement of value, and the arbitrators issue a statement of value that did not award any sum of money damages, and did not specify a formula by which to calculate damages, does the court have the power to perform its own calculation of damages the court deems are owed and then enter a money judgment on the award?

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The complete background relevant to this motion is set forth in MASN's and the Orioles' briefs on appeal, which are incorporated by reference here. Case No. 2019-05390 Dkt No. 8 (Principal Br.), No. 20 (Reply Br.). The basic facts relevant to this motion, including the relevant procedural history, are summarized below.

A. The Limited Mandate Granted to MLB's RSDC's Under the Arbitration Clause in Section 2.J.3 of the Settlement Agreement

This appeal arises from arbitration proceedings conducted before an MLB committee, the Revenue Sharing Definitions Committee, pursuant to a March 28, 2005 Settlement Agreement ("Settlement Agreement"). A.786. The arbitration proceedings were conducted pursuant to a narrow and specific arbitration provision in Section 2.J.3 of the Settlement Agreement. A.793. Section 2.J.3 provides that, if there is a dispute about the fair market value of the teams' telecast rights, "then the

fair market value of the Rights shall be determined by the Revenue Sharing Definitions Committee ('RSDC') using the RSDC's established methodology for evaluating all other related party telecast agreements in the industry." A.793. The RSDC has no authority outside this limited mandate. Other arbitral bodies have jurisdiction over other disputes arising under the Settlement Agreement. A.798-99.

MLB's RSDC is a standing committee appointed by the Commissioner of Baseball and comprised of three high-level MLB team representatives. The RSDC was created as part of MLB's Revenue Sharing Plan to ensure that the teams share all appropriate revenue. As part of this function, "[t]he RSDC typically reviews related-party transactions to see if the revenues that teams declare in the form of license fees are at market value or too low." A.740. The purpose of such RSDC reviews is to conduct valuations of teams' telecast rights in related party transactions—transactions between teams and team-owned networks—to ensure that team-owned networks are paying the teams fair market value rights fees (which are subject to revenue sharing) and not paying below fair market value rights fees to increase network profits (which are not subject to revenue sharing). A.740, 1754.

In the RSDC's typical reviews, the RSDC does not award any specific rights fee to any team and does not award any money damages to any team. Rather, the RSDC's role is to issue a declaration—a statement—about the fair market value of the team's telecast rights. *See, e.g.*, A.1736 (16th Report); A.1713 (18th Report);

A.1542 (38th Report). Consistent with the RSDC's traditional role, the parties in the Settlement Agreement gave the RSDC a very narrow and specific mandate: to "us[e] the RSDC's established methodology for evaluating all other related party telecast agreements in the industry" to "determin[e]" the "fair market value of the Rights." A.793. The text of section 2.J.3 shows that the parties did not give the RSDC any authority other than to apply the established methodology to issue a statement of fair market value. The Settlement Agreement did not grant the RSDC authority to award damages or any other legal *remedy* to the Nationals or Orioles.

B. The June 30, 2014 Award is Vacated due to Evident Partiality, but By a 3-2 Vote Proceedings are Remanded to the RSDC

The RSDC's first arbitration award in this dispute, the June 30, 2014 Award, was vacated by the Supreme Court (Marks, J.) due to MLB's and the RSDC's evident partiality. The Supreme Court's vacatur was unanimously affirmed by this Court in the July 13, 2017 Order. July 13, 2017 Order, 153 A.D.3d at 143. However, this Court sharply divided 2-1-2 on the proper forum for rehearing. The plurality (Andrias and Richter, JJ.) and concurrence (Kahn, J.) ordered rehearing before the RSDC but on different grounds. *Id.* at 143, 161. By contrast, the dissent (Acosta, J.P., and Gesmer, J.) concluded that "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." *Id.* at 181. Presiding Justice Acosta's dissent

concluded that the Court should have ordered the arbitration to be reheard before a different and neutral panel outside of MLB's ambit and control. *Id.* at 180-81.

Due to the two-Justice dissent, Appellants have the right, under CPLR § 5601(d), to appeal to the Court of Appeals to review the issues that divided the dissent from the plurality and concurrence. Appellants served and filed a notice of appeal to the Court of Appeals on November 19, 2020. Schiller Aff. Ex. 4.[3]

The vacated June 30, 2014 award did not award any sum of damages to the Nationals or any other remedy. It issued a (vacated) statement of value. A.833.

C. Post-Remand, MLB and its RSDC Engage in Additional Conduct that is Inconsistent with an Impartial Arbitral Proceeding

The issue of whether the Court was authorized to remand the proceedings to the RSDC after vacatur is currently before the Court of Appeals. In addition to that question, MLB's RSDC's conduct *after* the remand, during the second arbitration, raised further issues about the MLB's RSDC's partiality and lack of transparency.

The Nationals and MLB won (by a 3-2 vote) remand to the RSDC based on the Nationals' representation to this Court that the Nationals would post a bond to guarantee repayment of MLB's $25 million loan to the Nationals. July 13, 2017 Order, 153 A.D.3d at 158, 176 n.6. But after winning remand, MLB and the

[3] Appellants previously sought review of the July 13, 2017 Order in a Notice of Appeal dated July 14, 2017 (Index No. 652044/14 Docket No. 775), and in a Notice of Appeal dated May 14, 2019 (Index No. 652044/14 Docket No. 805). However, the Court of Appeals determined in both instances that the July 13, 2017 Order was non-final. Now, the July 13, 2017 Order is final.

Nationals reneged on the Nationals' representation to this Court. Instead, the Nationals and MLB negotiated an agreement which they signed on February 9, 2018 without MASN's or the Orioles' knowledge. A.941. In the February 9, 2018 agreement, the Nationals *conditioned* their repayment of the $25 million to MLB on its RSDC holding an arbitration hearing. If, but only if, MLB's RSDC held the hearing, the Nationals were obligated to pay the $25 million to MLB. *Id.* If MLB's RSDC did not hold the hearing, the Nationals were not obligated to repay the $25 million back to MLB. MLB's RSDC rejected the Orioles' motion to recuse, agreed to hold the hearing pursuant to the $25 million agreement, and MLB collected the $25 million from the Nationals shortly before the hearing commenced. A.556.

The RSDC arbitrators also refused to disclose their communications with MLB officials regarding the arbitration. There is substantial evidence that the MLB Commissioner and his officials prejudged the issues to be arbitrated in favor of the Nationals and against MASN and the Orioles. A.1003, 1009-11, 1205. Indeed, in the first vacatur proceeding, the MLB Commissioner personally filed affidavits supporting the Nationals' litigation positions and attacked MASN's and the Orioles' litigation positions. A.989-1007. But in the second arbitration the RSDC refused to disclose what MLB officials told the RSDC about the issues in dispute before the RSDC, despite MLB's lawyers admitting to the parties that the RSDC arbitrators

and MLB officials were communicating about the dispute. A.948, 1051. [4]

D. The RSDC Issues the April 15, 2019 Award

The RSDC held a hearing on November 15-16, 2018. The parties submitted detailed written briefs to the RSDC prior to the hearing. During the second arbitration, the Nationals *never* sought money damages or other legal remedy, and never submitted any calculation of claimed damages. The Nationals' briefs to the RSDC set forth only the Nationals' position as to the fair market value of the rights. A.1865, 1924, 1963. The Nationals' submissions did not include a Prayer for Relief, an *ad damnum* statement, or any other statement seeking a damages remedy.

The RSDC issued an award on April 15, 2019. A.736. The April 15, 2019 Award reached *the same result* as the June 30, 2014 award as to fair market value, just as Justice Acosta had predicted in his dissent from the July 13, 2017 Order remanding proceedings to the RSDC. A.833, A.785. Yet, despite the fact that it applied two different methodologies in the two awards, the RSDC somehow claimed the methodology it used in both was "the RSDC's established methodology for

[4] MLB's RSDC committed additional misconduct including by denying MASN and the Orioles the right to a fair hearing by refusing to disclose documents about the RSDC's established methodology, and by failing to apply the RSDC's established methodology in favor of a novel methodology that it had never before used that included consideration of the RSDC arbitrators' subjective opinion about the amount of money the Orioles had received. *See* MASN-Orioles Principal Br. at 38-47. MASN and the Orioles are not seeking leave to appeal to the Court of Appeals on these issues, but are seeking leave to appeal on the issues identified in this motion because these issues go to the core of fairness and impartiality in all New York arbitrations.

evaluating all other related party telecast agreements in the industry." *Compare* A.822-34 (June 30, 2014 Award), *with* A.766-85 (April 15, 2019 Award).

The April 15, 2019 Award decided a singular issue: the purported fair market value of the rights licensed to MASN. The April 15, 2019 Award did not calculate any amount of money damages owed by MASN. A.785 (reaching only a conclusion as to "the fair market value of MASN's rights to telecast each of the Orioles and Nationals"). The RSDC acknowledged that the damages owed to the Nationals *would be far less than the fair market value statement in the award* because MASN *had already paid* $197.2 million in rights fees to the Nationals, as well as $41.2 million in profit distributions—profit distributions that MASN would not have been able to pay if it had paid the higher telecast rights fees—during the 2012-2016 period. A.745, 784. The RSDC went on to calculate the total amount that it believed the Nationals should have received for the 2012-2016 period: $308.8 million. *Id*. The award did not calculate *the amount remaining unpaid*, i.e., any damages owed the Nationals based on the higher rights fee value, which would require subtracting the amounts already paid by MASN from that ultimate total amount. A.784-85.

E. Supreme Court Confirms the Award, Awards Money Damages Not Set Forth in the Award, and Enters a Money Judgment

In the Nationals' motion to confirm the April 15, 2019 Award, the Nationals sought a judgment confirming the award, but the Nationals *did not seek*, in *either* their motion to confirm the award *or* their reply in support of the motion, *any amount*

of money damages. A. 508, 1289. Nor did the Nationals submit to the Court any proposed formula to calculate monetary damages in *either* their motion to confirm the award or reply in support of their motion to confirm the award. *Id.*

The Supreme Court confirmed the award on August 22, 2019. The Supreme Court initially referred the proceeding to a Judicial Hearing Officer or Special Referee for an "inquest" to calculate what the Supreme Court stated was a "sum awarded" under the April 15, 2019 Award. A.32. MASN and the Orioles moved for reargument on the ground that Supreme Court's order was an unauthorized modification of an award that did not award damages. A.39. At the oral argument on that motion, Supreme Court stated multiple times that the issue of whether the April 15, 2019 award was an award of damages or only a declaratory award was a close question. A.41-75. However, Supreme Court denied reargument and reaffirmed its August 22, 2019 decision and order, although it removed the referral to the Special Referee. The Supreme Court directed the parties to calculate the Nationals' damages submit a proposed judgment to the court for review. A.39-41.

The Supreme Court entered a judgment against MASN and in favor of the Nationals on December 9, 2019 in the amount of $105,025,080.30. A.90.

F. This Court Affirms the Judgment

In the October 22, 2020 Order, this Court affirmed the judgment. Schiller Aff. Ex. 1. Appellants seek reargument and leave to appeal the October 22, 2020 order.

LEGAL STANDARD

A. Reargument

Under CPLR § 2221, and 22 NYCRR § 1250.16(d), the Court may grant leave to reargue if there are one or more matters of fact or law that were "overlooked or misapprehended by the court." This Court has granted reargument, or affirmed a grant of reargument by Supreme Court, in various circumstances, including, among other reasons, where the court misinterpreted a deposition transcript, *Mendez v. Queens Plumbing Supply, Inc.*, 39 A.D.3d 260 (1st Dep't 2007), misinterpreted medical documents submitted in opposition to a motion for summary judgment, *Jones v. Budhwa*, 23 A.D.3d 154 (1st Dep't 2005), misinterpreted a party's discovery request, *Hargrove v. Riverbay Corp.*, 128 A.D.3d 464 (1st Dep't 2015), and misinterpreted a prior order, *Post v. Post*, 156 A.D.2d 192 (1st Dep't 1989).

B. Leave to Appeal

The Appellate Division and Court of Appeals grant leave to appeal to the New York Court of Appeals in actions presenting questions that are unsettled, "novel", or of public importance. *See* 22 N.Y.C.R.R. § 500.22(b)(4) (issues that "are novel or of public importance" or that "conflict with prior decisions" merit review); *Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder*, 72 N.Y.2d 174, 183 (1988) (granting leave to appeal the "novel and significant issues tendered for review"); *In*

re Shannon B., 70 N.Y.2d 458, 462 (1987) (granting leave to appeal so the Court of Appeals could consider "the important issue" presented).

New York courts also grant leave to appeal when a case presents issues of federal law having significance and impact not only statewide, but also nationally. *See, e.g.*, *Guice v. Charles Schwab & Co.*, 89 N.Y.2d 31, 38 (1996) (leave to appeal granted to consider whether federal law preempted state-law claims). This case—governed by the Federal Arbitration Act Chapter 1—is just such a case. The FAA governs any arbitration arising out of a "contract evidencing a transaction involving commerce," 9 U.S.C. § 2, and therefore controls judicial review of a vast sweep of arbitration agreements and awards. However, even though it creates substantive federal arbitration law, the FAA Chapter 1 "does not create any independent federal-question jurisdiction." *Southland Corp. v. Keating*, 465 U.S. 1, 15 n.9 (1984). As a result, federal courts do not have jurisdiction to hear disputes governed by the FAA where, as here, diversity of citizenship is lacking, and state courts are regularly called upon to decide cases governed by the FAA and develop the jurisprudence. *See Flanagan v. Prudential-Bache Securities, Inc.*, 67 N.Y.2d 500, 506 (1986) (New York state courts interpreting the FAA in light of novel or unsettled issues have "the same responsibility as the lower Federal courts").

Decisions of New York courts are particularly important here because "the FAA was modeled after New York's arbitration law . . . and no significant distinction

can be drawn between the policies supporting the FAA and arbitration provisions of the CPLR." July 13, 2017 Order, 153 A.D.3d at 173 (Acosta, P.J., dissenting) (quoting *Matter of Smith Barney, Harris Upham* & Co. *v Luckie,* 85 N.Y.2d 193, 205-06 (1995)); *see Hall St. Assocs., LLC v. Mattel, Inc*., 552 U.S. 576, 589 n.7 (2008) ("The text of the FAA was based upon that of New York's arbitration statute."). Federal courts applying the FAA look to "[c]ases applying New York arbitration law analogous to the FAA" both in general and on the specific issues presented by this appeal. *In re Arbitration Between Tempo Shain Corp. v. Bertek, Inc.*, No. 96-3354, 1997 WL 580775, at *2 (S.D.N.Y. Sept. 17, 1997).

ARGUMENT

I. THE COURT SHOULD GRANT LEAVE TO REARGUE THE ISSUE OF WHETHER SUPREME COURT IMPROPERLY MODIFIED THE APRIL 15, 2019 AWARD BY ENTERING A MONEY JUDGMENT

A. The April 15, 2019 Award Demonstrates that the Arbitrators Did Not Award Damages or a Formula to Calculate Damages

The face of the April 15, 2019 Award demonstrates that the RSDC did not award a sum of monetary damages, or any other legal remedy, to either the Nationals or the Orioles. The RSDC's award was limited only to a *statement*—a *declaration* of "the fair market value of MASN's rights to the telecast of each of the Orioles and Nationals," not any *sum awarded* to the Nationals or Orioles. A.783-85.

Indeed, the RSDC's mandate in section 2.J.3 of the Settlement Agreement does not authorize the RSDC to award damages. As the award states, the RSDC's

"authority runs no further than determining the fair market value of the rights at issue." A.754. This statement in the April 15, 2019 Award follows directly from the RSDC's limited mandate in section 2.J.3 of the Settlement Agreement. Section 2.J.3 gives the RSDC a single narrow and specific mandate: to determine "the fair market value of the Rights" using "the RSDC's established methodology for evaluating all other related party telecast agreements in the industry." A.793. Consistent with that narrow mandate, which does *not* grant the RSDC the authority to award damages or any other remedy, the RSDC issued a statement concerning fair market value, not a damages award or a formula to calculate damages. A.754, 785.

As the award itself stated, the incremental sum due to the Nationals (which the award did not calculate or specify a formula for calculation) will be substantially less than the award's declaration of fair market value. A.784. As the award shows, a determination (which the award did not make) of the sum due to the Nationals must account for MASN's prior payments to the Nationals of (1) telecast rights fees and (2) profit distributions—which were overpayments because the higher rights fees necessarily reduced profits for 2012-2016. A.745, 754, 784. The RSDC did perform an "estimate[ ]" the total amount of payments from all sources that the RSDC believed the Nationals should have received in 2012-2016—$308.8 million. A.784. But that "estimate[ ]" is not a damages calculation or formula. The RSDC did not purport to award this amount (or any other sum) to the Nationals. The RSDC

determined only the supposed "fair market value of the rights." A.754, 793. The RSDC's inclusion of this estimate, which it clearly did not *award* to either team, further shows that its actual award was limited to a declaration, not damages.

The RSDC's typical role further supports MASN's and the Orioles' position regarding the April 15, 2019 Award and the RSDC's mandate in the Settlement Agreement. As the award noted, "[t]he RSDC typically reviews related-party transactions to see if the revenues that teams declare in the form of license fees are at market value or too low." A.740. The RSDC's typical role is limited to a statement—a declaration of fair market value of telecast rights—that is in turn factored into other calculations that affect MLB teams. The record in this proceeding contains several RSDC decisions both before and after the Settlement Agreement was signed, including the vacated June 30, 2014 Award in this dispute. *None* of those RSDC decisions awarded *money damages*. A. 833, 1376, 1713, 1542.

The Nationals' past conduct is inconsistent with their current position that the April 15, 2019 Award awarded them a sum of money damages. In the lengthy arbitration proceeding, the Nationals *never* submitted to the RSDC any prayer for relief or calculation of damages. The Nationals' briefs to the RSDC, like the briefs of MASN and the Orioles, only set forth the Nationals' position as to the fair market value of the rights. A.1865, 1924, 1963. Indeed, the Nationals' pre-hearing submission to the RSDC asked for *reallocation* of prior payments, not damages:

> "On these facts, the question for the RSDC is *not* whether MASN should be required to draw down on cash reserves in order to pay the Nationals. Rather, the question is whether funds *that MASN has already distributed, primarily to the Orioles*, *should be reallocated* from non-revenue-shareable profits distributions to revenue-shareable rights fees." A.1917 (emphasis added).

Nor did the Nationals submit any proposed calculation of any amount they claimed the RSDC awarded in *either* the Nationals' motion to the Supreme Court to confirm the second award, or in their reply brief in support of their motion to confirm. A. 508, 1289. It was only *at oral argument* on July 12, 2019, that the Nationals produced, for the first time, a *demonstrative* containing what the Nationals claimed was the amount of damages that the RSDC awarded them. A.1410-11.

The Nationals' own conduct is flatly inconsistent with a party that is seeking damages. Parties who seek damages ask the arbitrators to award them. They submit a calculation of the amount of their claimed damages; and include that calculation of damages in a Prayer for Relief or a similar statement in their briefs. The Nationals did none of this. Instead, they have tried to use the courts for the improper purpose of extracting damages in a judgment that the arbitrators did not actually award.

B. The Court Should Grant Leave to Reargue Because the Court Misapprehended the Award and Misapplied *Morgan Guaranty*

Under New York law, the Supreme Court had no power to award damages the arbitrators did not award, calculate damages the award did not calculate, or enter a money judgment on the award. Under CPLR 7510, the Supreme Court's authority

is limited to "confirm[ing]" the award, "unless the award is vacated or modified upon a ground specified in" CPLR 7511. Absent an express ground for modification contained in CPLR 7511(c), which includes a "miscalculation of figures," the Supreme Court has *no power* to modify an arbitration award. CPLR 7511(c).

Courts have *rejected* attempts by parties to obtain monetary damages or other remedies in judicial confirmation proceedings when the arbitrators did not expressly award those remedies in the award. In *Weiss v. Metalsalts Corp.*, 15 A.D.2d 46 (1st Dep't 1961), the court rejected a claimant's argument that an arbitration award awarded damages when the damages sought by the claimant were not expressly contained in the award. The court remanded proceedings to the arbitrators for further consideration. *Id.* at 46-47. In *Canada Dry Delaware Valley Bottling Co. v. Hornell Brewing Co*., No. 11 CIV. 4308 PGG, 2013 WL 5434623 (S.D.N.Y. Sept. 30, 2013), the court rejected a claimant's attempt to seek monetary damages from the court in confirmation proceedings, when the award was limited to "a declaratory award issued by an arbitration panel." *Id.* at *10-11. And in *W. Massachusetts Elec. Co. v. Int'l Bhd. of Elec. Workers, Local 455*, No. Civ.A. 11-30106-DPW, 2012 WL 4482343, (D. Mass. Sept. 27, 2012), the court rejected a claimant's attempt to seek monetary damages and injunctive relief in confirmation proceedings because the arbitration award did not award those remedies. *Id.* at *8. Instead, as the court explained: "The arbitrator's decision was in the nature of a declaratory judgment.

The effect of confirmation is that it will govern interpretation of the parties' contractual relationship and it may estop the same parties from relitigating the issue by analogy to principles of res judicata and collateral estoppel." *Id.* "Future disputes between the parties, if any, will determine the precise impact of the arbitrator's interpretive declaration, which [the court] confirm[ed] in this proceeding." *Id.*

The sole case cited by this Court in its October 22, 2020 Order affirming the money judgment, *Morgan Guaranty Trust Co. v. Solow*, 114 A.D.2d 818 (1st Dep't 1985), does not support the Court's conclusion here. In *Morgan Guaranty*, the award itself actually contained the formula to be applied to compute the damages due to the claimant. The award "fixed the formula upon which the escalate rent was based, the real issue they were called upon to decide. All that remained was a calculation of the amount due based upon that formula. That was a mere ministerial act and did not detract from the finality of the award." *Id.* at 821-22. The court explained that "where the formula for the computations are so clear and specific that the determination of the amounts owed is merely an accounting calculation, the award is final and definite and is required to be confirmed." *Id.* at 822.

There is no formula in the April 15, 2019 Award at issue in this appeal from which to calculate damages—much less a formula that is "so clear and specific" so as to eliminate all doubt. Indeed, in the April 15, 2019 Award, the RSDC specifically stated that its authority "runs no further" than issuing a statement about the fair

market value of the rights. A.754. The narrow exception in *Morgan Guaranty* for a clear and specific formula *set forth in the award* is not applicable here, and the Court misapprehended the award and *Morgan Guaranty* in so concluding.

If adhered to by this Court, its decision in this case will greatly expand the narrow exception in *Morgan Guaranty* for awards setting forth a formula that is "so clear and specific that the determination of the amounts owed is merely an accounting calculation." Its decision will also fly in the face of the Court's narrow authority in CPLR § 7510 to "confirm the award" "unless the award is vacated or modified upon a ground specified in" CPLR § 7511. CPLR §§ 7510 and 7511 *do not* give the Court the authority to *add* a damages calculation formula *into* the award that is not expressly set forth in the award. The Court's decision doing so far exceeds the Court's limited authority under CPLR § 7511 to modify an award to correct "a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award" or address something that makes the award "imperfect in a matter of form, not affecting the merits of the controversy."

The Nationals have argued that the April 15, 2019 Award contains a formula for the calculation of monetary damages. Case No. 2019-05390, Dkt. No. 18 (Nationals' Response Brief) at 55-57. But a plain reading of the April 15, 2019 award shows that the award does not contain any formula. Nowhere in the Nationals' brief do the Nationals identify any formula in the award, because there is

no formula *in the award*—much less a formula that is "so clear and specific" as to remove all doubt from its application, as is required under *Morgan Guaranty*.

Indeed, the "formula" the Nationals have argued the April 15, 2019 Award contains (which it does not) is *inconsistent* with the award. Under the "formula" the Nationals argue is in the award, the Nationals would receive a total of *$338.3 million* for 2012-2016: $197.6 million of rights fees already paid (A.745) + $41.5 million in profit distributions already paid (A.745) + $99.2 million in additional rights fees the Nationals claim constitute their damages (Nats. Resp. Br. 54). But the award "estimate[d]" that the Nationals are entitled to a total of only *$308.8 million*, $239.2 million of which MASN has already paid. A.784-Bullet Point 4. That is because past rights fees *and* past profit distributions offset the higher rights fees. A.753-54. The Nationals are thus asking the Court to *overpay* them by *$30 million* compared to the *award's* estimate, pursuant to a "formula" not actually in the award.

In sum, the face of the April 15, 2019 award demonstrates that the arbitrators did not award monetary damages to either the Nationals or Orioles, and did not set forth *any* formula for the calculation of damages—much less a formula "so clear and specific that the determination of the amounts owed is merely an accounting calculation." *Morgan Guaranty*, 114 A.D.2d at 822. This Court's October 22, 2020 Order misapprehended the April 15, 2019 Award, and misapplied *Morgan Guaranty*, when it affirmed the money judgment entered by Supreme Court. The

Court should grant leave to reargue on this issue, and should vacate the money judgment entered by Supreme Court as in excess of Supreme Court's authority.

II. LEAVE TO APPEAL SHOULD BE GRANTED

A. The Court of Appeals is Already Reviewing the Court's July 13, Remand Order. The Court of Appeals Should Also Review the Additional Issues that Arose After the Remand Order

The procedural posture of this appeal gives rise to a particularly compelling justification for the Court to grant leave to appeal the October 22, 2020 Order to the Court of Appeals. Specifically, the Court's prior July 13, 2017 Order, which by a vote of 3-2 (with a two-Justice dissent) remanded proceedings to MLB's RSDC, is now before the Court of Appeals as of right under CPLR 5601(d). Schiller Aff. Ex. 4, Supreme Court Dkt. No. 965 (5601(d) Notice of Appeal to the Court of Appeals). Thus, the Court of Appeals will already be hearing and deciding whether the Court's 2017 decision to remand the proceedings to the RSDC was correct or incorrect.

In the course of hearing and deciding Appellants' as-of-right appeal seeking review of the July 13, 2017 Order, the Court of Appeals will need to become familiar with the core agreements and facts of this case, including the Settlement Agreement, the role and the conduct of MLB's RSDC, and MLB's agreement with the Nationals advancing the Nationals $25 million. *Compare* July 13, 2017 Order, 153 A.D.3d at 143-61 (Andrias, J., Plurality), *with id.* at 162-81 (Acosta, J., Dissenting). The Court of Appeals will then need to decide whether the Court's July 13, 2017 decision to

remand proceedings to the RSDC was proper. If the Court of Appeals concludes that this Court erred in ordering remand to the RSDC, then the Court of Appeals would not need to address whether the additional issues that occurred during the second arbitration require vacatur of the April 15, 2019 award. However, if the Court of Appeals concludes that this Court was correct to remand proceedings to the RSDC, the Court of Appeals should also review the conduct of MLB after the remand decision and during the second arbitration. As explained below, the events during the second arbitration present fundamental issues going to the core of the impartiality and disclosure required in arbitrations conducted in New York.

B. Certification Is Warranted to Settle a Fundamental Question Regarding When, if Ever, an Arbitrator or Arbitral Forum May Take a Direct Financial Stake in an Issue Before the Arbitrator

As the Court's July 13, 2017 Order demonstrates, on March 31, 2017, at oral argument before this Court, the Nationals' lawyer represented to the Court that the Nationals would "post a bond to guarantee repayment of" MLB's $25 million advance to the Nationals "regardless of the outcome of the arbitration." July 13, 2017 Order, 153 A.D.3d at 158 (Andrias, J., plurality); *id.* at 176 n.6 (Acosta, P.J., dissenting). The July 13, 2017 Order also demonstrates that the two-Justice plurality opinion cited and relied on the Nationals' lawyer's promise to post a bond when ruling that arbitration proceedings should be remanded to MLB's RSDC. *Id.*

The record in the second arbitration (after remand), the subject of the present

appeal, demonstrates that the Nationals did not post a bond. The record demonstrates that, instead, the Nationals and MLB negotiated an agreement which they signed on February 9, 2018, and which conditioned the Nationals' repayment of $25 million to MLB on MLB's RSDC actually holding the arbitration hearing. A.941. This evidence demonstrates that MLB, the arbitral appointing authority, had a direct financial interest in the decision of its arbitrators of whether to hold the hearing.

Certification to the Court of Appeals is warranted so the Court of Appeals can address when, if ever, an arbitral appointing authority or arbitrator may take a direct financial stake in a decision before the arbitrator—here, the decision of whether to recuse or to deny recusal and hold the arbitration hearing. Review of this question is particularly warranted because multiple analogous precedents all point in the opposite direction of the October 22, 2020 Order. For example, in *Coty Inc. v. Anchor Const., Inc.*, 7 A.D.3d 438 (1st Dep't 2004), this Court affirmed vacatur of an award because the arbitrators involved themselves "in the parties' dispute over prepayment of arbitration fees, a matter in which the arbitrators had a direct financial interest." *Id.* at 439. And in *Pitta v. Hotel Ass'n of N.Y.C., Inc.*, 806 F.2d 419 (2d Cir. 1986), the Second Circuit held that the FAA prohibited an arbitrator from arbitrating a dispute over whether he had been validly dismissed as arbitrator, because he had a financial incentive (beyond his hourly charges) to conclude that he had not been validly dismissed. The Second Circuit vacated the award and remanded

the issue to be heard before a different, independent arbitrator. *Id.* at 423-24.

MASN and the Orioles submit that *Coty* and *Pitta*, the two most directly analogous precedents from New York State and Federal Court on the issue of an arbitrator's financial interest, hold that an arbitrator cannot have a direct financial interest in a decision before the arbitrator, including on whether to recuse. There is no case MASN and the Orioles are aware of permitting an arbitrator or an arbitral appointing authority to have a direct financial interest in a decision before it.

There is no sound reason to allow the tension between the October 20, 2020 Order and the above-cited authorities to persist. The Court of Appeals should instead have the opportunity to consider the scope of when, if ever, an arbitrator or arbitral appointing authority is permitted under the Federal Arbitration Act to have a direct financial interest in a decision before the arbitrator, including a recusal decision. Leave to appeal should be granted to facilitate this critically-needed review.

Indeed, the bright line rule indicated in *Coty* and *Pitta*—that an arbitrator or appointing authority *may not* have a direct financial interest in any matter before it—is sound and justified. In enacting the FAA, Congress struck a careful balance between promoting private agreements to arbitrate on the one hand, and ensuring that arbitration, including all of the accompanying decisions by arbitrators prior to a hearing on the merits, meets a basic level of due process. The question of whether any direct financial interest is permitted in any circumstance (beyond a nominal

financial interest in collecting arbitrator fees) is a central question that the Court of Appeals should answer because it goes to basic arbitral process integrity.

At its "essence," arbitration is "a tool for administering justice outside of the courts," Order at 73 (Acosta, P.J., dissenting), which is intended to "conserve the time and resources of the courts and the contracting parties," *Marracino v. Alexander*, 73 A.D.3d 22, 26 (4th Dep't 2010). Because arbitration is intended to give the parties the flexibility to design their own adjudicatory processes, an arbitration "is not required to comport with strictures of formal court proceedings." *Kaplan v. Alfred Dunhill of London*, No. 96-0256, 1996 WL 640901, *5 (S.D.N.Y. Nov. 4, 1996) (citations omitted). But this does not mean that arbitrations are permitted to abandon basic notions of fairness, impartiality and integrity.

To the contrary, courts recognize that for arbitration to serve its intended purpose, "it is *imperative* that the integrity of the process … be z*ealously safeguarded*." *Matter of Goldfinger v. Lisker*, 68 N.Y.2d 225, 231 (1986) (emphasis added). Arbitral proceedings must be fair and impartial, and meet the minimum standards for due process. *Kaplan*, 1996 WL 640901, *6 ("Before a district court may confirm an arbitration award, it must be satisfied that the parties were provided a fundamentally fair hearing."); *Bell Aerospace Co.*, 500 F.2d at 923 (arbitrator must "grant parties a fundamentally fair hearing"); *accord Bowles Fin. Grp., Inc. v. Stifel, Nicolaus & Co.*, 22 F.3d 1010, 1012-13 (10th Cir. 1994) ("Courts have created a

basic requirement that an arbitrator must grant the parties a fundamentally fair hearing"). A direct financial interest by an arbitrator or arbitral appointing authority in an arbitrator's decision —especially one, as here, that arises from an agreement between the appointing authority and *a party*—is inconsistent with basic fairness.

These principles are reflected in Section 10 of the FAA and the "confirmation and vacatur safety net" that it creates. *See Hoeft v. MVL Group, Inc.,* 343 F.3d 57, 63 (2d Cir 2003), *overruled on other grounds by Hall St. Assocs.*, 552 U.S. 576. Through Section 10, Congress "impressed limited, but critical, safeguards onto this process, ones that respected the importance and flexibility of private dispute resolution mechanisms, but at the same time barred federal courts from confirming awards tainted by partiality, a lack of elementary procedural fairness, corruption, or similar misconduct." *Id.* at 64; *In re Wal-Mart Wage & Hour Emp't Practices Litig.*, 737 F.3d 1262, 1268 (9th Cir. 2013) (parties cannot waive FAA's statutory grounds for vacatur because that would "frustrate Congress's attempt to ensure a minimum level of due process for parties to an arbitration" and leave parties "without any safeguards against arbitral abuse"). These safeguards undergird the policy favoring arbitration. Indeed, it is only *because* these safeguards exist that courts can defer to private agreements to arbitrate in the first place. *Hoeft*, 343 F.3d at 63 ("Thus, while we have spoken in broad terms of deference to private agreements to arbitrate, we have always done so with an awareness of the confirmation-and-vacatur safety net

that hangs below."); *see also Goldfinger*, 68 N.Y.2d at 231 (explaining that it is imperative to "zealously" safeguard the integrity of the arbitral process "[p]recisely *because* arbitration awards are subject to such judicial deference").

MASN and the Orioles submit that, at a minimum, the FAA's mandate that arbitrators act impartially forbids arbitrators or arbitral appointing authorities from taking *a direct financial stake* in an issue before the arbitrator—including the issue of whether to recuse. *See Commonwealth Coatings Corp. v. Cont'l Cas. Co.,* 393 U.S. 145, 147 (1968) (in enacting the FAA, Congress intended "to provide not merely for an arbitration *but for an impartial one*") (emphasis added); A.863 (Marks, J.) ("neutrality of the adjudicative process is the very bedrock of the FAA ... [and] [i]t is upon that foundation, and in great reliance upon it, that courts can defer to processes decided upon and designed by private contract"); *Bowles*, 22 F.3d at 1013 (a fundamentally fair hearing requires proceedings before "*decisionmakers [that] are not infected with bias*.") (emphasis added); THOMAS H. OEHMKE, COMMERCIAL ARBITRATION § 36:01 (Revised Ed., Cumulative Supp. 2001) ("The notion of decision-making by *neutrals who are independent* is central" to arbitration; parties "have a right to be judged *impartially and independently*") (emphasis added).

The question of whether any direct financial interest is allowed, including after an order vacating an award but remanding proceedings to the same appointing authority, is fundamental. It bears directly on the integrity of the arbitral process

and public confidence in arbitration as an alternative forum of dispute resolution. The rule this Court adopted in the October 22, 2020 Order, that an arbitral appointing authority may, *in an agreement with one party, take a direct financial stake in an issue before the arbitrator*, would disserve the policy interest in ensuring that arbitration is consistent with fundamental fairness, and is viewed in those terms by the public—an interest that is particularly crucial given the ubiquity of arbitration agreements in modern life. It would equally disserve New York's global reputation as one of the leading centers for business arbitration. New York has a unique and compelling interest in resolving this critical questions regarding when, if ever, it is appropriate for an appointing authority to take a financial interest in a decision.

C. Certification is Warranted to Clarify Arbitrators' Disclosure Obligations when Officials of the Appointing Authority Have Publicly Argued in Favor of One Party and Against Another

The RSDC's post-remand refusals to disclose communications with MLB officials, and the Supreme Court's sanctioning of those refusals to disclose when confirming the April 15, 2019 Award, raise a fundamental question regarding replacement arbitrators' disclosure obligations after a remand following vacatur.

As explained above, in the July 13, 2017 Order, this Court *unanimously* affirmed vacatur of the June 30, 2014 Award due to MLB's and its RSDC's evident partiality under the Federal Arbitration Act, but divided 3-2 on the issue of the proper arbitral forum for the rehearing. The record in the first arbitration and subsequent

court proceedings, which resulted in the July 13, 2017 Order, demonstrates that MLB and its officials, including the Commissioner of Baseball, have prejudged the issues arbitrated in this dispute. Indeed, the Commissioner himself has demonstrated evident bias and, in some instances, outright hostility to MASN and the Orioles. The Commissioner has argued in favor of the Nationals' interpretation of what "the RSDC's established methodology" means in the Settlement Agreement, the key issue before the RSDC, strenuously (and wrongly) arguing that MASN's and the Orioles' interpretation of the provision "does not conform to its text." A.1003.

The Commissioner has also publicly accused MASN and the Orioles of "engag[ing] in a pattern of conduct designed to avoid [the Settlement Agreement] being effectuated." A.1205. The Commissioner has actively litigated against MASN and the Orioles in this dispute, personally filing three affidavits with Supreme Court arguing directly in favor of Nationals' litigation positions and attacking MASN's and the Orioles' arguments as "false," "groundless," "baseless," "inaccurate," and "misleading." A.989-1007 ¶¶ 11, 20, 38, 41. Senior MLB officials who report to the Commissioner also personally filed affidavits in the Supreme Court proceedings in support of the Nationals. After the Supreme Court found Appellants were likely to *succeed* on the merits of their vacatur challenge to the award, the Commissioner declared that MASN "will be required to pay" the rights fees set in the vacated first award "sooner or later." A.1009-11.

In sum, the record in this case demonstrates that the *appointing authority*—MLB including the Commissioner himself—is not neutral in this dispute, and has publicly prejudged the issues to be arbitrated in this dispute. Thus, the proceedings on remand raised a question that the Court's July 13, 2017 Order did not address: the replacement RSDC arbitrators' disclosure obligations. There can be no serious dispute that statements or instructions by the MLB Commissioner or his staff to these arbitrators about the issues to be arbitrated could create an impression that the Commissioner or his staff are attempting to influence the proceedings. The MLB Commissioner appoints and removes the RSDC arbitrators at will and exercises broad powers over all MLB teams. A.165, 194. The Commissioner's statements to the RSDC arbitrators could plainly influence the arbitrators' deliberations.

This appeal presents the question of whether the arbitrators were required to disclose any communications they had with the MLB Commissioner or his staff about this dispute. MASN and the Orioles submit that the authority most analogous, *Sanko S.S. Co. v. Cook Indus, Inc.*, 495 F.2d 1260 (2d Cir. 1973), supports a requirement that the RSDC arbitrators disclose the requested communications. In *Sanko*, the Second Circuit held that a party to an arbitration was entitled to an evidentiary hearing to ascertain the full extent and nature of the relationships, both direct and indirect, between the arbitrator and the other party. *Id.* at 1264-65. The arbitrators were required to make this disclosure because the information about

which disclosure was sought "could create an impression of possible bias." *Id.*

Here, the evidence demonstrates that the appointing authority, MLB, *is biased* in this dispute in favor of the Nationals, and against MASN and the Orioles. Indeed it has publicly advocated for and litigated in favor of the Nationals, and against MASN and the Orioles. To the extent the MLB Commissioner or his staff, which control the league and exercise plenary power of the RSDC and its members' teams, communicated with the arbitrators about this dispute, such a communication would, Appellants submit, "create an impression of possible bias" under *Sanko*.

The Court of Appeals should have the opportunity to consider the scope of when, in light of clear evidence of bias of the appointing authority, the arbitrators must disclose their communications with officials of the appointing authority.

D. Certification is Warranted to Clarify Whether a Court May Enter a Money Judgment on an Arbitral Award when the Award Does Not Expressly Award Damages or Specify a Formula

For the reasons stated in section I, *supra*, the Court should grant leave to reargue on the issue of whether Supreme Court's entry of a money judgment on the April 15, 2019 Award was proper, and should vacate the money judgment because the April 15, 2019 Award did not award either party monetary damages. At the very least, if this Court denies reargument, the Court should then grant leave to appeal to the Court of Appeals on this issue. The April 15, 2019 Award is materially different than the award in the one case this Court relied on to affirm the money judgment:

Morgan Guaranty Trust Co. v. Solow, 114 A.D.2d 818 (1st Dep't 1985).

In *Morgan Guaranty*, the arbitration award itself *actually contained* a formula for the calculation of money damages due to the claimant. And that formula in the award at issue in *Morgan Guaranty* was "*so clear and specific that the determination of the amounts owed is merely an accounting calculation.*" *Id.* (emphasis added). The text of the April 15, 2019 Award clearly does not contain any formula.

To the extent this Court rules that *Morgan Guaranty* continues to apply even where the award itself *does not expressly contain* any formula, this Court will have made new law holding that a Court can *imply* a damages calculation formula into the award in some circumstances. That novel and important arbitration law issue has not been sanctioned by any case. It is also inconsistent with the narrow authority granted in CPLR §§ 7510 and 7511 to either confirm the award, vacate the award, or modify the award to correct "a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award" or address something that makes the award "imperfect in a matter of form, not affecting the merits of the controversy." It should be certified for review by the Court of Appeals.

CONCLUSION

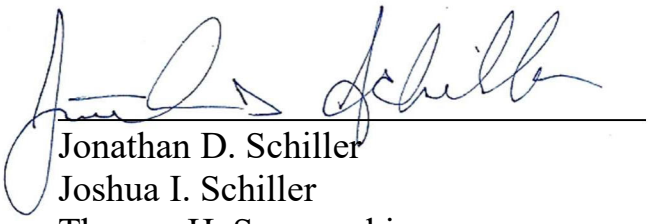
The Court should grant Appellants' motion for leave to reargue the October 22, 2020 Order, because the Court misapprehended the April 15, 2019 Award and misapplied *Morgan Guaranty Trust Co. v. Solow*, 114 A.D.2d 818 (1st Dep't 1985),

when it affirmed the $105,025,080.30 money judgment. The Court should grant leave to reargue this appeal and should vacate the monetary judgment.

The Court should grant Appellants' motion for leave to appeal and should certified the three fundamental legal questions identified herein for review.

Dated: New York, New York
November 20, 2020

Respectfully submitted,



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PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 N.Y.C.R.R. § 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: New York, New York
November 20, 2020

EXHIBIT 3

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, COMMERCIAL DIVISION

TCR SPORTS BROADCASTING HOLDING, LLP,

Petitioner,

-against-

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

Respondents,

-and-

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

Nominal Respondents.

N.Y. County Clerk's
Index No.: 652044/2014

Appellate Division Case Nos.:
2019-05390
2019-05458
2019-05459

NOTICE OF APPEAL TO THE COURT OF APPEALS PURSUANT TO CPLR 5601(d)

PLEASE TAKE NOTICE that, Petitioner TCR Sports Broadcasting Holding, LLP (d/b/a Mid-Atlantic Sports Network), and Nominal Respondents the Baltimore Orioles Limited Partnership, in its capacity as managing partner of TCR Sports Broadcasting Holding, LLP, and the Baltimore Orioles Baseball Club (collectively, "Appellants") hereby appeal, pursuant to CPLR 5601(d), to the Court

of Appeals of the State of New York, from the October 22, 2020 Order of the Supreme Court, Appellate Division, First Department, duly entered on October 22, 2020 ("October 22, 2020 First Department Order," Ex. 1), and from each and every part thereof, which finally determined an appeal from a final judgment of the Supreme Court, New York County, Commercial Division (Cohen, J.), dated December 9, 2019, and duly entered in the Office of the New York County Clerk on December 9, 2019 ("December 9, 2019 Judgment," Ex. 2), confirming an arbitration award issued by Major League Baseball's Revenue Sharing Definitions Committee dated April 15, 2019, and seek review, pursuant to CPLR 5501(b), of the Decision and Order of the Supreme Court, Appellate Division, First Department dated July 13, 2017, duly entered on July 13, 2017 ("July 13, 2017 First Department Order," Ex. 3), which is (i) an order of the Appellate Division on a prior appeal in the action which necessarily affected the December 9, 2019 Judgment and October 22, 2020 First Department Order, and (ii) satisfies the requirements of CPLR 5601(a) because it contains a dissent by two justices on a question of law in favor of Appellants.

Dated: New York, New York
November 19, 2020

By: /s/ *Jonathan D. Schiller*

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(via NYSCEF)

Exhibit 1
To Notice of Appeal

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

TCR SPORTS BROADCASTING HOLDING, LLP, Petitioner-Appellant, -against- WN PARTNER, LLC, et al., Respondents, WASHINGTON NATIONALS BASEBALL CLUB, LLC, Respondent-Respondent. --- THE BALTIMORE ORIOLES BASEBALL CLUB, et al., Nominal Respondents-Appellants.	Index No. 652044/14 Case No. 2019-05390 2019-05458 2019-05459 **NOTICE OF ENTRY**

PLEASE TAKE NOTICE that the within is a true and correct copy of the Decision and Order issued by the Supreme Court, Appellate Division, First Department duly entered in the office of the Clerk of the Supreme Court, Appellate Division, First Department, on October 22, 2020.

Dated: New York, New York
October 22, 2020

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Supreme Court of the State of New York
Appellate Division, First Judicial Department

Renwick, J.P., Kern, Scarpulla, Shulman, JJ.

12147- 12147A- 12147B

In re TCR Sports Broadcasting Holding, LLP,
Petitioner-Appellant,

-against-

WN Partner, LLC, et al.,
Respondents,

Washington Nationals Baseball Club, LLC,
Respondent-Respondent.

- - - - -

The Baltimore Orioles Baseball Club, et al.,
Nominal Respondents-Appellants.

Index No. 652044/14
Case No. 2019-05390
2019-05458
2019-05459

Boies Schiller Flexner LLP, New York (Jonathan D. Schiller of counsel) and Sidley Austin LLP, Washington, DC (Carter G. Phillips, of the bar of the District of Columbia, admitted pro hac vice, of counsel), for appellant and respondents-appellants.

Quinn Emanuel Urquhart & Sullivan LLP, New York (Stephen R. Neuwirth of counsel), for Washington Nationals Baseball Club, LLC, respondent.

Judgment, Supreme Court, New York County (Joel M. Cohen, J.), entered December 9, 2019, in favor of respondent Washington Nationals Baseball Club, LLC (the Nationals), unanimously affirmed, with costs. Appeals from orders, same court and Justice, entered on or about August 22, 2019 and on or about November 14, 2019, which granted the Nationals' motion to confirm an arbitration award and denied petitioner's motion to resettle the August 22, 2019 order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

In a prior appeal in this arbitration proceeding arising out of a contractual dispute between petitioner (MASN) and the Baltimore Orioles and the Washington

Nationals over Major League Baseball (MLB) telecast rights fees, this Court found that the 2014 arbitration award issued by MLB's Revenue Sharing Definitions Committee (RSDC) was correctly vacated due to "evident partiality" in the arbitrators (9 USC § 10[a][2]), i.e., the Nationals' counsel's unrelated representations at various times of virtually every participant in the arbitration except for MASN and the Orioles and the failure of MLB and the RSDC, despite repeated protests, to provide MASN and the Orioles with full disclosure or to remedy the conflict before the arbitration hearing was held (*Matter of TCR Sports Broadcasting Holding, LLP v WN Partner, LLC*, 153 AD3d 140 [1ST Dept 2017], *appeal dismissed* 30 NY3d 1005 [2017]). However, the Court found no basis for directing that the second arbitration be heard in a forum other than the industry-insider committee that the parties selected in their agreement to resolve this particular dispute, fully aware of the role MLB would play in the arbitration process. The parties proceeded to a second arbitration before the RSDC.

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.

We have considered petitioner's remaining arguments, including the argument that the court unlawfully modified the award in its confirmation order by performing a calculation of the Nationals' damages (*see e.g. Morgan Guar. Trust Co. of N.Y. v Solow*, 114 AD2D 818, 821-822 [1ST Dept 1985], *affd* 68 NY2D 779 [1986]), and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 22, 2020

Susanna Molina Rojas
Clerk of the Court

Exhibit 2
To Notice of Appeal

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

TCR SPORTS BROADCASTING HOLDING, LLP,

Petitioner,

-against-

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

Respondents,

-and-

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

Nominal Respondents.

Index No. 652044/2014

(Cohen, J.)

NOTICE OF ENTRY

PLEASE TAKE NOTICE that attached is a true and correct copy of the Judgment of the Supreme Court, New York County, Commercial Division (Cohen, J.) in favor of Washington Nationals Baseball Club, LLC for $105,025,080.30, dated December 9 2019 (Doc. # 958), entered with the Clerk on December 9, 2019

DATED: New York, New York
December 12, 2019

By: /s/ Jonathan D. Schiller
Jonathan D. Schiller
Joshua I. Schiller
Thomas H. Sosnowski

BOIES SCHILLER FLEXNER LLP
55 Hudson Yards
New York, NY 10001
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Carter G. Phillips (*pro hac vice*)
Kwaku A. Akowuah
Tobias S. Loss-Eaton
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David C. Frederick (*pro hac vice*)
James M. Webster, III (*pro hac vice*)
Kellogg, Hansen, Todd, Figel
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1615 M Street NW, Suite 400
Washington, D.C. 20036

Counsel to Mid-Atlantic Sports Network and the Baltimore Orioles Limited Partnership

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

TCR SPORTS BROADCASTING HOLDING, LLP,

Petitioner,

-against-

WN PARTNER, LLC; NINE SPORTS HOLDING, LLC; WASHINGTON NATIONALS BASEBALL CLUB, LLC; THE OFFICE OF THE COMMISSIONER OF BASEBALL; and ALLAN H. "BUD" SELIG, AS COMMISSIONER OF MAJOR LEAGUE BASEBALL,

Respondents,

-and-

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

Nominal Respondents.

Index No. 652044/2014

Hon. Joel M. Cohen, J.S.C.

JUDGMENT

WHEREAS, on April 15, 2019, Major League Baseball's Revenue Sharing Definitions Committee ("RSDC") issued its Second Award (NYSCEF Doc. No. 813);

WHEREAS, on April 15, 2019, Respondent the Washington Nationals Baseball Club ("the Nationals") filed a motion to confirm the Second Award (the "Motion") (NYSCEF Doc. No. 783);

WHEREAS, on August 22, 2019, this Court entered its Decision and Order, granting the Motion and confirming the Second Award (NYSCEF Doc. No. 924);

WHEREAS, on August 30, 2019, Petitioner TCR Sports Broadcasting Holding, LLP d/b/a Mid-Atlantic Sports Network and Nominal Respondents the Baltimore Orioles Baseball Club and

the Baltimore Orioles Limited Partnership (collectively, "MASN") filed a motion to resettle, or in the alternative, to reargue this Court's August 22, 2019 Decision and Order (the "Motion to Resettle/Reargue") (NYSCEF Doc. No. 926);

WHEREAS, on September 20, 2019, MASN filed and served a Notice of Appeal of this Court's August 22, 2019 Decision and Order (NYSCEF Doc. No. 934);

WHEREAS, on November 12, 2019, the parties appeared before this Court for a hearing on the Motion to Resettle/Reargue;

WHEREAS, on November 14, 2019, this Court entered its Decision and Order, denying the Motion to Resettle/Reargue (NYSCEF Doc. No. 936);

WHEREAS, this Court's November 14, 2019 Decision and Order further "**ORDERED** that the parties are directed jointly to submit on or before November 21, 2019 a Proposed Judgment for the Court's review and approval in favor of the Washington Nationals in the amount of the television rights fees set forth on page 48 of the April 15, 2019 Second Award (NYSCEF Doc. No. 813) minus the television rights fees already paid to the Nationals for the same relevant period, directing the Clerk to calculate statutory interest on the net amount from April 15, 2019 through the date of judgment." (NYSCEF Doc. No. 936);

WHEREAS, this Court's November 14, 2019 Decision and Order further ordered that: "The Proposed Judgment should make clear that it does not foreclose the Orioles from seeking adjustments to or recalculations of past, current or future MASN profit distributions in the ordinary course of business under the parties' 2005 Agreement, including the dispute resolution mechanisms set forth in that agreement if necessary. Submitting a Proposed Judgment does not constitute an admission by any party or otherwise waive any party's right to contest the Judgment on appeal." (NYSCEF Doc. No. 936); and

WHEREAS, consistent with the Court's November 14, 2019 Decision and Order, no party is making an admission or otherwise waiving their right to contest the Judgment on appeal.

UPON, this Court's August 22, 2019 Decision and Order (NYSCEF Doc. No. 924) and this Court's November 14, 2019 Decision and Order (NYSCEF Doc. No. 936); it is hereby

ADJUDGED that the Nationals' petition to confirm the Second Award is granted and the Second Award is confirmed; it is further

ADJUDGED that the Nationals, having an office at 1500 South Capitol Street, SE Washington, D.C. 20003-3599, have judgment and shall recover against TCR Sports Broadcasting Holding, LLP, having an office at 333 West Camden Street, Baltimore, Maryland 21201, the sum of **$99,203,339.14** (ninety-nine million, two-hundred three thousand, three hundred thirty nine dollars and fourteen cents), plus interest at the rate of 9% per annum from the date of April 15, 2019 through the date of judgment, as computed by the Clerk in the amount of $5,821,741.16, for the sum total of $105,025,080.30 and that the Nationals have execution therefor; it is further

ORDERED, that submission by the parties of a Proposed Judgment does not constitute an admission by any party or otherwise waive any party's right to contest the Judgment on appeal; and it is further

ORDERED, that MASN and the Orioles and related parties are not foreclosed from seeking adjustments to or recalculations of past, current or future MASN profit distributions in the ordinary course of business under the parties' 2005 Agreement, including the dispute resolution mechanisms set forth in that agreement if necessary. The RSDC arbitration panel did not award such adjustments or recalculations in the Second Award, and thus the Court's confirmation of the Second Award does not address or adjudicate those issues.

Enter:

HON. JOEL M. COHEN
J.S.C.

Milton A. Tingling, Clerk

FILED

DEC - 9 2019

COUNTY CLERK'S OFFICE
NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

INDEX # 652044/2014

TCR Sports Broadcasting Holding, LLP

Plaintiff(s)/Petitioner(s)

Against

WN Partner LLC, Nine Sports Holding LLC, Washington Nationals Baseball Club, LLC, The Office Of Commissioner Of Baseball, Allan H. (Bud) Selig, As Commissioner Of Major League Baseball,

Defendant(s)/Respondent(s)

The Baltimore Orioles Baseball Club, Baltimore Orioles Limited Partnership, in its capacity as managing partner of TCR Sports Broadcasting Holding, LLP

Nominal Respondent(s)

JUDGMENT

Attorney for the Prevailing Party

QUINN EMANUEL URQUHART & SULLIVAN LLP
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212-849-7165

Exhibit 3
To Notice of Appeal

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

TCR SPORTS BROADCASTING HOLDING, LLP,

Petitioner,

-against-

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

Respondents,

-and-

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

Nominal Respondents.

Index No. 652044/2014

NOTICE OF ENTRY

PLEASE TAKE NOTICE that the within is a true and correct copy of the Decision and Order issued by the Supreme Court, Appellate Division, First Department duly entered on July 13, 2017, in the office of the Clerk of the Appellate Division of the Supreme Court, First Department.

DATED: New York, New York
July 14, 2017

By: */s/ Eamon P. Joyce*
Benjamin R. Nagin
Eamon P. Joyce
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787 Seventh Avenue
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(212) 839-5300

Carter G. Phillips
(Of the Bar of the District of Columbia and State of Illinois)
By Permission of the Court
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Washington, D.C. 20005

Attorneys for Nominal Respondents The Baltimore Orioles Baseball Club and Baltimore Orioles Limited Partnership in its capacity as managing partner of TCR Sports Broadcasting Holding, LLP

By: */s/ Rachel W. Thorn*
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Attorneys for Respondents The Office of Commissioner of Baseball and The Commissioner of Major League Baseball

Acosta, P.J., Richter, Andrias, Kahn, Gesmer, JJ.

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3596 Index 652044/14

In re TCR Sports Broadcasting Holding, LLP,
Petitioner-Appellant-Respondent,

-against-

WN Partner, LLC, et al.,
Respondents,

Washington Nationals Baseball Club, LLC, et al.,
Respondents-Respondents-Appellants,

The Baltimore Orioles Baseball Club, et al.,
Nominal Respondents-Appellants-Respondents.

- - - - -

In re TCR Sports Broadcasting Holding, LLP,
Petitioner-Respondent,

-against-

WN Partner, LLC, et al.,
Respondents,

Washington Nationals Baseball Club, LLC,
Respondent-Appellant,

The Baltimore Orioles Baseball Club, et al.,
Nominal Respondents-Respondents.

- - - - -

E. Leo Milonas, Diamond Dealers Club, Inc., Kenneth R. Feinberg and Robert S. Smith
Amici Curiae.

Chadbourne & Parke LLP, New York (Rachel W. Thorn of counsel), for TCR Sports Broadcasting Holding, LLP, appellant-respondent/respondent.

Sidley Austin LLP, Washington, DC (Carter G. Phillips of the bar of the District of Columbia and the State of Maryland, admitted pro hac vice, of counsel), for TCR Sports Broadcasting Holding, LLP, the Baltimore Orioles Baseball Club and the Baltimore Orioles Limited Partnership, appellants-respondents/respondents.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Stephen R. Neuwirth of counsel), for Washington Nationals Baseball Club, LLC, respondent-appellant/appellant.

Kirkland & Ellis LLP, Washington, DC (Paul Clement of the bar of the District of Columbia, admitted pro hac vice of counsel), for the Office of Commissioner of Baseball and the Commissioner of Major League Baseball, respondents-appellants.

Pillsbury Winthrop Shaw Pittman LLP, New York (David G. Keyko of counsel), for E. Leo Milonas, amicus curiae.

Moses & Singer LLP, New York (Lawrence I. Ginsburg of counsel), for Kenneth R. Feinberg, amicus curiae.

Jenner Block LLP, New York (Irene M. Ten Cate of counsel), for Diamond Dealers Club, Inc., amicus curiae.

Friedman Kaplan Seiler and Adelman, New York (Robert S. Smith of counsel), for Robert S. Smith, amicus curiae.

Order, Supreme Court, New York County (Lawrence K. Marks, J.), entered on or about November 4, 2015, affirmed, without costs. Order, same court and Justice, entered July 11, 2016, modified, on the law, to grant the Nationals' motion, and otherwise affirmed, without costs.

Andrias and Richter, JJ. concur in a separate Opinion by Andrias, J. Kahn, J. concurs in a separate Opinion. Acosta, P.J. and Gesmer, J. dissent in part in an Opinion by Acosta, P.J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, P.J.
Rosalyn H. Richter
Richard T. Andrias
Marcy L. Kahn
Ellen Gesmer, JJ.

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Index 652044/14

x

In re TCR Sports Broadcasting Holding, LLP,
Petitioner-Appellant-Respondent,

-against-

WN Partner, LLC, et al.,
Respondents,

Washington Nationals Baseball Club, LLC, et al.,
Respondents-Respondents-Appellants,

The Baltimore Orioles Baseball Club, et al.,
Nominal Respondents-Appellants-Respondents.

- - - - -

In re TCR Sports Broadcasting Holding, LLP,
Petitioner-Respondent,

-against-

WN Partner, LLC, et al.,
Respondents,

Washington Nationals Baseball Club, LLC,
Respondent-Appellant,

The Baltimore Orioles Baseball Club,
et al.,
Nominal Respondents-Respondents.

- - - - -

E. Leo Milonas, Diamond Dealers Club, Inc.,
Kenneth R. Feinberg and Robert S. Smith,
Amici Curiae.

x

Cross appeals from the order of the Supreme Court, New York County (Lawrence K. Marks, J.), entered on or about November 4, 2015, which, insofar as appealed from as limited by the briefs, denied respondent Washington Nationals Baseball Club, LLC's (the Nationals) motion to confirm an arbitration award issued June 30, 2014 by Major League Baseball's Revenue Sharing Definitions Committee, granted the part of petitioner's motion seeking to vacate the award, and denied the part of petitioner's motion seeking to direct that a second arbitration proceed before an impartial panel unaffiliated with Major League Baseball. Respondent the Nationals appeals from the order of the same court and Justice, entered July 11, 2016, which denied its motion to compel the parties to re-arbitrate the claim before the Revenue Sharing Definitions Committee, and granted petitioner's cross motion to stay the parties from compelling or conducting another arbitration of this dispute until the final determination of the appeals from the November 4, 2015 order.

Chadbourne & Parke LLP, New York (Thomas J. Hall of counsel), and Cooley LLP, New York (Rachel W. Thorn, Alan Levine and Caroline Pignatelli of counsel), for TCR Sports Broadcasting Holding, LLP, appellant-respondent/respondent.

Sidley Austin LLP, Washington, DC (Carter G. Phillips of the bar of the District of Columbia and the State of Maryland, admitted pro hac vice, of counsel), for TCR Sports Broadcasting Holding, LLP, the Baltimore Orioles Baseball Club and the Baltimore Orioles Limited Partnership, appellants-respondents/respondents.

Sidley Austin LLP, New York (Benjamin R. Nagin, Eamon P. Joyce, Kwaku A. Akowuah and Tobias S. Loss-Eaton of counsel), for the Baltimore Orioles Baseball Club and the Baltimore Orioles Limited Partnership, appellants-respondents/respondents.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Stephen R. Neuwirth, Sanford I. Weisburst, Julia J. Peck and Cleland B. Welton II of counsel), for Washington Nationals Baseball Club, LLC, respondent-appellant/respondent.

Kirkland & Ellis LLP, Washington, DC (Paul Clement of the bar of the District of Columbia, admitted pro hac vice, Erin E. Murphy of the bar of the District of Columbia and the State of Virginia, admitted pro hac vice, and Michael H. McGinley of the bar of the District of Columbia, admitted pro hac vice, of counsel), Williams & Connolly, New York (John J. Buckley, Jr. of counsel), and Lupkin and Associates, New York (Jonathan D. Lupkin of counsel), for the Office of Commissioner of Baseball and the Commissioner of Major League Baseball, respondents-appellants.

Pillsbury Winthrop Shaw Pittman LLP, New York (David G. Keyko of counsel), for E. Leo Milonas, amicus curiae.

Jenner Block LLP, New York (Stephen L. Ascher, Irene M. Ten Cate and Jeremy H. Ershow of counsel), for Diamond Dealers Club, Inc., amicus curiae.

Moses & Singer LLP, New York (Lawrence I. Ginsburg, Jay R. Fialkoff and Robert B. McFarlane of counsel), for Kenneth R. Feinberg, amicus curiae.

Friedman Kaplan Seiler and Adelman, New York (Robert S. Smith, Robert J. Lack and Nora Bojar of counsel), for Robert S. Smith, amicus curiae.

PER CURIAM

The order of the Supreme Court, New York County (Lawrence K. Marks, J.), entered on or about November 4, 2015, which, insofar as appealed from as limited by the briefs, denied respondent Washington Nationals Baseball Club, LLC's motion to confirm an arbitration award issued June 30, 2014 by Major League Baseball's Revenue Sharing Definitions Committee, granted the part of petitioner's motion seeking to vacate the award, and denied the part of petitioner motion seeking to direct that a second arbitration proceed before an impartial panel unaffiliated with Major League Baseball, should be affirmed, without costs. The order of the same court and Justice, entered July 11, 2016, which denied the Nationals' motion to compel the parties to re-arbitrate the claim before the Revenue Sharing Definitions Committee, and granted petitioner's cross motion to stay the parties from compelling or conducting another arbitration of this dispute until the final determination of the appeals from the November 4, 2015 order, should be modified, on the law, to grant the Nationals' motion, and otherwise affirmed, without costs.

Andrias and Richter, JJ. concur in a separate Opinion by Andrias, J. Kahn, J. concurs in a separate Opinion. Acosta, P.J. and Gesmer, J. dissent in part in an Opinion by Acosta, P.J.

ANDRIAS, J.

Pursuant to the negotiated terms of the parties' written agreement, the subject arbitration, governed by the Federal Arbitration Act (FAA) (9 USC § 1 *et seq.*), was initiated before the Revenue Sharing Definitions Committee (RSDC) of Major League Baseball (MLB), to resolve a contractual dispute over telecast rights fees between TCR Sports Broadcasting Holding, LLP d/b/a the Mid-Atlantic Sports Network (MASN) and the Baltimore Orioles, and the Washington Nationals. For the reasons stated herein, we find that the arbitration award issued by the RSDC on June 30, 2014 was correctly vacated based on "evident partiality" (9 USC § 10[a][2]) arising out of the Nationals' counsel's unrelated representations at various times of virtually every participant in the arbitration except for MASN and the Orioles, and the failure of MLB and the RSDC, despite repeated protests, to provide MASN and the Orioles with full disclosure or to remedy the conflict before the arbitration hearing was held. However, even if this Court has the inherent power to disqualify an arbitration forum in an exceptional case, on the record before us there is no basis, in law or in fact, to direct that the second arbitration be heard in a forum other than the industry-insider committee that the parties selected in their agreement to resolve this particular dispute, fully aware of the role MLB would play

in the arbitration process.

Contrary to the view of the dissent, there has been no showing of bias or corruption on the part of the members of the reconstituted RSDC, and the Nationals will use new counsel at the second arbitration. Speculation that MLB will dictate the outcome of the second arbitration by exerting pressure on the new members of the RSDC does not suffice to establish that they will not exercise their independent judgment or carry out their duties impartially, or that the proceedings will be fundamentally unfair.

In 2001, the Orioles and TCR Sports Broadcasting Holding, LLP (TCR) established the Orioles' Television Network as a platform to broadcast Orioles games in a seven-state television territory. In 2002, MLB purchased the failing Montreal Expos for $120 million. In 2004, MLB announced the relocation of the Expos to Washington, D.C. to become the Nationals. The Orioles objected to the move on the grounds that the introduction of the Nationals into its previously-exclusive markets would cause it significant economic harm.

In an effort to resolve several issues associated with the Expos' relocation, on March 28, 2005, MLB, TCR, the Nationals, and the Orioles entered into an agreement which provided, among other things, that TCR would be converted into a two-club

regional sports network, MASN, which would have the sole and exclusive right to telecast, in the television territory, Nationals' and Orioles' games that were not otherwise retained or reserved by MLB's national rights agreements. The Orioles would be the managing partner and, initially, own 90% of MASN. The Nationals would own 10%, with its stake increasing, starting in 2010, by 1% per year, until it reached 33% in 2032. This allocation would allow the Orioles to receive reparative compensation through the distribution of profits in accordance with its then-applicable supermajority interests.

The agreement set the annual telecast fees to be paid to the teams between 2005 and 2011.[1] For 2005-2006, the Nationals would be paid $20 million per year. The Orioles would be paid up to $75,000 per game, with the final amount to be agreed upon between TCR and the Orioles. Beginning in 2007, the Orioles and the Nationals would each be paid $25 million per year, escalating at a noncompounded 4% rate.

The agreement also provided a methodology for determining future fees. "After 2011, and for each successive five year period, the Orioles, the Nationals and [MASN] [had to] first

[1]Because telecast rights fees are MASN's single largest expense, the amount of those fees directly affects MASN's profitability. Thus, any increase in telecast rights fees necessarily decreases the Orioles' compensation.

negotiate in good faith using the most recent information available which is capable of verification to establish the fair market value [FMV] of the telecast rights." If they were unable to agree on FMV during the mandatory negotiation period (30 days), they were to enter into nonbinding mediation under the auspices of the American Arbitration Association (AAA) or JAMS. If negotiation and mediation failed, "then the fair market value of the Rights [would] be determined by [the RSDC] using the RSDC's established methodology for evaluating all other related party telecast agreements in the industry." The RSDC determination would be final and binding on the parties, who could seek to vacate or modify the FMV determination "only on the grounds of corruption, fraud or miscalculation of figures."

In anticipation of the negotiations for 2012-2016, MASN, with MLB's consent, retained the Bortz Media and Sports Group to calculate the fees pursuant to the "Bortz methodology," an accounting based profit margin analysis derived from a regional sports network's actual revenues and expenses. MASN maintains that the Bortz methodology is the "established methodology" adopted by the RSDC in at least 19 prior FMV determinations.

On January 4, 2012, MASN sent the Nationals a proposed rights fee schedule of $34 million per year. The Nationals, by their counsel, Proskauer Rose, LLP (Proskauer) rejected the

proposal, valuing the Nationals' rights at more than $110 million per year based on a different methodology which analyzed fees obtained by MLB clubs in comparable markets.

In 2012, after negotiations failed and the parties waived mediation before the AAA or JAMS, the matter proceeded to arbitration before the RSDC, which was to be comprised of representatives from the Tampa Bay Rays, Pittsburgh Pirates, and New York Mets. In accordance with customary practice, the arbitration was administered by MLB staff, who also provided analytical and legal assistance to the RSDC.

The Nationals were represented by Proskauer. Because Proskauer served as MLB's longtime outside counsel, in January 2012, the Orioles' counsel sent separate emails to MLB's then-Senior Vice President and General Counsel and its then-Executive Vice President, Labor Relations and Human Resources (Robert D. Manfred, Jr.), inquiring about Proskauer's representation of MLB and MLB Clubs, including those with representatives on the RSDC. In reply, counsel was told that Proskauer had been MLB's principal labor counsel for years, represented MLB in the Los Angeles Dodgers bankruptcy matter and other matters, assisted in a small number of seminars/conference calls for club counsel about ADA and DOJ enforcement, and possibly did salary arbitration work for the Rays. Counsel was

advised to contact the clubs directly for further information concerning their relationships with Proskauer.

In a January 27, 2012 letter, the Orioles' counsel advised Proskauer that the arbitration

> "cannot be insulated from your firm's deeply ingrained, concurrent representations of [MLB], and various [MLB] clubs ('Clubs') including one, if not more of the Clubs appointed by the Commissioner to serve on the RSDC as to the present rights fee dispute. As you know, the RSDC functions under the direct control of MLB and the Office of the Commissioner, and as your correspondence confirms, your firm has 'performed certain work for the Office of the Commissioner ....'"

In a separate letter dated that same day, TCR's counsel advised Proskauer that he too had "serious concerns" about the firm's role in the arbitration, including its

> "longstanding representation of MLB itself, MLB's Labor Relations Committee (which is tightly lined with the RSDC), and at least one of the three Clubs that are voting members of the RSDC. We do not believe it is appropriate for a firm that represents the decision-maker in the instant dispute also to represent a litigant before that decision maker."

On February 2, 2012, the Nationals, the Orioles, and MASN met with Manfred and MLB staff for a pre-hearing organizational meeting. Counsel for MASN and the Orioles provided Manfred with a letter dated February 1, 2012 which reiterated that Proskauer's substantial past and current representation of the Orioles, which Proskauer unilaterally terminated, and of MLB and various MLB clubs, "including at least one of the Clubs appointed by the

Commissioner to serve on the RSDC," tainted the proceedings. Particularly, the letter stated that

> "Proskauer's longstanding representations of litigant, ultimate decision-maker and participating RSDC member Club(s) raise, at a minimum, serious questions of partiality, prejudice, and misuse of confidential and proprietary information, which in view of well-established fair hearing and due process protections, compromise this proceeding and the rights and privileges to which the parties are entitled. Moreover, as a practical matter and, at the very least, the appearance of a conflict of interest on the part of Proskauer cannot be avoided and will thus diminish the credibility of the RSDC proceeding and undermine principles of fairness and impartiality.
>
> "The full scope of Proskauer's representations of MLB, including the Labor Relations Committee and other matters, and MLB Clubs, including at least the one Club participating on the RSDC, is not fully known at present to TCR or the Orioles and may, in fact, extend even further. Under the circumstances, therefore, and in view of recognized principles of fairness and due process, the Orioles and TCR respectfully request that the RSDC preclude Proskauer from participating in this proceeding. Anything less would he procedurally and substantively inappropriate and compromise the integrity of this appeal. We submit that this issue should be addressed prior to the RSDC addressing any substantive matters."

Because MLB had yet to reveal the identities of the individuals representing the clubs that would be on the RSDC, and had instructed the parties not to communicate with the arbitrators directly, MASN and the Orioles asked Manfred to transmit the February 1, 2017 letter to the arbitrators (who were shown as "cc, Members Revenue Sharing Definition Committee"), and

inform them of their objections to Proskauer's participation in the arbitration.[2] When MASN and the Orioles asked that Proskauer be disqualified from representing the Nationals, Manfred replied that the RSDC lacked the legal authority to disqualify counsel. Counsel for MASN then asked Manfred for a continuing objection as to Proskauer's participation in the arbitration, which Manfred granted.

In March 2012, in their submissions statements to the RSDC, MASN and the Orioles expressly reserved their objections arising out of Proskauer's conflicts and participation in the proceedings on behalf of the Nationals. Pursuant to protocol, these submission statements, as well as the Orioles' reply, which reiterated the continuing objection to Proskauer's involvement, were sent to Manfred for distribution to the RSDC members.

On April 3, 2012, the RSDC, composed of the president of the Pittsburgh Pirates, the principal owner of the Tampa Bay Rays and the chief operating officer of the New York Mets, held a one-day hearing. The Nationals asserted that their rights had an FMV averaging $118 million per year for 2012-16, based on an analysis of factors including the size and attractiveness of the Nationals' television market, a survey of the economic value of

[2]Only during the vacatur proceeding did MASN and the Orioles learn that MLB claimed that it never did so.

recent deals entered into by teams in other comparable markets, and the escalating value of live sports programming. MASN asserted that the Nationals should be paid an average $39.5 million per year based on the Bortz methodology, including an assumption that MASN should be guaranteed a 20% profit margin on baseball programming. During the arbitration, MASN and the Orioles repeated their objections to Proskauer's representation of the Nationals numerous times.

In the summer of 2012, the approximate amounts of the rights fees determined by the RSDC were announced to the parties. However, the release of a final decision was deferred while then Commissioner Bud Selig attempted to negotiate a broader settlement.

During the course of these negotiations, MASN paid the Nationals for their telecast rights in the amounts that it had proposed to the RSDC. When the Nationals made clear that they viewed the resolution of their 2012-2013 compensation as a "condition precedent" to any broader settlement, MLB, to keep the negotiations going, advanced $25 million to the Nationals to reduce the shortfall between RSDC's unreleased award and the amounts that MASN was paying for those two years. MLB documented this payment, which was made more than a year after the RSDC had informed the parties what its decision would be, in a letter

agreement with the Nationals stating 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. The agreement provided in the alternative that MLB could recover the $25 million if MASN was sold to a third party.

On June 30, 2014, the RSDC issued its final written decision in which it determined that the Nationals' rights fees for 2012 would be roughly $53 million, and would rise by approximately $3 million per year through 2016. The RSDC rejected MASN's and the Orioles' argument that their interpretation of the Bortz methodology was the "RSDC's established methodology," stating that Bortz "does not estimate the fair market value of a Club's broadcasting rights by reviewing the network's revenue and expenses and nothing more," but includes "additional information relevant to the Committee's deliberations, including, for example, comparisons of the Club's local rights fees with verified fees of Clubs in comparable Major League markets." The RSDC also rejected the Nationals' position that the RSDC'S "'established methodology' consists primarily of an analysis of rights fees obtained by Clubs in comparable markets." Instead, the RSDC stated that its "established methodology includes an analysis of the income statement of the network, a review of

broadcast agreements in comparable markets to verify the financial statement analysis, and a consideration of any additional factors raised by the parties that may impact the analysis."

Although MLB cautioned all parties that they should not challenge the award in court, and threatened them with the strongest sanctions available under MLB's constitution if they did so, in September 2014, MASN (on behalf of itself and the Orioles) commenced this proceeding seeking to vacate the arbitration award on the ground it was procured through bias, evident partiality, misconduct, fraud, corruption, and undue means, and was rendered beyond the scope of the arbitrators' authority and in manifest disregard of the law. MASN also sought to have the matter remanded for a second arbitration before a different forum. The Nationals cross-moved to confirm the RSDC's award.

In support of its petition, MASN alleged that MLB had a financial stake in the outcome of the arbitration due to the $25 million advance it made to the Nationals; that MLB, the Nationals and the arbitrators all used the same law firm without full disclosure as to possible conflicts; that MLB controlled the arbitration process; and that the arbitrators failed to apply the Bortz methodology, as required by the agreement. MASN further

alleged that the RSDC was impossibly tainted by a conflict of interest because an increase in the rights fees, which are taxed by MLB, meant that more money would go into MLB's revenue sharing pool, and the Rays and Pirates, whose representatives were on the RSDC, were teams that benefited from revenue-sharing.

By order dated November 4, 2015, the court denied the Nationals' motion to confirm and granted the part of MASN's motion seeking to vacate the RSDC's award. The sole basis for this determination was the court's finding that "evident partiality" had resulted from the Nationals' representation by Proskauer. The court rejected MASN's and the Orioles' other challenges to the award, finding that there was no fraud or prejudicial misconduct, that there was no proof that RSDC had been improperly influenced by MLB's purported financial stake in the award, and that the RSDC's award was "reasonable on its face" and did not exceed the RSDC's powers or constitute manifest disregard of the law.

In reaching its finding of evident partiality, the court stated that the arbitration proceedings had been rendered fundamentally unfair by (i) Proskauer's representation of "MLB, its executives and closely related entities in nearly 30 other matters" and "interests associated with all three arbitrators," and (ii) MLB, the arbitrators, the Nationals and/or Proskauer's

failure to take reasonable steps to address MASN and the Orioles concerns over Proskauer's involvement. The court rejected the Nationals and MLB's argument that such conflicts were to be expected because MASN and the Orioles agreed to an "inside baseball" arbitration, stating that MASN and the Orioles had not agreed to "a situation in which MASN's arbitration opponent, the Nationals, was represented in arbitration by the same law firm that was concurrently representing MLB and one or more of the arbitrators and/or the arbitrators' clubs in other matters."

The court denied the part of petitioner's motion seeking to direct that a second arbitration proceed before an impartial panel unaffiliated with MLB, stating that "re-writing the parties' Agreement is outside of [the court's] authority."

MASN appealed on the issue of whether the court properly rejected its argument that a new arbitration should be before a different forum. The Nationals filed a cross appeal challenging the determination of evident partiality. Before the appeals were heard, the Nationals moved for an order compelling MASN and the Orioles to submit to a new RSDC arbitration. MASN opposed and cross-moved pursuant to CPLR 2201 for a stay of proceedings pending determination of the appeals.

The court denied the Nationals' motion to compel a new arbitration before the RSDC. Pursuant to CPLR 2201, the court

stayed the parties "from compelling or conducting another arbitration of this dispute, without the agreement of all the parties to this proceeding, until the final determination of the appeals."

To vacate an award because of evident partiality under the FAA (9 USC § 10[a][2]), the movant bears the burden of showing that a reasonable person, considering all the circumstances, would have to conclude that an arbitrator was partial to one party to the arbitration (*see Kolel Beth Yechiel Mechil of Tartikov, Inc. v YLL Irrevocable Trust*, 729 F3d 99, 104 [2d Cir 2013]; *U.S. Elecs., Inc. v Sirius Satellite Radio, Inc.*, 17 NY3d 912 [2011] [adopting the Second Circuit's "reasonable person standard"]). Although this requires "something more than the mere appearance of bias" (*see Morelite Constr. v New York City Dist. Council Carpenters Benefit Funds*, 748 F2d 79, 83 [2d Cir 1984] [internal quotation marks omitted]), "[p]roof of actual bias is not required" (*Scandinavian Reins. Co. Ltd. v St. Paul Fire & Marine Ins. Co.*, 668 F3d 60, 72 [2d Cir 2012]). Rather, a finding of partiality can be inferred "from objective facts inconsistent with impartiality" (*Kolel Beth Yechiel Mechil*, 729 F3d at 104 [internal quotation marks omitted]).

"Among the circumstances under which the evident-partiality standard is likely to be met are those in which an arbitrator

fails to disclose a relationship or interest that is strongly suggestive of bias in favor of one of the parties" (*Scandinavian Reinsurance Co. Ltd.*, 668 F3d at 72). Factors to be considered include "(1) the extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceedings; (2) the directness of the relationship between the arbitrator and the party he is alleged to favor; (3) the connection of that relationship to the arbitrator; and (4) the proximity in time between the relationship and the arbitration proceeding" (*Yosemite Ins. Co. v Nationwide Mut. Ins. Co.*, 2016 WL 6684246, *7, 2016 US Dist LEXIS 157061, *19-20 [SD NY 2016] [internal quotation marks omitted]). "While the presence of actual knowledge of a conflict can be dispositive of the evident partiality test, the absence of actual knowledge is not" (*Applied Indus. Materials Corp. v Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F3d 132, 138 [2d Cir 2007]).

The record shows that Proskauer, while representing the Nationals in the arbitration, had an extensive relationship with the clubs that comprised the RSDC and/or their representatives, and with MLB, which administered the proceeding. Discovery in the vacatur proceeding revealed that

(i) the Proskauer attorneys representing the Nationals represented the Pirates in *Senne v Office of the Commissioner of*

Baseball, No. 14-00608 (ND Cal) and *Garber v Office of the Commissioner of Baseball*, No. 12-03704 (SD NY). Proskauer had also represented the Pirates president, who was its representative on the RSDC, in *Phillips, et al. v Selig*, No. 1966 EDA 2007 (Pa Super Ct), and advised the Pirates on Americans with Disability Act matters.

(ii) Proskauer represented the Rays in *Senne* and four separate salary arbitrations, one of which occurred during the arbitration; and

(iii) Proskauer defended the father of Jeffery Wilpon, the Mets chief operating officer and its representative on the RSDC, and the father's company, in a class action arising out of the Madoff Ponzi scheme, which was ongoing during the arbitration. Proskauer also represented the Mets in *Senne*.

Proskauer also concurrently represented MLB, its executives and closely-related entities in approximately 50 engagements. Although MASN and the Orioles repeatedly protested Proskauer's involvement and requested complete disclosure so they could assess the extent of the potential conflicts, MLB and the arbitrators undisputedly failed to provide full disclosure or seek to conduct the proceeding with arbitrators who had no prior relationships with Proskauer. While the arbitrators aver in this proceeding that they have no recollection of MASN's and the

Orioles' disclosure requests or objections, the record establishes conclusively that MASN and the Orioles reiterated their objections in their written submissions to the RSDC before the merits hearing was held and at the hearing itself.

The evidence that the same lawyers in the same firm were representing interests of the arbitrators and MLB at the same time as they represented the Nationals in the arbitration is an objective fact inconsistent with impartiality. The arbitrators had a duty to, but did not, investigate or disclose their relationships with Proskauer, and MLB failed to exercise what power it had to ensure confidence in the fairness of the proceedings in light of MASN's stated concerns (*see Applied Indus. Materials Corp.*, 492 F3d at 137 [where "[a]n arbitrator . . . knows of a material relationship with a party" but fails to disclose it, "[a] reasonable person would have to conclude that [the] arbitrator who failed to disclose under such circumstances was partial to one side," even where the award itself was not clearly favorable to the other party]; *Morelite*, 748 F2d at 84 [vacating award based on "a father-son relationship between an arbitrator and the President of an international labor union," without any suggestion that the father was sitting in some representative capacity]).

MASN did not waive its evident partiality challenge by

failing to move for the disqualification of the arbitrators. MASN demonstrated its belief that it was improper for Proskauer to represent the Nationals given its role as MLB's outside counsel, its representation of MLB clubs, including one club that had a representative of the RSDC panel, and MLB's role in administering the proceeding and appointing the RSDC arbitrators, who might also have relationships with Proskauer. Particularly, in a February 13, 2012 email, Manfred stated that the Orioles and MASN's objections should be separately documented to him. On February 14, 2012, counsel for the Orioles and MASN complied, asking Manfred whether anything more was needed. On February 16, 2012, counsel for the Orioles again wrote to Manfred, stating,

> "To reiterate, what we agreed to when we met in New York on February 4, 2012 [sic], and what has been consistently stated in our discussions and all correspondence is that since the RSDC would not - or believed it did not have the authority to - preclude Proskauer as we had requested, the RSDC would grant, and in fact, granted the Orioles and TCR [MASN] a continuing objection to Proskauer's representation of the Nationals and that all of the Orioles' and TCR's [MASN's] objections, reservations, rights, privileges, claims and actions related to Proskauer's participation in these proceedings would be preserved for all purposes, without any waiver of any kind, including by virtue of the Orioles' and TCR's [MASN's] continued participation in this RSDC proceeding."

In their March 12 submission statements to the RSDC, counsel for the MASN and the Orioles expressly stated that they reserved and preserved all rights, claims, causes of action and

privileges, waiving none, arising from or related to Proskauer's participation in the proceedings on behalf of the Nationals. In a September 2, 2013 email, Manfred advised the Orioles' counsel that "We would never assert that you have waived your objection to Proskauer's involvement."

Accordingly, the trial court was correct in vacating the RSDC's determination based on "evident partiality." However, even if the dissent is correct that it must be within the inherent equitable power of the court to protect fundamental fairness by sending the arbitration to a new forum, we conclude, on the record before us, that the court correctly rejected MASN's and the Oriole's argument that the parties' agreement should be disregarded and the matter remanded to an arbitral forum unaffiliated with MLB.[3]

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[3] Citing *Rabinowitz v Olewski* (100 AD2d 539, 540 [2d Dept 1984]), the dissent finds that courts, in an appropriate case, have inherent power to disqualify an arbital forum before an award has been rendered. However, *Rabinowitz* did not involve the FAA and the Second Circuit and other federal courts have held that although the FAA provides for vacatur where there was "evident partiality or corruption in the arbitrators, it does not provide for pre-award removal of an arbitrator" (*Aviall, Inc. v Ryder Sys., Inc*, 110 F3d 892, 895 [2d Cir 1997] [internal quotation marks and citation omitted]; *PK Time Group, LLC v Robert*, 2013 WL 3833084, *2-4, 2013 US Dist LEXIS 104449, *5-11 [SD NY 2013]; *see also Gulf Guar. Life Ins. Co. v Connecticut General Life Ins. Co.* 304 F3d 476, 490 [5th Cir 2002]). The concurrence, citing *Matter of Salvano v Merrill Lynch, Pierce, Fenner & Smith, Inc.* (85 NY2d 173, 181-182 [1995] and *Matter of Cullman Ventures [Conk]*, 252 AD2d 222, 228 [1st Dept 1998]) would

The FAA "requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms" (*Volt Info. Sciences, Inc. v Board of Trustees of Leland Stanford Jr. Univ.*, 489 US 468, 478 [1989]). "Where, as here, the parties have agreed explicitly to settle their disputes only before particular arbitration fora, that agreement controls" (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v Georgiadis*, 903 F2d 109, 113 [2d Cir 1990]).

The dissent nevertheless states that, under the "rare circumstances" presented, MASN and the Orioles' expectations of a reasonably fair and impartial arbitration forum in the RSDC have been frustrated, and that the arbitration clause selecting the RSDC as the arbitral forum should be reformed to require a rehearing before a new forum. In delineating these rare circumstances, the dissent asserts that MLB and the Commissioner effectively control the RSDC, appointing its members and

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also hold that "[t]his Court may not order that the arbitration take place in a forum other than the one selected by the parties, notwithstanding the possibility of a more impartial proceeding in another forum." However, we need not, and, contrary to the dissent's characterization, indeed do not, determine whether, in an exceptional case, *Rabinowitz* should apply to cases governed by the FAA. As discussed *infra*, even if such inherent power exists, MASN and the Orioles have not established that remand to the RSDC will be fundamentally unfair under the particular circumstances before us. Thus, we leave the issue for another day, if it arises in an appropriate case.

participating in the evidentiary and decision-making process, and that they have endorsed the original award in public comments and filings in this case that prejudge and predetermine the outcome of a future arbitration before the RSDC. The dissent also finds that the RSDC would be conflicted in a second arbitration because the only way MLB can now recover its $25 million advance is if the RSDC rejects the lower amount of telecast rights fees put forth by MASN and the Orioles, and awards the Nationals significantly higher amounts. Thus, the dissent posits that a rehearing by the same arbitral forum would be all but guaranteed to yield the same result, even though the panel has changed.

However, the circumstances cited by the dissent do not warrant the removal of the RSDC. While the dissent waxes poetic about the purity of the game of baseball, MLB is first and foremost a business, governed by its constitution and innumerable agreements and contracts. Because arbitration is a matter of contract, "the parties to an arbitration can ask for no more impartiality than inheres in the method they have chosen" (*National Football League Mgt. Council v National Football League Players Assn.*, 820 F3d 527, 548 [2d Cir 2016]) and the FAA permits parties to select arguably partial arbitrators, if doing so serves their interests (*see Sphere Drake Ins. Ltd. v All Am. Life Ins. Co.*, 307 F3d 617 [7th Cir 2002], *cert denied* 538 US 961

[2003]). In *Sphere Drake*, the Seventh Circuit explained:

> "Parties are free to choose for themselves to what lengths they will go in quest of impartiality. Section 10(a)(2) just states the presumptive rule, subject to variation by mutual consent. Industry arbitration, the modern law merchant, often uses panels composed of industry insiders, the better to understand the trade's norms of doing business and the consequences of proposed lines of decision. The more experience the panel has, and the smaller the number of repeat players, the more likely it is that the panel will contain some actual or potential friends, counselors, or business rivals of the parties. Yet all participants may think the expertise-impartiality tradeoff worthwhile; the Arbitration Act does not fasten on every industry the model of the disinterested generalist judge. To the extent that an agreement entitles parties to select interested (even beholden) arbitrators, § 10(a)(2) has no role to play" (307 F3d at 620 [internal citations omitted]); *see also Yonkers Contr. Co. v Port Auth. Trans-Hudson Corp.*, 87 NY2d 927, 929 [1996] ["As a general proposition, parties to an arbitration contract are completely free to agree upon the identity of the arbitrators, and New York courts have therefore regularly refused to disqualify arbitrators on grounds of conflict of interest or partiality even in cases where the contract expressly designate[s] a single arbitrator . . . employed by one of the parties" [internal quotation marks omitted]).

Here, MASN, the Orioles and the Nationals expressly chose to carve out disputes over telecast fees for arbitration before the RSDC, an industry-insider committee with specialized knowledge on the complex issue of how to calculate the appropriate fees that television networks should pay to teams for broadcast rights. In contrast, their agreement specified that other disputes would be arbitrated before the Commissioner or the AAA, evidencing that

the decision to carve out telecast fee disputes for arbitration before the RSDC was a conscious choice.

In making that choice, as the dissent acknowledges, the sophisticated parties, represented by experienced counsel, knew full well how the RSDC operated, including that MLB would have significant influence over the arbitration process. MASN and the Orioles knew that RSDC's members are selected by MLB in its sole discretion, that there are no written rules of evidence, discovery rights or obligations, sworn testimony, or direct or cross-examination of witnesses. Most significantly, they knew that MLB staff would provide administrative, organizational and legal support, including analyzing financial information and preparing draft decisions in accordance with the instructions of the RSDC members who would make the final determinations. Indeed, while objecting to Proskauer's involvement, MASN's counsel acknowledged during proceedings before the motion court that MASN "bought into whatever the structure was, whatever [MLB]'s role was; we agreed to that, we had to live with that."

Furthermore, in 2004, the Orioles had used the RSDC to determine the FMV of the telecast rights fees the Orioles were receiving from their then regional sports network. In 2006, Orioles owner Peter G. Angelos testified before Congress as to the advantages of using the RSDC as a neutral body to determine

the FMV of the future rights fees under the agreement, stating:

> "Last year, we paid the Nationals $20 million to televise their games, which is more than Comcast SportsNet paid us to televise Orioles games. The agreement provides a mechanism to revalue the rights fees at a market-based rate through an MLB committee in the event TCR/MASN and the Nationals are not able to agree on a new contract. The benefits of that arrangement to both the Nationals and Orioles cannot be overstated. It guarantees each team a market rate as evaluated and set by a neutral third party determined by [MLB]."

MASN and Orioles also waived the opportunity to mediate this dispute before the AAA or JAMS, electing to proceed directly to arbitration before the RSDC, as the preferred entity to resolve the dispute. The only reason that their position has changed is that they are unhappy with the RSDC's refusal to accept their interpretation of the Bortz methodology as RSDC's established methodology, which led to an award that exceeded their expectations.

Insofar as the dissent finds that MLB demonstrated a lack of concern for the fairness of the first proceeding by taking no action in response to petitioner's objections to the participation of Proskauer as counsel for the Nationals, this defect has been remedied. Proskauer is no longer representing the Nationals and the composition of the RSDC has changed, with the appointment of three new arbitrators affiliated with different clubs.

The dissent's position that the new panel will remain puppets of MLB, rather than exercise its independent judgment, is pure conjecture. An attack on the impartiality of the arbitrators "must be based on something overt, some misconduct on the part of an arbitrator[s], and not simply on [their] interest in the subject matter of the controversy or [their] relationship to the party who selected [them]" (*Matter of Astoria Med. Group [Health Ins. Plan of Greater N.Y.]*, 11 NY2d 128, 137 [1962]). Indeed, if the dissent's position is adopted, and the RSDC is disqualified based on the mere possibility that MLB will unduly influence it, it would eliminate the viability of any future arbitration by any MLB club before the RSDC, and place into question the viability of industry-insider arbitrations in general.

The dissent finds that MLB has a direct financial stake in the amount of the fees that will be awarded in the second arbitration because MLB will only recoup its $25 million advance if the Nationals are awarded more than the amount MASN and the Orioles have proposed. However, the Nationals have offered to post a bond to guarantee repayment of the advance to MLB regardless of the outcome of the arbitration. While the dissent states in conclusory fashion that the posting of a bond will not resolve the issue, and should not be considered because it was

raised at oral argument, it does not persuasively explain why that is so, and ignores the circumstances that led to the advance and its purpose, turning the parties' intent behind the advance on its head.

After the arbitrators made their draft decision known, the issuance of a final decision was deferred in the hope of reaching a global settlement among the parties. While negotiations continued and settlement proposals were exchanged, MASN continued to pay the Nationals the $39.5 million per year it maintained was due, notwithstanding its awareness that the RSDC would award over $50 million. The Nationals were not content with this continuing shortfall and MLB made the $25 million advance to keep the club at the negotiating table, which benefited both parties by allowing the Nationals to receive the proposed award at no financial cost to MASN and the Orioles, thereby forestalling litigation to enforce the RSDC award. To allow the Orioles to now use the advance, which maintained the status quo, as a sword to disqualify the RSDC defies logic and mischaracterizes MLB's efforts to have the parties negotiate their differences without undue financial pressure on either side. Furthermore, given the fact that MASN has paid the Nationals over $30 million per year for the last five years for their telecast rights, it is speculative at best to conclude that the Nationals do not have

the ability to repay the advance if the result of the second arbitration changes to its detriment.

Nor does the fact that MLB has made certain public statements expressing the view that the RSDC acted within the scope of its authority in setting the rights fees, and that MASN would have to abide by that determination "sooner or later," warrant the transfer to a new forum. Again, it is the RSDC, not MLB or its Commissioner that will render a final decision in this matter. Indeed, while the dissent casts MLB's Commissioner as a "de facto fourth arbitrator," it concedes that he does not have a vote. As to the dissent's reliance on evidence that MLB has actively opposed MASN's claims by threatening sanctions for pursuing a judicial remedy, those warnings were addressed to all parties. In taking this position, MLB was merely attempting to protect the binding arbitration process that the parties had previously agreed to and MLB's constitution.

In an attempt to bring the forum dispute within the purview of the FAA, the dissent also finds that the initial decision reflects that the RSDC has been shown to be "so corrupt or biased" as to undermine the expectations of the parties to have a fundamentally fair hearing. However, when viewed in the context of the RSDC's actual award, the dissent's position is without foundation. In fact, the RSDC rejected both sides' arguments as

to the methodology that should be used to determine FMV and the award of $53 million per year was far closer to the $39.5 million proposed by MASN and the Orioles than the $118 million demanded by the Nationals. There has been no showing that the RSDC was either corrupt or biased.

Even if the second arbitration was referred to the AAA, as proposed by the dissent, any panel selected would necessarily be comprised of arbitrators with expertise in professional sports and broadcast fees. Thus, given the small pool of qualified arbitrators available, there would be no assurance that all potential conflicts or bias would be removed or that MASN and the Orioles would be satisfied with the RSDC's successor and "would not bring yet another proceeding to disqualify him or her" (*Marc Rich & Co. v Transmarine Seaways Corp. of Monrovia*, 443 F Supp 386, 388 [SD NY 1978]).

The dissent's reliance on *Aviall, Inc. v Ryder Sys., Inc.* (110 F3d 892 [2d Cir 1997], *supra*), and *Erving v Virginia Squires Basketball Club* (349 F Supp 716 [ED NY 1972], *affd* 468 F2d 1064 [2d Cir 1972]) as a basis for reforming the arbitration clause is misplaced.

In *Aviall*, the agreement required that the disputes only be submitted to the designated arbitrator if it were an "independent auditor" of both parties (*Aviall* at 894). The plaintiff sought

removal of the arbitrator due to a "business relationship" with a party (*id.* at 893). While stating that in certain limited circumstances a court has the power to remove an arbitrator pursuant to section 2 of the FAA if the arbitration agreement itself "is subject to attack under general contract principles" (*Aviall* at 895), the Second Circuit affirmed the district court's decision not to adjudicate the dispute over which arbitrator would hear the matter. The court reasoned that the dispute over whether the auditor arbitrator was sufficiently "independent" to satisfy the terms of the arbitration agreement did not constitute a claim "invalidating the contract" or a claim of some type of fraud in the inducement that would invalidate the agreement under general contract principles (*id.* at 895-897). This reasoning is equally applicable to this case.

In *Erving*, the Second Circuit affirmed the district court's decision to substitute a neutral arbitrator in place of the Commissioner of the American Basketball Association based on an impermissible conflict of interest, that is, that the Commissioner was a partner at the law firm representing the defendant. Here, the dissent's criticism is directed at MLB, not the arbitrators.

Even if a challenge to the panel's independence was an equitable ground for reformation, we are not asked to replace

arbitrators who have shown themselves to be less than impartial. Indeed, the new arbitrators on the reconstituted RSDC have not demonstrated any bias in the matter and there has been no showing of an impermissible conflict between them and MASN or the Orioles. Thus, MASN and the Orioles have not made the extraordinary showing of grounds needed to reform the agreement or disqualify the RSDC, without which we lack the authority to reform the contract.

In sum, it cannot be said that MASN's and the Orioles' expectation of a reasonably fair and impartial arbitration forum in the RSDC has been frustrated, and there is no basis to sever the clause in the parties' agreement selecting the RSDC as the arbitral forum for this dispute or to reform the clause to require a rehearing before a new forum unconnected to MLB.

The motion court's decision vacating the award was based solely on Proskauer's conflicts, a defect that has been remedied in that the Nationals have retained new counsel. MASN and the Orioles have not and cannot show that the agreement is unenforceable under general contract principles. Everyone was aware that the RSDC was composed of MLB owners, or their designees, and of the inherent conflicts the panel's relationship with MLB created. MASN and the Orioles have not established that MLB, whose staff are required to treat each Club "fairly and

equitably," would wield any improper or unforeseen power over a newly constituted RSDC arbitration panel. Nor has it been shown that the new RSDC members (the principal owner of the Milwaukee Brewers and executives of the Toronto Blue Jays and Seattle Mariners) have any bias against MASN or the Orioles.

Under these circumstances, to compel the parties to arbitrate before a body other than one to which they knowingly agreed, just because MASN and the Orioles are dissatisfied with the result, would violate the Nationals' right to assert their contractual rights under the agreement and create undue uncertainty within this industry, and others, that have chosen to use panels composed of industry insiders, with specialized expertise, to arbitrate complex disputes.

KAHN, J. (concurring)

I agree that Supreme Court correctly vacated the award based on evident partiality. I also concur in the result reached by the plurality that the arbitration may not be referred to another forum, but I do so on different grounds.

This arbitration is governed by the Federal Arbitration Act (FAA) (9 USC § 1 *et seq.*), and the substantial body of case law under the FAA holding that the terms of negotiated arbitration agreements must be judicially enforced according to their terms (*Volt Info. Sciences, Inc. v Board of Trustees of Leland Stanford Jr. Univ.*, 489 US 468, 476 [1989]), in the absence of an established ground for setting such agreement aside, such as fraud, duress, coercion or unconscionability (*Matter of Cullman Ventures [Conk]*, 252 AD2d 222, 228 [1st Dept 1998], citing *Matter of Salvano v Merrill Lynch, Pierce, Fenner & Smith*, 85 NY2d 173, 181-182 [1995]). The duty of courts in promoting the goal of the FAA is to "'rigorously enforce' arbitration agreements according to their terms" (*Salvano* at 181), even when they appear to be unwise.

Here, the conduct of Major League Baseball and its representatives has been far from neutral and balanced. But this was the forum the parties chose, even avoiding the opportunity for a hearing before a panel of the American Arbitration

Association and proceeding directly to the Revenue Sharing Definitions Committee (RSDC). New arbitrators have been designated to hear the matter for the RSDC. This Court may not order that the arbitration take place in a forum other than the one selected by the parties, notwithstanding the possibility of a more impartial proceeding in another forum (*Salvano*, *at* 181-182; *Cullman Ventures*, 252 AD2d at 228 ["Nor may courts direct that the arbitration take place in a forum other than that specified in the agreement, notwithstanding a possibly fairer or more convenient proceeding in a forum not designated in the agreement"]).

ACOSTA, P.J. (dissenting in part)

Part of what makes baseball such a beloved sport is its rules, which preserve the integrity and popularity of the game (*see* Office of the Commissioner of Baseball, Official Baseball Rules [2016], available at http://mlb.mlb.com/mlb/downloads/y2016/official_baseball_rules.pdf [accessed June 29, 2017]). Players take the field with the expectation that the umpires are not predisposed to apply those rules in favor of one team over the other. The players win or lose each game based on their own skills and the fair application of the rules - not the influence of some outside force, such as partial umpires or illegal betting. In short, the game is fundamentally fair, a concept that is equally important in arbitrations. An arbitration, like most sports, requires that adversaries begin on a level playing field, with ground rules that are applied fairly to both sides, and without decision makers who will prejudge the matter. Otherwise, there would be no integrity or trust in the process. Unfortunately, in this case, we are confronted with a fundamentally unfair arbitration that was conducted by Major League Baseball and involved a dispute between two baseball clubs.

I cannot recall having previously encountered such a confluence of factors that call for judicial intervention in an

arbitration: Not only does the entity administering the arbitration (Major League Baseball [MLB]) have significant influence over the arbitrators, including the power to marshal evidence and draft arbitral award decisions, but it also 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.[1] And, more egregiously still, the Commissioner of Baseball who controls the arbitration process made public statements during post-award litigation indicating a position on the merits of the case. Under these unique circumstances, a rehearing by the same arbitral forum that conducted the initial arbitration under the purview of the Commissioner's office would be all but guaranteed to yield the same result. Therefore, to effectuate the intent of the parties as expressed by their contractual choice to arbitrate the dispute before a panel of

[1] Coincidentally, in recent decision issued by the MLB Commissioner's office, the Commissioner noted that the "severe rule [that led to a player's permanent ban from the sport for betting] is a reflection of the fact that gambling by players and managers on games involving their Clubs has the potential to undermine the integrity of the game on the field and public confidence in the game" (Office of the Commissioner, Major League Baseball, *Decision of Commissioner Robert D. Manfred, Jr., Concerning the Application of Rose for Removal from the Permanently Ineligible List*, Dec. 14, 2015, available at http://mlb.mlb.com/documents/8/4/6/159619846/Commissioner_s_Decision_on_Pete_Rose_Reinstatement_u35dqem0.pdf [hereinafter MLB Rose Decision] [accessed June 29, 2017].

experts, I would hold that it is necessary and appropriate to exercise our inherent equitable power to reform the contract and refer the matter to a neutral arbitral forum, one that is possessed of expertise relevant to the specific issues involved, to conduct a fundamentally fair arbitration.

Justice Andrias's concurring opinion (the plurality) appears to acknowledge that this Court may have the power to refer the matter to a neutral arbitral forum other than that chosen by the parties under the appropriate circumstances, but chooses not to exercise that power here. This invites the question: If courts do have the power to reform an arbitration clause to provide fundamental fairness in an arbitration, where, if not here, would the exercise of such power be proper? While I agree that the arbitral award was properly vacated due to evident partiality - where it was not fully disclosed that the law firm representing one of the parties also represented the entity conducting the arbitration and the interests of all three arbitrators in unrelated matters, and the arbitral forum refused to take any steps to correct this obvious unfairness - I dissent because this particularly egregious set of circumstances warrants the referral of the case to a neutral arbitral forum. Thus, I would instead hold that courts can and should refer the matter to an alternative forum in the rare circumstances presented here.

To the extent that Justice Kahn's concurrence (the concurrence) suggests that this Court lacks the power to substitute an arbitral forum even in the most compelling circumstances, that argument is belied by the case law indicating that fundamental fairness is a requirement in any arbitration. And it fails to convincingly explain why this Court should abdicate its inherent equitable power to dispense justice in every case that comes before it (*see* New York Const., art. VI, § 7[a]; *People v Correa*, 15 NY3d 213, 227-228 [2010]). The concurrence would render this Court impotent to do anything other than vacate an arbitral award and remand it to the same forum for a subsequent arbitration - resulting in an endless loop of partial arbitrations, vacaturs, and remands - even where the parties' chosen forum has shown itself to be unwilling to guarantee a baseline of impartiality. To adopt that position would be a mistake. In the same way that the Commissioner of Baseball has a duty to protect "the integrity of play on the field through appropriate enforcement of the Major League Rules" (MLB Rose Decision, at 2), so too does this Court have the obligation, and the power, to ensure fundamental procedural fairness in an arbitration that is brought before it for review.

I. Background

Major League Baseball (MLB) purchased the Montreal Expos

baseball franchise in 2002 and, in 2004, renamed the team "the Nationals" and relocated it to Washington, D.C.. The Baltimore Orioles Baseball Club (the Orioles) objected to the relocation, as it had been the only MLB club in the Baltimore/D.C. area since 1972 and had developed TCR Sports Broadcasting Holding (TCR), a regional sports network that gave the team the exclusive right to telecast baseball games in most of a seven-state television territory. The Orioles were concerned that the Nationals would dilute the market, cause fan attrition, and diminish the value of the Orioles' telecast rights and other investments in the region.

In March 2005, after the Orioles and TCR threatened to take legal action, MLB, TCR, the Nationals, and the Orioles entered into an agreement to resolve the dispute. The agreement provided for annual compensation to the Orioles and TCR for the significant economic harms caused by the Nationals' relocation. As relevant here, the agreement converted TCR into a two-club regional sports network named the Mid-Atlantic Sports Network (MASN), which was to be owned in supermajority by the Orioles and in minority by the Nationals and was given the exclusive right to present the games of both teams. The Orioles were initially given a 90% ownership stake in MASN, which would decrease by 1% per year from 2010 to 2032, at which point the Orioles would have a final stake of 67%. The Orioles would receive ongoing payments

from MASN's profits in proportion to their supermajority interest (i.e., for each dollar of profit, the Orioles would receive a percentage equal to their ownership stake at the time of profit distribution).

Because the telecast rights fees paid to the teams are MASN's single largest expense, the amount of the fees directly impacts MASN's profitability. Thus, any increase in telecast rights fees necessarily decreases the Orioles' compensation. The parties negotiated the specific fees to be paid annually by MASN to the teams between 2005 and 2011, as well as a methodology for determining future fees. With regard to future fees, the agreement provided that, for each five-year period after 2011, "the Orioles, the Nationals and [MASN] first shall negotiate in good faith using the most recent information available which is capable of verification to establish the fair market value of the telecast rights."

The agreement included a dispute resolution clause to be used in the event that the three entities (the Orioles, the Nationals, and MASN) could not reach an agreement on a fair market value of the rights. That clause provided that, if there was no resolution after a mandatory negotiation period, the entities would enter a nonbinding mediation "under the auspices of the American Arbitration Association or JAMS." If that

failed, the entities would then submit the dispute to arbitration before the MLB's Revenue Sharing Definitions Committee[2] (RSDC), which would make a binding determination as to the fair market value of the parties' rights using "the RSDC's established methodology for evaluating all other related party telecast agreements in the industry."

In 2011, in advance of negotiations with the Nationals regarding the fair market value for the telecast rights fees for the 2012-2016 period, MASN devised a fee schedule based upon what it believed to be the "RSDC's established methodology" - an accounting-based profit margin analysis derived from a regional sports network's actual revenues and expenses that was developed by Bortz Media and Sports Group, Inc. (Bortz). With MLB's consent, MASN retained Bortz to determine the fees pursuant to the Bortz methodology, and on January 4, 2012, MASN sent the Nationals a proposed fee schedule of $34 million per year for the period of 2012-2016. The Nationals rejected that valuation, instead valuing its rights at more than $110 million per year

[2] The RSDC is a standing committee of MLB consisting of three representatives from MLB clubs appointed by the Commissioner of Baseball. The RSDC's principal role is to analyze transactions between clubs and other parties that involve baseball-related revenue (including telecast agreements with regional sports networks) to ensure that the revenue clubs receive under those transactions faithfully represents fair market value for revenue-sharing purposes.

according to a different methodology, which was based on factors including the size and attractiveness of the Nationals' television market, a survey of the economic value of recent deals entered into by teams in other comparable markets, and the escalating value of live sports programming.

The parties failed to resolve their dispute through negotiation, waived the agreement's mediation requirement, and submitted the dispute to the RSDC.[3] The RSDC conducted an arbitration administered by MLB staff, including Robert D. Manfred, Jr., then an executive vice president of MLB and currently the Commissioner of Baseball. MLB and Manfred's staff provided significant support to the RSDC, including legal analysis, participation in the decision-making process, and the drafting of an arbitral award.

At the RSDC arbitration, the Nationals were represented by Proskauer Rose LLP (Proskauer), a law firm that also served as MLB's longtime outside counsel. MASN and the Orioles objected to Proskauer's representation of the Nationals and sought complete disclosure of MLB's and the individual arbitrators' relationships with the firm. MLB provided only limited disclosures, which did

[3] As constituted at that time, the RSDC was comprised of Stuart Sternberg, principal owner of the Tampa Bay Rays; Francis Coonelly, President of the Pittsburgh Pirates; and Jeffrey Wilpon, Chief Operating Officer of the New York Mets.

not reveal the full extent of Proskauer's representations of MLB and the arbitrators' clubs and interests. In February 2012, Manfred held an organizational meeting to discuss the procedures for the arbitration before the RSDC; the arbitrators were not present at that meeting. MASN and the Orioles persisted in their objection - which they repeated at least 18 times throughout the arbitration - but Manfred stated that he did not believe MLB had the authority to disqualify Proskauer. In addition, counsel for MASN and the Orioles sent Manfred a letter dated February 1, 2012, explaining that Proskauer's past representation of the Orioles - which Proskauer had unilaterally terminated - and the firm's representation of MLB and various MLB clubs, "including at least one of the Clubs appointed by the Commissioner to serve on the RSDC," tainted the proceedings. Counsel for MASN and the Orioles asked Manfred to transmit the letter to the individual arbitrators (whose identities had yet to be revealed) and to inform them of the objections to Proskauer's participation in the arbitration.[4]

In discovery before the motion court, it was revealed that Proskauer represented MLB, its executives, and closely related

[4] It was not until the instant action that MASN and the Orioles learned that MLB claimed that it never transmitted the letter to the arbitrators.

entities in nearly 50 separate engagements and that the firm also represented interests associated with all three arbitrators. Many of those representations were concurrent with the RSDC arbitration yet were not disclosed to the Orioles or MASN at the time. In the order appealed from, the motion court noted that there were nearly 30 engagements between MLB and Proskauer during the 2½ years that the arbitration was pending.

The RSDC held a one-day hearing on the merits in April 2012. According to a sworn affidavit of MASN's outside counsel who was present at the hearing, Manfred sat at the head table with the arbitrators and asked questions of counsel. That summer, MLB's staff prepared a draft decision for the RSDC and all parties were advised of the approximate amounts of the telecast rights fees under it. Release of the RSDC's final decision was deferred until June 2014 while then-Commissioner Allan H. (Bud) Selig attempted to negotiate a resolution of the dispute. In the interim, MASN paid the Nationals the Bortz-calculated fees, which were significantly lower than the estimated fees as set forth in the draft decision.

In August 2013, while negotiations were ongoing, MLB paid a $25 million advance to the Nationals in anticipation of the Nationals being awarded the same amount in the RSDC's final determination as in the draft decision. Pursuant to an agreement

between MLB and the Nationals, the Nationals would only be required to repay MLB if MASN were sold or if the RSDC awarded fees to the Nationals for the years 2012 and 2013 at the amount set forth in the draft decision. MASN and the Orioles were aware of the advance but were not apprised of all of the repayment terms between MLB and the Nationals, and claim that they were told at the time that MLB was lending the Nationals only $7.5 million.

On June 30, 2014, the RSDC issued its final decision in writing. With respect to the methodology of fair market valuation, the RSDC explained that the parties' agreement requires the MLB to apply the RSDC's "established methodology" (not the so-called Bortz methodology advocated by MASN and the Orioles). The RSDC also rejected the Nationals' argument that the "'established methodology' consists primarily of an analysis of rights fees obtained by Clubs in comparable markets." Instead, the RSDC explained, its "established methodology includes an analysis of the income statement of the network, a review of broadcast agreements in comparable markets to verify the financial statement analysis, and a consideration of any additional factors raised by the parties that may impact the analysis." Applying this methodology to the parties' dispute, the RSDC valued the Nationals' telecast rights fees from MASN at

roughly $53 million in 2012, with the fees rising more than $3 million each year thereafter, culminating in fees of approximately $66 million in 2016. It appears based on emails in the record on appeal that the RSDC's written determination was essentially similar to the draft decision.

In a letter dated June 30, 2014, the same day as the RSDC award, then-Commissioner Selig expressed his disappointment to the principal owners of the Orioles and the Nationals that the two clubs were unable to negotiate a settlement. In addition, Selig advised the parties that they were not authorized to commence litigation seeking judicial review of the award, and issued the following threat: "[I]f any party [i.e. the Orioles, the Nationals, or MASN] initiates any lawsuit, or fails to act in strict compliance with the procedures set forth in the Agreement concerning the RSDC's decision, I will not hesitate to impose the strongest sanctions available to me under the Major League Constitution."

Despite that threat, MASN commenced this special proceeding in July 2014 (on behalf of itself and the Orioles) to vacate the RSDC arbitration award, arguing, inter alia, that it was procured through evident partiality. Specifically, the petition noted the following as evidence of partiality: (1) the Nationals' choice to be represented in the arbitration by Proskauer; (2) MLB's $25

million loan to the Nationals; (3) MLB's significant role in the arbitration process; and (4) the inadequacy of disclosures made by the arbitrators and/or MLB as to possible conflicts.[5]

In October 2014, the Nationals submitted a verified answer to the petition and a cross motion to confirm the arbitration award and dismiss the petition. MLB also submitted an answer asking the court to deny the petition and grant the Nationals' cross motion to confirm the RSDC's decision.

During the pendency of this action, now-Commissioner Manfred was quoted in the press as saying, "I think the agreement's clear . . . . 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 fees" (Associated Press, *Manfred: MASN eventually must pay Nats increased rights fees*, USA Today, May 21, 2015, available at https://www.usatoday.com/story/sports/mlb/2015/05/22/manfred-masn-eventually-must-pay-nats-increased-rights-fees/27735977/ [accesed June 29, 2017]). In addition, Manfred submitted an

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[5] After MASN commenced the instant action, MLB continued to threaten sanctions, leading MASN to seek and obtain from the motion court a temporary restraining order and preliminary injunction against MLB and Nationals to prevent enforcement of the arbitral award until judicial review was completed.

In filings and arguments in the instant action, MLB and its officials have continued to defend the RSDC award and to seek to have it confirmed.

affirmation in the present litigation in which he states that he advised the Orioles' attorney that the Orioles' interpretation of the parties' agreement

> "did not conform to the text. . . . The relevant contract provision makes no reference to any 'Bortz Methodology,' and certainly includes no reference to MASN maintaining a 20 percent operating margin, which is what MASN and the Orioles now claim the Bortz Methodology requires. . . . [I]f MASN maintaining a mandatory 20 percent operating margin had been intended by the parties, it would have been very easy to write those words into the contract."

In an order entered on or about November 4, 2015 (the November 2015 order), Supreme Court denied the Nationals' motion to confirm the RSDC decision, and granted MASN's petition to the extent of vacating the RSDC award due to evident partiality. Specifically, the court found evident partiality based on Proskauer's representation of the Nationals in the RSDC arbitration "while concurrently representing MLB, its executives and closely related entities in nearly 30 other matters" and "concurrently representing interests associated with all three arbitrators during [the relevant] period" (from January 5, 2012 to June 30, 2014). The court determined that the objective facts were "unquestionably inconsistent with impartiality," and that MLB's "complete inaction" in addressing MASN's concerns about Proskauer's conflicts "demonstrates an utter lack of concern for fairness of the proceeding that is 'so inconsistent with basic

principles of justice' that the award must be vacated" (quoting *Pitta v Hotel Assn. of New York City, Inc.*, 806 F2d 419, 423 [2d Cir 1986]). However, the court, reasoning that it lacked the authority to rewrite the parties' agreement, rejected the Orioles' argument that the matter should not be remanded to the RSDC and should instead be referred to a body of neutral arbitrators not subject to MLB's influence.

The Nationals subsequently advised the other parties that they would forgo representation by Proskauer, and moved for an order compelling MASN to comply with the November 2015 order by arbitrating before the RSDC. MASN opposed the motion and cross-moved for a stay of further arbitral proceedings pending resolution of the appeal of the prior order. In an order entered July 11, 2016 (the July 2016 order), Supreme Court denied the motion to compel arbitration before the RSDC and granted the cross motion to stay arbitration pending resolution of the appeal of the November 2015 order.

MASN and the Orioles appeal from the November 2015 order to the extent that the court declined to direct that a second arbitration proceed before a different arbitral forum, and the Nationals and MLB cross-appeal from that order to the extent that it vacated the award and denied the motion to confirm the arbitration award. The Nationals also appeal from the July 2016

order.

II. Discussion

Under section 10(b) of the FAA, if an arbitral award is vacated, "the court may, in its discretion, direct a rehearing by the arbitrators" (9 USC § 10[b]). Moreover, while the FAA generally upholds arbitration agreements as "valid, irrevocable, and enforceable," such agreements may be vitiated "upon such grounds as exist at law or in equity for the revocation of any contract" (9 USC § 2). "Although not made explicit in the statute, courts have discretion to remand a matter to the same arbitration panel or a new one" (*Sawtelle v Waddell & Reed, Inc.*, 304 AD2d 103, 117 [1st Dept 2003]). This is a logical extension of courts' "broad discretion in fashioning appropriate relief" (*Aircraft Braking Sys. Corp. v Local 856, UAW*, 97 F3d 155, 162 [6th Cir 1996] [discussing powers of federal district courts], *cert denied* 520 US 1143 [1997]; *see also* New York Const, art VI, § 7 [New York "supreme court shall have general original jurisdiction in law and equity and the appellate jurisdiction herein provided"]; *Correa*, 15 NY3d at 227-228). The inherent discretion of the courts to fashion the appropriate remedy is necessary to ensure, among other things, that arbitrations are conducted in a fundamentally fair manner.

Fundamental fairness is indeed a foundational precept of any

arbitration (*see e.g. Bowles Fin. Group., Inc. v Stifel, Nicolaus & Co.*, 22 F3d 1010, 1012 [10th Cir 1994] ["Courts have created a basic requirement that an arbitrator must grant the parties a fundamentally fair hearing"]; *Bell Aerospace Co. Div of Textron, Inc. v Local 516, UAW*, 500 F2d 921, 923 [2d Cir 1974] ["(A)n arbitrator need not follow all the niceties observed by the federal courts. He (or she) need only grant the parties a fundamentally fair hearing"]). What is meant by fundamental fairness is that the parties can reasonably expect that the arbitrators will approach the dispute without bias, that the arbitrators will view evidence without prejudgment as to the merits, and that the dispute is not predetermined as it enters arbitration (*see Bowles Fin. Group*, 22 F3d at 1013 ["(C)ourts seem to agree that a fundamentally fair hearing requires only notice, opportunity to be heard and to present relevant and material evidence and argument before the decision makers, and that the decisionmakers (sic) are not infected with bias"]; *see also Matter of Astoria Med. Group [Health Ins. Plan of Greater N.Y.]*, 11 NY2d 128, 137 [1962] [applying state law and noting that even "partisan" arbitrators in tripartite arbitration, where two party-selected arbitrators select a "neutral" third, may not "be deaf to the testimony or blind to the evidence presented. Partisan [they] may be, but not dishonest"]). Indeed, as the

United States Supreme Court has held, the "provisions of [Section 10 of the FAA] show a desire of Congress to provide not merely for any arbitration but for an impartial one" (*Commonwealth Coatings Corp. v Continental Cas. Co.*, 393 US 145, 147 [1968]). In *Commonwealth Coatings Corp.*, the Court also rejected the argument that Congress intended "to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another" (393 US at 150).

The Nationals' argument that fundamental fairness is not required in arbitration - and the concurrence's implication that the courts have no role to play in protecting fundamental fairness in arbitrations - is perplexing, as an arbitration conducted by partial or conflicted arbitrators who are permitted to prejudge a case would be nothing more than a farce. Likewise, it would be farcical 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. And yet, the concurrence apparently takes the position that, no matter how egregious the case, the courts are powerless to refer an arbitration to a forum other than the one selected in the parties' contract. This view, taken to its logical conclusion, would lead to an absurd result: an endless cycle of partial

arbitrations, vacaturs, and remands. While the plurality leaves open the question of whether this Court has the authority to refer the matter to a neutral forum, the concurrence's categorical position would strip this Court of its inherent discretion to fashion an appropriate remedy and would undermine the role of courts in protecting at least an elemental degree of fairness in the adjudicative process of arbitration. Therefore, it must be within the inherent equitable power of the courts to protect fundamental fairness in any arbitration that is submitted for their review.

What, then, may a court do when presented with an arbitration that was (or a subsequent arbitration that would almost certainly be) devoid of fundamental fairness? There is no real dispute that courts are empowered to substitute a contractually chosen arbitrator where there is evidence of a conflict or bias (*see* 4 Commercial Arbitration § 131:17*; Erving v Virginia Squires Basketball Club*, 468 F2d 1064, 1068 n 2 [2d Cir 1972] [affirming district court's substitution of a neutral arbitrator for parties' chosen arbitrator "to insure a fair and impartial hearing," where the chosen arbitrator had become a partner of the law firm representing one of the parties]). Where the parties differ is on the question of whether courts have the discretion to direct a rehearing before an entirely different

arbitral forum, where it is shown that a fundamentally fair hearing cannot be had in the parties' chosen forum.

Although the Nationals, MLB, and the concurrence argue that courts have no such discretion, they fail to cite any authority that specifically prohibits courts from fashioning a remedy that includes ordering an arbitration in a different forum under the appropriate circumstances. There also does not appear to be any clear authority that under the FAA a court can direct a new arbitration to be administered by an arbitral organization different from the one agreed to by the parties; yet, the statute does permit courts to reform an arbitration agreement on legal or equitable grounds (9 USC § 2; *see also Aviall, Inc. v Ryder Sys., Inc.*, 110 F3d 892, 896 [2d Cir 1997], discussing reformation of contract in *Erving v Virginia Squires Basketball Club*, 349 F Supp 716 [ED NY 1972], *affd* 468 F2d 1064 [2d Cir 1972], *supra*). Moreover, such a result has been approved under New York law (*see Rabinowitz v Olewski*, 100 AD2d 539 [2d Dept 1984]). In *Rabinowitz*, the Second Department, applying state law, affirmed the trial court's removal of an arbitration from the forum that the parties had selected, because "the appearance of bias . . . permeate[d] the entire [arbitral forum] including the board of arbitrators from which the arbitrators for th[e] dispute were selected" (*id.* at 540). Because "the FAA was modeled after New

York's arbitration law" as codified in the CPLR, and "no significant distinction can be drawn between the policies supporting the FAA and the arbitration provisions of the CPLR" (*Matter of Smith Barney, Harris Upham & Co. v Luckie*, 85 NY2d 193, 205-206 [1995]), it is appropriate to apply the reasoning of *Rabinowitz* here.

Thus, while the parties' contractual choice to select a particular arbitral forum is entitled to great deference, courts nevertheless retain their inherent judicial power, and their statutory power under 9 USC § 2, to override that choice in the event that the forum is shown to be so corrupt or biased as to undermine the reasonable expectations of the parties to have a fundamentally fair hearing.

The plurality appears to view as unequivocal the quote excerpted from a Second Circuit decision that the FAA "does not provide for pre-award removal of an arbitrator" (quoting *Aviall*, 110 F3d at 895). However, the plurality takes this quote out of context by omitting the very next sentence of that Court's opinion, which explained that "an agreement to arbitrate before a particular arbitrator may not be disturbed, *unless the agreement is subject to attack under general contract principles* 'as exist at law or in equity'" (*id.*, quoting 9 USC § 2 [emphasis added]). Indeed, the Court in *Aviall* noted the plaintiff's citation to

"cases in which an arbitrator was removed prior to arbitration on account of a relationship with one party to the dispute," cases that "manifest the FAA's directive that an agreement to arbitrate shall not be enforced when it would be invalid under general contract principles" (*id.* at 895-896). In one of those cases, *Erving*, the Second Circuit affirmed the district court's reformation of an arbitration agreement where the parties' chosen arbitrator had become a partner at the law firm representing one of the parties (*see Aviall*, 468 F2d at 1064). This shows that 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 (*cf. Matter of Astoria Med. Group [Health Ins. Plan of Greater N.Y.]*, 11 NY2d at 132 [holding under state law that, "in an appropriate case, the courts have inherent power to disqualify an arbitrator before an award has been rendered"]). This is one of those cases.

Here, notwithstanding the contractual provision naming the RSDC as the arbitral forum, the circumstances call for an equitable remedy providing that the second arbitration take place in a forum unaffiliated with MLB or the RSDC. MASN and the Orioles persuasively argue that they would be unable to obtain a fundamentally fair arbitration if the RSDC were to rehear the

matter. This argument is supported by amici curiae Robert S. Smith and Kenneth R. Feinberg and the following facts: MLB's apparent lack of concern for fairness at the first proceeding; MLB's refusal to address the Orioles' complaints of the unfairness created by Proskauer's multiple roles; MLB's direct monetary stake in the outcome of the dispute as a result of its $25 million loan to the Nationals; evidence that 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 agreement is incorrect; evidence that MLB has actively supported the Nationals' attempts to confirm the award and/or compel a rehearing before the RSDC; MLB's continued defense of the original arbitration award which all members of this bench agree was affected by evident partiality; and evidence of the current Commissioner's personal involvement in the prior arbitration, including the drafting of the vacated award, and his publicly stated views about the dispute.

To be sure, MASN and the Orioles were aware at the time of entering into the contract that MLB would have significant influence over the arbitration process at the RSDC, as is consistent with MLB's standard practice in RSDC proceedings (MLB typically provides administrative support, legal analysis, and

drafting assistance). But, over the course of those proceedings and in the instant litigation, it has become clear that their choice of the RSDC as a fundamentally fair forum comprised of industry-insider arbitrators has been frustrated. Thus, contrary to the plurality, while they "knew full well how the RSDC operated, including that MLB would have significant influence over the arbitration process," they did not know at the time of contracting how far MLB would go to obtain the outcome it wanted.

For example, MLB failed to protect the parties' confidence in the fairness of the proceeding when it refused to adequately address the objections to Proskauer's participation. While the removal of Proskauer from further involvement resolves the inherent conflicts resulting from the firm's participation, contrary to the plurality, the firm's removal does not negate the finding that MLB conducted itself poorly in failing to intercede, nor does it guarantee that MLB will prioritize fundamental fairness in a subsequent arbitration. In fact, MLB does not yet acknowledge that there was anything wrong with its conduct during the original arbitration. Thus, MLB's lack of concern for fairness at the first proceeding supports a remedy directing a rehearing before a different arbitral body unattached to MLB. Moreover, in light of MLB's refusal to acknowledge its wrongful conduct that led to the now-vacated arbitral award, the plurality

fails to answer this critical question: If the decision maker cannot see the flaws in its decision-making process, why should it be trusted to go through the process again?

MLB's $25 million loan to the Nationals during the first arbitration also suggests that a second arbitration at the RSDC would be bereft of fundamental fairness. At the time it made the loan, MLB bore little risk that it would not be repaid, because it made the loan only after the arbitrators had issued the draft decision, which covered that amount. Now that the Court is affirming the vacatur of the first award, however, MLB's actual financial interest in the outcome of the second arbitration is quite significant. Since MASN has already paid the Nationals the full amount of telecast rights fees as calculated under the Bortz methodology, the Orioles' and MASN's position in a second arbitration will likely be that an appropriate award would be zero. Thus, the only way MLB can now recover the loan amount is through an award in excess of the Bortz-calculated fees. In other words, if MASN's calculations are adopted (and the Nationals' and MLB's calculations rejected) at the second hearing, MLB will not be repaid. As MLB's counsel acknowledged in proceedings before the motion court, "[I]f the award had changed [from the amount set forth in the draft decision], . . . Major League Baseball would have been out the money." It is

surprising to me that the plurality fails to appreciate the incentive this provides to MLB to do whatever it can to steer a second arbitration in its (and the Nationals') favor.

Moreover, as amicus curiae Robert S. Smith points out, the motion court described the support role of MLB's Commissioner's Office in the first arbitration as "generally akin to the support that a law clerk provides to a judge." Notwithstanding that MLB's role in the arbitration went far beyond the role of a law clerk, Mr. Smith writes that "[t]his case may thus be viewed as presenting the question: When is it acceptable for the arbitral counterpart of a judge's law clerk to have a significant financial stake in the outcome of an arbitration? We respectfully submit that the answer should be 'Never.'" I agree.[6] Just as betting is an affront to the integrity of

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[6] We should not countenance the Nationals' proposal to post a bond to guarantee repayment of the $25 million advance to MLB, as it was not raised in the briefs and, instead, was raised for the first time at oral argument before this Court. Thus, the argument that this proposal should assuage the Court's concerns regarding fundamental fairness in a subsequent arbitration before the RSDC is unpreserved (*see Matter of Erdey v City of New York*, 129 AD3d 546, 547 [1st Dept 2015]; *OFSI Fund II, LLC v Canadian Imperial Bank of Commerce*, 82 AD3d 537, 538 [1st Dept 2011], *lv denied* 17 NY3d 702 [2011]).

In any event, contrary to the plurality, the Nationals' proposal to post a bond does not sufficiently eliminate the potential of unfairness if the arbitration were to return to the RSDC. The issue of fundamental fairness involves due process concerns, and MLB's loan to the Nationals is but one indicium of bias. Posting a bond to ensure that the loan would be repaid to

baseball (*see* MLB Rose Decision, at 2), staking money on a result in an arbitration under one's own control is anathema to the nature of arbitration as an adjudicative process and to the ability of courts to do justice by the parties.

The fact that the RSDC is comprised of three new members does not change the analysis, because MLB retains its significant influence over the panel. Indeed, the Commissioner sat with the RSDC arbitrators and asked questions during the hearing at the first arbitration, acting as a de facto fourth arbitrator. Although he did not provide a fourth vote, his influence on the panel, including his ability to marshal and exclude evidence and draft an award, remains substantial. Given the Commissioner's public comments touching upon the merits of the dispute and telegraphing his support for the Nationals' position, it is highly unlikely that the RSDC would come to a different conclusion if it were to rehear the case. While it is true that the parties chose the RSDC with the understanding that MLB would have significant influence over the arbitration process, they did not consent to MLB dictating the result. The plurality misses

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MLB regardless of who wins the subsequent arbitration would not overcome the other procedural infirmities described herein. In other words, the Nationals cannot buy their way out by offering to post bond for the amount of the advance to be repaid to MLB.

the point when it states that the three new RSDC arbitrators have not shown any bias. While that may be true, the salient point is that 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. Here, as in *Rabinowitz*, the arbitral forum initially selected by the parties is tainted by "the appearance of bias," which "permeates the entire [arbitral forum]" (100 AD2d at 540).

Therefore, I would hold that the matter cannot be reheard by the RSDC and should be referred to a neutral arbitral body, namely the American Arbitration Association (AAA). This is the proper result in the circumstances of this case. The AAA is the logical choice given that Section 8.C of the parties' agreement selected the AAA as a catchall to arbitrate disputes that were not specifically covered by other clauses in the contract.[7] Although, in Section 2.J of the agreement, the parties

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[7] Section 8.C of the agreement states that those disputes "shall be arbitrated before a three-person panel in accordance with the Commercial Rules of the American Arbitration Association," and Rule R-2 of those rules states that "[w]hen parties agree to arbitrate under these rules . . . they thereby authorize the AAA to administer the arbitration" (American Arbitration Association Commercial Arbitration Rules and Mediation Procedures § R-2, available at https://www.adr.org/sites/default/files/Commercial%20Rules.pdf [accessed June 30, 2017]).

specifically selected the RSDC for disputes over telecast rights fees, the RSDC is no longer an appropriate forum for this particular dispute. Accordingly, applying the catchall provision's selection of the AAA to conduct the arbitration is the best method to effectuate the intent of the parties while protecting fundamental procedural fairness. To the extent that the parties intended to select arbitrators who have some level of expertise relevant to the dispute - a concern also voiced by amicus curiae E. Leo Milonas - Section 8.C satisfies that prerequisite: it states that the three-person panel of the AAA "shall be constituted of persons with specialized knowledge, experience or expertise in broadcasting, media rights, or professional sports." Surely the AAA, a nationally renowned arbitration organization, has on its roster several arbitrators with the desired expertise or its equivalent; the parties would not have selected the AAA to arbitrate Section 8.C disputes if that forum lacked such arbitrators.

The plurality is simply wrong in its assertion that "there is no basis, in law or in fact," to order a rehearing in a different arbitral forum from the one originally selected by the parties. As discussed above, courts are empowered to do so through their inherent discretion and the reformation power embodied in section 2 of the FAA. Even the plurality, while

arguing that there is no legal basis for referring the matter to a new arbitral forum, agrees that the agreement could be reformed if only MASN and the Orioles had "made the extraordinary showing of grounds needed to reform the agreement or disqualify the RSDC."[8] In my view, they have made such a showing here.[9]

The cases relied on by the plurality are distinguishable. For example, the plurality quotes the Second Circuit in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Georgiadis*, which stated that where "parties have agreed explicitly to settle their disputes only before particular arbitration fora, that agreement controls" (903 F2d 109, 113 [2d Cir 1990]). The difference

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[8] Ironically, the plurality's eloquent description of the defects in the original arbitration convincingly shows that it was affected by an extraordinary degree of bias.

[9] Surprisingly, the plurality speculates that the "only reason" MASN and the Orioles challenged the RSDC award is that "they are unhappy with the RSDC's refusal to accept their interpretation of the Bortz methodology as RSDC's established methodology." That view does not comport with the plurality's position that the first arbitration was properly vacated due to evident partiality. The Orioles may very well be unhappy with the amount of the arbitral award, but they likewise are legitimately unhappy with the defective manner in which the arbitration was conducted.

Furthermore, the plurality's suggestion that the arbitration amount was fair because the dollar amount of the award was closer to the Orioles' calculations than to the Nationals' does not show that the arbitration process was fair, that it was free of undue influence by MLB, or that a second arbitration would be fair. The amount of the award may simply reflect that the Nationals' proposed valuation was outlandish (an issue I do not decide).

between that case and this one is obvious from the word "fora," the plural form of the term "forum" (Merriam-Webster Online Dictionary, fora [https://www.merriam-webster.com/dictionary/fora][accessed June 30, 2017]). In other words, the agreement in *Georgiadis* allowed the plaintiff to "select one of several arbitration fora in which to arbitrate" (903 F2d at 110-111) - and none of those were shown to be biased - whereas the agreement in the instant matter named a single arbitral *forum* (the RSDC) that has shown itself to be incapable of observing fundamental fairness in arbitrating this particular dispute. Moreover, the plurality quotes *Matter of Salvano v Merrill Lynch, Pierce, Fenner & Smith*, in which the Court of Appeals noted that "courts have refused . . . to direct that the parties arbitrate in a forum other than that specified in their agreement, even though permitting the choice of a different forum might seem fairer or more suited to the needs of a particular party" (85 NY2d 173, 181-182 [1995]). That courts have refused to do so, however, does not mean that courts are without the power to do so where fundamental fairness cannot be obtained in the parties' chosen forum. Here, a different forum not only "seems fairer," but the parties' chosen forum is decidedly unfair under the circumstances. And, critically, none of the cases cited by the plurality (and the concurrence) holds

that courts lack the power to order an arbitration in a new forum where the parties' only selected forum is too biased to fairly arbitrate the dispute.[10]

Moreover, notwithstanding the plurality's statement that "the FAA permits parties to select arguably partial arbitrators, if doing so serves their interests," MASN and the Orioles did not agree to an arbitration before a panel that would prejudge the case in their adversary's favor. Nor is it likely that such a concession would comport with fundamental fairness. Of course, the parties may select arbitrators who have specific expertise

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[10] Neither *Salvano* nor *Matter of Cullman Ventures (Conk)* (252 AD2d 222 [1st Dept 1998]) confronted the issue of pervasive bias and fundamental fairness in an arbitration. *Salvano* held that the trial court lacked "the authority to order the parties to proceed [with an expedited arbitration pursuant to CPLR art 75] absent any provision explicitly authorizing expedited arbitration in the parties' agreements" (85 NY2d at 178). *Cullman Ventures* held that the trial court improperly enjoined an arbitration in another state and consolidated it with an arbitration in New York (252 AD2d at 228 ["By conflating two different arbitrations, arising under separate and distinct agreements, involving different parties, the court improperly intruded into what clearly were binding contractual arrangements"]).

Thus, to the extent that those decisions touch upon the issue raised in this case - by suggesting that courts may not "direct that the arbitration take place in a forum other than that specified in the agreement, notwithstanding a possibly fairer . . . proceeding in a forum not designated in the agreement" (*id.; see also Salvano*, 85 NY2d at 182) - they did so only in dicta and without the threat of a forum that had revealed its unwillingness to provide the parties with a fundamentally fair arbitration.

relevant to the dispute and who may therefore be somewhat non-neutral, but there is no authority that supports the proposition that parties may select an arbitral panel that is predisposed to ruling in favor of one party regardless of the evidence presented to it. To the contrary, "simply because arbitrators can be non-neutral does not mean that such arbitrators are excused from their ethical duties and the obligation to participate in the arbitration process in a fair, honest and good-faith manner" (*Matter of Excelsior 57th Corp. [Kern]*, 218 AD2d 528, 531 [1st Dept 1995] [internal quotation marks omitted]).

The plurality's reliance on *National Football League Mgt. Council v National Football League Players Assn.* (820 F3d 527 [2d Cir 2016]) is also inapposite. That case involved a labor arbitration (not a commercial arbitration, as here) in which the court specified that "[t]he basic principle driving both our analysis and our conclusion is well established: a federal court's review of labor arbitration awards is narrowly circumscribed and highly deferential–indeed, among the most deferential in the law (*id.* at 532)." That level of deference does not apply here. Moreover, although "the parties to an arbitration can ask for no more impartiality than inheres in the method they have chosen" (*id.* at 548), an arbitral award may still be set aside even "where the parties have expressly agreed

to select partial party arbitrators" and "the objecting party proves that the arbitrator's partiality prejudicially affected the award" (*Winfrey v Simmons Foods, Inc.*, 495 F3d 549, 551 [8th Cir 2007] [internal quotation marks omitted], cited by *National Football League Mgt. Council*, at 548).

Even the plurality's lengthy quote from *Sphere Drake Ins. Ltd. v All Am. Life Ins. Co.* does not support the proposition that party-appointed arbitrators may completely prejudge a case (307 F3d 617, 620 [7th Cir 2002], *cert denied* 538 US 961 [2003] [noting that the arbitrators under arbitration rules in that case could "engage in *ex parte* discussions with their principals until the case is taken under advisement, but they are supposed thereafter to be impartial adjudicators"]). Furthermore, that court determined that section 10(a)(2) of the FAA had no role to play in determining whether an award could be vacated due to evident partiality of party-appointed arbitrators, but it said nothing about section 10(b), which explicitly permits courts "in [their] discretion" to "direct a rehearing" once an arbitral award is vacated.

Furthermore, the plurality's fears that my position, if adopted, would "eliminate the viability of any future arbitration by any MLB club before the RSDC, and place into question the viability of industry insider arbitrations in general" are

entirely unfounded. Presumably, MLB does not regularly place bets on other disputes that come before the RSDC, nor does the Commissioner of Baseball typically make public comments and sworn statements in favor of one party or outcome. And, presumably, other industry insider arbitrations do not often include egregious showings of bias as presented here. By contrast, as I have stated above, this case involves extraordinary circumstances that necessitate removing this particular matter from the RSDC and MLB's purview.

The plurality may be correct that I "wax[] poetic about the purity of the game of baseball," but it misses the point by stating that "MLB is first and foremost a business, governed by its constitution and innumerable agreements and contracts." This case is not solely about business. It is also about arbitration, which, at its core, is about fairness. To be sure, arbitration does not contain the same procedural and evidentiary rules as litigation, and it may be truncated and, at times, not absolutely fair. But it remains an adjudicatory process in which adversaries submit their disputes to relatively impartial decision makers who are expected to fairly decide matters on the evidence. To say that arbitration is simply a matter of business overlooks its essence as a tool for administering justice outside of the courts.

At bottom, 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. Even 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. Because that intent has been frustrated, reformation of the agreement to require a rehearing not administered by MLB or the RSDC is warranted. Therefore, we should substitute our discretion for that of the motion court and direct the parties to submit the subsequent arbitration to the AAA.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 13, 2017

CLERK

EXHIBIT 4

NEW YORK STATE
COURT OF APPEALS

Preliminary Appeal Statement
Pursuant to section 500.9 of the Rules of the Court of Appeals

1. CAPTION OF CASE (as the parties should be denominated in the Court of Appeals):

STATE OF NEW YORK COURT OF APPEALS

TCR Sports Broadcasting Holding, LLP,

-against-

WN Partner, LLC; Nine Sports Holding, LLC; Washington Nationals Baseball Club, LLC; the Office of Commissioner of Baseball; and the Commissioner of Major League Baseball

2. Name of court or tribunal where case originated, including county, if applicable:
New York Supreme Court, New York County, Commercial Division

3. Civil index number, criminal indictment number or other number assigned to the matter in the court or tribunal of original instance: 652044/2014

4. Docket number assigned to the matter at the Appellate Division or other intermediate appellate court: 2019-05390

5. Jurisdictional basis for this appeal:
   - ____Leave to appeal granted by the Court of Appeals or a Judge of the Court of Appeals
   - ____Leave to appeal granted by the Appellate Division or a Justice of the Appellate Division
   - ____CPLR 5601(a): dissents on the law at the Appellate Division
   - ____CPLR 5601(b)(1): constitutional ground (Appellate Division order)
   - ____CPLR 5601(b)(2): constitutional ground (judgment of court of original instance)
   - ____CPLR 5601(c): Appellate Division order granting a new trial or hearing, upon stipulation for judgment absolute
   - ✓ CPLR 5601(d): from a final judgment, order, determination or award, seeking review of a prior nonfinal Appellate Division order
   - ____Other (specify)_____

6. How this appeal was taken to the Court of Appeals (choose one) (see CPLR 5515[1]):

NOTICE OF APPEAL Date filed: Nov. 20, 2020
Clerk's office where filed: N.Y. County Supreme Court

ORDER GRANTING LEAVE TO APPEAL (civil case):
Court that issued order: _____
Date of order: _____

CERTIFICATE OR ORDER GRANTING LEAVE TO APPEAL (criminal case):
Justice or Judge who issued order: _____
Court: _____
Date of order: _____

7. Demonstration of timeliness of appeal in civil case (CPLR 5513, 5514):
Was appellant served by its adversary with a copy of the order, judgment or determination appealed from and notice of its entry? ✓ yes ___ no
If yes, date on which appellant was served (if known, or discernable from the papers served): Oct. 22, 2020
If yes, method by which appellant was served: ___ personal delivery
___ regular mail
___ overnight courier
✓ other (describe NYSCEF)

Did the Appellate Division grant or deny a motion for leave to appeal to this Court in this case? ✓ yes ___ no
If yes, fill in the following information:
a. date appellant served the motion for leave to appeal made at the Appellate Division: Nov. 20, 2017
b. date on which appellant was served with the Appellate Division order granting or denying such motion with notice of the order's entry: Jan. 20, 2018 , and
c. method by which appellant was served with the Appellate Division order granting or denying such motion:
_____ personal service
_____ ✓ _____ regular mail
_____ _____ overnight courier
_____ ✓ _____ other (describe NYSCEF)

8. Party Information:

Instructions: Fill in the name of each party to the action or proceeding, one name per line. Indicate the status of the party in the court of original instance and the party's status in this Court, if any. Examples of a party's original status include: plaintiff, defendant, petitioner, respondent, claimant, third-party plaintiff, third-party defendant, intervenor. Examples of a party's Court of Appeals status include: appellant, respondent, appellant-respondent, respondent-appellant, intervenor-appellant.

No.	Party Name	Original Status	Court of Appeals Status
1	TCR Sports Broadcasting Holding, LLP	Petitioner	Appellant
2	Baltimore Orioles Limited Partnership	Respondent	Appellant
3	Baltimore Orioles Baseball Club	Respondent	Appellant
4	WN Partner, LLC	Respondent	Respondent
5	Nine Sports Holding, LLC	Respondent	Respondent
6	Washington Nationals Baseball Club, LLC	Respondent	Respondent
7	Office of the Commissioner of Baseball	Respondent	Respondent
8	Commissioner of Major League Baseball	Respondent	Respondent
9			
10			

9. Attorney information:

Instructions: For each party listed above, fill in the name of the one law firm and responsible attorney who will act as counsel of record, if the party is represented. Where a litigant is self-represented, fill in that party's data in section 10 below.

For Party No. 1 above:
Law Firm Name: Boies Schiller Flexner LLP
Responsible Attorney: Jonathan D. Schiller
Street Address: 55 Hudson Yards
City: New York State: NY Zip: 10001
Telephone No: 212-446-2300 Ext. Fax: (212) 446-2350
If appearing Pro Hac Vice, has attorney satisfied requirements of section 500.4 of the Rules of the Court of Appeals? ___yes ____no

For Party No. 2 above:
Law Firm Name: Boies Schiller Flexner LLP
Responsible Attorney: Jonathan D. Schiller
Street Address: 55 Hudson Yards
City: New York State: NY Zip: 10001
Telephone No: (212) 446-2300 Ext. Fax: (212) 446-2350
If appearing Pro Hac Vice, has attorney satisfied requirements of section 500.4 of the Rules of the Court of Appeals? ___yes ____no

For Party No. 3 above:
Law Firm Name: Boies Schiller Flexner LLP
Responsible Attorney: Jonathan D. Schiller
Street Address: 55 Hudson Yards
City: New York State: NY Zip: 10001
Telephone No: (212) 446-2300 Ext. Fax: (212) 446-2350
If appearing Pro Hac Vice, has attorney satisfied requirements of section 500.4 of the Rules of the Court of Appeals? ___yes ____no

For Party No. 4-6 above:
Law Firm Name: Quinn Emanuel Urquhart & Sullivan LLP
Responsible Attorney: Stephen R. Neuwirth
Street Address: 51 Madison Ave., 22nd Floor
City: New York State: NY Zip: 10010
Telephone No: (212) 849-7000 Ext. Fax: (212) 849-7100
If appearing Pro Hac Vice, has attorney satisfied requirements of section 500.4 of the Rules of the Court of Appeals? ___yes ____no

For Party No. 7 above:
Law Firm Name: Williams & Connolly LLP
Responsible Attorney: John J. Buckley, Jr.
Street Address: 725 Twelfth Street NW
City: Washington State: D.C. Zip: 20005
Telephone No: (202) 434-5051 Ext. Fax:
If appearing Pro Hac Vice, has attorney satisfied requirements of section 500.4 of the Rules of the Court of Appeals? ___yes ____no

(Use additional sheets if necessary)

10. Self-Represented Litigant information:

For Party No. ___ above:
Party's Name:
Street Address:
City: State: Zip:
Telephone No.: Ext. Fax:

For Party No. ___ above:
Party's Name:
Street Address:
City: State: Zip:
Telephone No.: Ext. Fax:

11. Related motions and applications:

Does any party to the appeal have any motions or applications related to this appeal pending in the Court of Appeals? ___yes ✓ no
If yes, specify:

a. the party who filed the motion or application:
b. the return date of the motion:
c. the relief sought:

Does any party to the appeal have any motions or applications in this case currently pending in the court from which the appeal is taken? ✓ yes ____no

If yes, specify:

a. the party who filed the motion or application: Appellants TCR Sports et al.
b. the return date of the motion: December 7, 2020
c. the relief sought: Reargument/Leave to Appeal to the Court of Appeals

Are there any other pending motions or ongoing proceedings in this case? If yes, please describe briefly the nature and the status of such motions or proceedings:

12. Set forth, in point-heading form, issues proposed to be raised on appeal (this is a nonbinding designation, for preliminary issue identification purposes only):

Whether, as a matter of law, the two dissenting Justices of the Appellate Division correctly concluded that: (1) courts possess the power, after vacating an arbitral award (here unanimously) because of the evident partiality of the governing institution under whose auspices the arbitration was conducted, to order rehearing in a neutral and unbiased forum other than that stated in the arbitration clause, and (2) the legal standards governing such power required its exercise under the circumstances presented here.

(use additional sheet, if necessary)

13. Does appellant request that this appeal be considered for resolution pursuant to section 500.11 of the Rules of the Court of Appeals (Alternative Procedure for Selected Appeals)?

____yes ✓ no

If yes, set forth a concise statement why appellant believes that consideration pursuant to section 500.11 is appropriate (see section 500.11[b]): (Fill in on lines below)

14. Notice to the Attorney General.

Is any party to the appeal asserting that a statute is unconstitutional? ____yes ✓ no

If yes, has appellant met the requirement of notice to the Attorney General in section 500.9(b) of the Rules of the Court of Appeals? ____yes ____no

15. **ITEMS REQUIRED TO BE ATTACHED TO EACH COPY OF THIS STATEMENT:**

A. A copy of the filed notice of appeal to the Court of Appeals (with proof of service), a copy of the order granting leave to appeal to the Court of Appeals (civil case), or a copy of the certificate granting leave to appeal to the Court of Appeals (criminal case), whichever is applicable;

B. A copy of the signed order, judgment or determination appealed from to this Court (use document issued by the court, not internet version);

C. A signed copy of any order, judgment or determination which is the subject of the order appealed from, or which is otherwise brought up for review (use document issued by the court, not internet version);

D. Copies of all decisions or opinions relating to the orders set forth in subsections B and C above (use documents issued by the court, not internet versions); and

E. If required, a copy of the notice sent to the Attorney General pursuant to section 500.9(b) of the Rules of the Court of Appeals.

F. If required, a disclosure statement pursuant to section 500.1(f) of the Rules of the Court of Appeals.

Date: 11/25/2020

Submitted by: Boies Schiller Flexner LLP
(Name of law firm)

(Signature of responsible attorney)

Jonathan D. Schiller
(Typed name of responsible attorney)

Attorneys for appellant TCR Sports Broadcasting Holdir
(Name of party)

-or-

Date: _____

Submitted by _____, pro se
(Signature of appellant)

_____
(Typed/printed name of self-represented appellant)

EXHIBIT 5

State of New York
Court of Appeals

John P. Asiello
Chief Clerk and
Legal Counsel to the Court

Clerk's Office
20 Eagle Street
Albany, New York 12207-1095

December 3, 2020

Boies Schiller Flexner, LLP
Attn: Jonathan D. Schiller, Esq.
55 Hudson Yards
New York, NY 10001

Re: TCR Sports Broadcasting v WN Partner

Dear Mr. Schiller:

This acknowledges receipt of appellants' preliminary appeal statement. The preliminary appeal statement indicates that this appeal is being taken from a final order to bring up for review a prior nonfinal Appellate Division order pursuant to CPLR 5601(d). On such an appeal only the earlier, nonfinal order is reviewable (*see Curiale v Adra Ins. Co., appeal dismissed in part* 86 NY2d 774 [1995]). If you seek review of the later, final order, you must establish an independent jurisdictional basis for an appeal as of right from that order. The Court will now examine its subject matter jurisdiction with respect to whether (1) the two-Justice dissent in the July 13, 2017 Appellate Division order is on a question of law (*see* CPLR 5601[a], [d]); (2) the July 13, 2017 Appellate Division order "necessarily affects" the December 9, 2019 Supreme Court judgment (*see* CPLR 5601[d]); and (3) a substantial constitutional question is directly involved to support an appeal as of right from the the October 2, 2020 Appellate Division order. This examination of jurisdiction shall not preclude the Court from addressing any jurisdictional concerns in the future.

You should file within ten days after this letter's date your comments in letter format justifying the retention of subject matter jurisdiction ("Jurisdictional Response"). By copy of this letter, your adversary is likewise afforded the opportunity to submit a Jurisdictional Response within the same ten-day period after this letter's date. All letters shall be filed with proof of service of one copy of the letter on each party.

If applicable, the disclosure statement required to be filed by corporations and other business entities pursuant to section 500.1(f) of the Court of Appeals Rules of Practice shall be filed with the written submissions discussed above.

The times within which briefs on the merits must be filed are held in abeyance during the pendency of this jurisdictional inquiry. If this inquiry is terminated by the Court, the Clerk will notify counsel in writing and set a schedule for the perfecting of the appeal. This communication is without prejudice to any motion any party may wish to make.

Digital Filing Requirement

Parties also are required to submit digital versions of each paper filing (see sections 500.2, 500.10 of the Rules) by uploading them to the Court of Appeals Companion Filing Upload Portal for Civil Motions and Rule 500.10 Jurisdictional Responses (the Portal) accessed through the Court's web site (www.courts.state.ny.us/ctapps). Appellants also shall upload a digital version of each brief filed by each party in the Appellate Division and a copy of the record or appendix filed in that court. A document containing the Technical Specifications and Instructions for Companion Filing Upload of Rule 500.10 Jurisdictional Responses (including Naming Conventions) is enclosed and available on the Court's web site.

For the Portal, parties to this appeal will use **93203** as the pin number and **APL-2020-00175** as the appeal number for uploading purposes. This pin number should not be shared with others who are not parties to this appeal. All companion digital filings must be submitted no later than the due date for the jurisdictional response letter.

For uploading purposes, appellants' digital Jurisdictional Response shall have the following file name: **TCRSportsBroadcastingvWNPartner-app-TCRSports-JurRsp.pdf**. Appellants also shall follow the PDF file naming conventions with respect to the digital submission of additional materials, including Appellate Division records and briefs. All digital materials shall be submitted in separate files. Respondents' digital Jurisdictional Responses shall have the following file names: **TCRSportsBroadcastingvWNPartners-res-WNPartner-JurRsp.pdf** and **TCRSportsBroadcastingvWNPartner-OficeofComm-JurRsp.pdf**.

The contents of the digital submissions must be identical to those filed in hard copy, with the exception that the digital version need not contain an original signature (see section 7 of the enclosed Technical Specifications and Instructions).

If you have any questions regarding this letter, you may contact either Margaret N. Wood at 518-455-7702 or Edward J. Ohanian at 518-455-7701.

Very truly yours,

John P. Asiello

JPA/ejo/ai

cc: Stephen R. Neuwirth, Esq.
John J. Buckley Jr., Esq.

EXHIBIT 6

Court of Appeals

of the

State of New York

TCR SPORTS BROADCASTING HOLDING, LLP,

Appellant,

– against –

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

Respondents,

– and –

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

Appellants.

NOTICE OF MOTION TO DISMISS APPEAL

MORRISON COHEN LLP
909 Third Avenue
New York, New York 10022
Tel.: (212) 735-8600
Fax: (212) 735-8708

QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, New York 10010
Tel.: (212) 849-7000
Fax: (212) 849-7100

Attorneys for Respondent WN Partner, LLC

PLEASE TAKE NOTICE, that upon the annexed Affirmation of Patrick D. Curran, Esq., dated December 3, 2020, the exhibits thereto, the accompanying Memorandum of Law, and all of the pleadings and proceedings herein, respondent-movant the Washington Nationals Baseball Club, LLC (the "Nationals") will move this Court at a motion term thereof, to be held at Court of Appeals Hall located at 20 Eagle Street, Albany, New York on December 14, 2020 at 9:30 A.M., or as soon thereafter as counsel may be heard, for an Order (i) dismissing the putative appeal by appellants the Baltimore Orioles Baseball Club and Baltimore Orioles Limited Partnership (together, the "Orioles"), and TCR Sports Broadcasting Holding, LLP (d/b/a "MASN"), taken by Notice of Appeal dated November 19, 2020; and (ii) granting the Nationals such other and further relief that this Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE, that pursuant to Court of Appeals Rule (22 NYCRR) § 500.21(c), answering papers, if any, must be served and filed in the Court of Appeals, with proof of service, on or before the return date of the motion.

DATED: New York, New York
December 3, 2020

Respectfully submitted,

QUINN EMANUEL URQUHART
& SULLIVAN, LLP

By:

Stephen R. Neuwirth
Patrick D. Curran
Kathryn D. Bonacorsi
51 Madison Avenue
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212-849-7000

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Gayle Pollack
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New York, New York 10022
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Attorneys for Respondent Washington Nationals Baseball Club, LLC

STATE OF NEW YORK
COURT OF APPEALS

TCR SPORTS BROADCASTING HOLDING, LLP, Appellant, -against- WASHINGTON NATIONALS BASEBALL CLUB, LLC; WN PARTNER, LLC; NINE SPORTS HOLDING, LLC; THE OFFICE OF THE COMMISSIONER OF BASEBALL; and THE COMMISSIONER OF MAJOR LEAGUE BASEBALL, Respondents, -and- THE BALTIMORE ORIOLES BASEBALL CLUB and BALTIMORE ORIOLES LIMITED PARTNERSHIP, in its capacity as managing partner of TCR SPORTS BROADCASTING HOLDING, LLP, Appellants.	New York County Index No. 652044/2014 **SECTION 500.1(f) CORPORATE DISCLOSURE STATEMENT**

Pursuant to Section 500.1(f) of the Rules of Practice of the Court of Appeals (22 NYCRR § 500.1[f]), Respondents Washington Nationals Baseball Club, LLC; WN Partner, LLC; and Nine Sports Holding, LLC, state as follows:

Respondent Washington Nationals Baseball Club, LLC (the "Washington Nationals") is 100% owned by Nine Sports Holdings, LLC ("Nine Sports Holdings"). The Washington Nationals hold a 50% ownership interest in HW

Spring Training Complex, LLC, and own 100% of WNDR Holdings, LLC and WNDR, LLC, WNDR One, LLC, and WNDR Two, LLC.

Named Respondent WN Partner, LLC ("WN Partner") is 100% owned by Nine Sports Holdings, LLC. WN Partner holds a 21% ownership interest in Appellant TCR Sports Broadcasting Holding, LLP.

Named Respondent Nine Sports Holdings owns 100% of each of the Washington Nationals, WN Partner, and Washington Nationals Stadium, LLC.[1]

[1] Named Respondents WN Partner and Nine Sports Holding were not parties to the arbitration underlying this case. They therefore are not proper parties to this case.

DATED: New York, New York
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Court of Appeals

of the

State of New York

TCR SPORTS BROADCASTING HOLDING, LLP,

Appellant,

– against –

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

Respondents,

– and –

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

Appellants.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

Respondent the Washington Nationals Baseball Club, LLC (the "Nationals") respectfully moves this Court for an order dismissing the putative appeal, purportedly under C.P.L.R. § 5601(d), by Appellants the Baltimore Orioles Baseball Club and Baltimore Orioles Limited Partnership (together, the "Orioles") and TCR Sports Broadcasting Holding, LLP (d/b/a "MASN") from the October 22, 2020 order of the Appellate Division, First Department to bring up for review a prior nonfinal Appellate Division order dated July 13, 2017, which remanded the parties to a new arbitration before a different panel of Major League Baseball's Revenue Sharing Definitions Committee (the "RSDC") (*see Matter of TCR Sports Broadcasting Holding, LLP v. WN Partner, LLC*, 187 A.D.3d 623 (1st Dep't Oct. 22, 2020); *Matter of TCR Sports Broadcasting Holding, LLP v. WN Partner, LLC*, 153 A.D.3d 140 (1st Dep't 2017), *appeal dismissed* 30 N.Y.3d 1005 (2017)). The RSDC conducted the new arbitration in December 2018 and issued its arbitration award in April 2019. In the subsequent C.P.L.R. Article 75 proceeding, Supreme Court confirmed the arbitration award, and entered judgment for the Nationals in December 2019. The First Department, in a 4-0 order, affirmed the Supreme Court judgment on October 22, 2020.

This is now the *third* time MASN and the Orioles have sought to appeal to this Court, purportedly as of right, to bring up for review the First Department's July

2017 order remanding the parties to a new arbitration before the RSDC. Each of the first two times, this Court dismissed the appeal for lack of jurisdiction. Specifically, when MASN and the Orioles appealed directly from the First Department's July 2017 order, this Court dismissed the appeal "sua sponte, upon the ground that the order appealed from does not finally determine the proceeding within the meaning of the Constitution." *TCR Sports Broad. Holding, LLP v. WN Partner, LLC*, 30 N.Y.3d 1005 (2017) (dismissing appeal). Then in 2019, when MASN and the Orioles again attempted to appeal as of right under C.P.L.R. § 5601(d) to bring up for review the Appellate Division's nonfinal July 2017 order after the new RSDC arbitration had been completed upon remand, this Court granted the Nationals' motion to dismiss the appeal, again on the ground that the order appealed from did "not finally determine the proceeding within the meaning of the Constitution." *Matter of TCR Sports Broadcasting Holding, LLP v. WN Partner, LLC, appeal dismissed* 2019 NY Slip Op 84723 (Nov. 25, 2019) (Motion No. 2019-545).

On this third attempted appeal to this Court, again purportedly as of right, the requirements of C.P.L.R. § 5601(d) once again have not been met. This Court, therefore, still lacks jurisdiction under the New York State Constitution to review the First Department's July 2017 order.

First, C.P.L.R. § 5601(d) requires that the prior nonfinal Appellate Division order to be brought up for review "necessarily affects" a subsequent final judgment.

This requirement is not satisfied where, as here, the Appellate Division order merely remands a case for a new plenary hearing.

This Court has consistently held that an Appellate Division order requiring a new plenary trial does not "necessarily affect" the final judgment that ensues from that new trial, because any legal issues that were raised in the prior appeal can be raised again and decided at the new trial (and then brought up for review in an appeal from the new final judgment). The same principle applies to the First Department's July 2017 order here remanding the parties to conduct a new RSDC arbitration. And, in fact, many of MASN's and the Orioles' arguments made on this appeal were considered (and rejected) by the RSDC on remand. The same arguments were then considered (and rejected) by Supreme Court in 2019 and the First Department in 2020. Because the July 2017 Appellate Division order merely remanded for a new arbitration before the RSDC, it does not necessarily affect the final judgment in this proceeding confirming the new April 2019 RSDC award.

Second, C.P.L.R. § 5601(d) also requires that the July 2017 Appellate Division order satisfy the requirements of C.P.L.R. § 5601(a), which requires "a dissent by at least two justices on a question of law in favor of the party taking such appeal." That requirement is not met here, because the July 2017 First Department order's two-justice dissent is not "on a question of law." C.P.L.R. § 5601(a). Rather, the dissent in the July 2017 First Department order was premised on a dispute of

fact, not a dispute of law. Indeed, the plurality and the dissent *agreed* on the well-established *legal* principle that in extraordinary circumstances, a court may exercise its equitable authority to reform an arbitration agreement and direct that a dispute be arbitrated in a forum other than the one agreed by the parties in the contract.

The plurality and dissent divided only on the *factual* question of whether the circumstances here justified directing the parties to arbitrate in a forum different from the one agreed by the parties in their contract. The plurality concluded that the circumstances here did not justify reforming the parties' agreement, and the dissent disagreed. Even to the extent the plurality and dissent could be said to have disagreed on applying the facts to the law, it is well established that this does not constitute a disagreement on a "question of law," which is the necessary requirement for this Court's jurisdiction. This Court, therefore, should dismiss MASN's and the Orioles' appeal as of right under C.P.L.R. § 5601(d).

STATEMENT OF FACTS

A. The Arbitration Agreement

In 2003, MLB decided to move the then-Montreal Expos to Washington D.C. On March 28, 2005, the Office of the MLB Commissioner, the Nationals, MASN (the regional sports network that until then had been televising only Orioles' games) and the Orioles entered an agreement ("The March 2005 Agreement") (Ex. 1) that, among other things, gives MASN the exclusive right to televise both Orioles and

Nationals games. The 2005 Agreement also provides that the Orioles have super-majority ownership, and complete control, of MASN, while the Nationals have a minority ownership stake. The 2005 Agreement is governed by Maryland law. *Id.* at 15.

The 2005 Agreement sets forth a fixed schedule of below-market fees that MASN would pay the Nationals from 2005-2011 for the right to broadcast Nationals games. *Id*. at 7. These below-market fees were a massive benefit to the Orioles: the lower rights fees meant higher profits for MASN, and the Orioles (as supermajority owners of MASN) received a supermajority of those profits. *Id*. at 9.

The 2005 Agreement provided that, beginning in 2012, the rights fees paid to the Nationals would be determined for "successive five year period[s]" based on "the fair market value of the telecast rights." *Id*. at 7-8. If a dispute arose regarding rights fees, the 2005 Agreement provides for negotiation, then mediation, and then:

> 2.J.3. Appeal: In the event that the Nationals and/or the Orioles and [MASN] are unable to timely establish the fair market value of the Rights by negotiation and/or mediation … , then the fair market value of the Rights shall be determined by the Revenue Sharing Definitions Committee ("RSDC") using the RSDC's established methodology for evaluating all other related party telecast agreements in the industry.

Id. at 8. The Agreement provides that "[t]he fair market value of the rights established pursuant to" Section 2.J.3 "shall be final and binding on the Nationals and [MASN][.]" *Id*.

The RSDC is a panel of MLB Club owners and executives, with rotating membership appointed by the MLB Commissioner, that regularly hears disputes concerning revenue-sharing and related issues, including valuation of television broadcast rights. The RSDC does not normally follow a formalized arbitration model like that used by bodies such as the AAA (*see* Ex. 2 at 12), and the RSDC openly receives administrative support from MLB (Ex. 3 at 2). The March 2005 Agreement provides that in an arbitration, the RSDC is to determine the "fair market value" of the Nationals' telecast rights by applying "the RSDC's established methodology for evaluating all other related party telecast agreements in the industry." Ex. 1 at 8. As MASN acknowledged in Supreme Court, it "agreed to" and "ha[s] to live with" "whatever the structure [of the arbitration] [i]s, whatever Major League Baseball's role [i]s." Ex. 4 at 11.

B. The 2012 Arbitration Before the RSDC

In late 2011, the Nationals and MASN were unable to agree on the fair market value of the Nationals' telecast rights for the forthcoming five-year period of 2012-2016. The parties waived mediation and submitted the dispute to the RSDC. Ex. 5 at 4-5. At the time, the RSDC was composed of executives from the New York Mets, the Pittsburgh Pirates, and the Tampa Bay Rays. *Id.* at 5. The Nationals were represented in the proceedings by Proskauer Rose LLP. *Id.* at 6.

The RSDC held a hearing on April 3, 2012 at MLB headquarters in New York City. As is customary, MLB personnel provided the RSDC with administrative and procedural support. *Id*. at 6, 16. The RSDC reached its determination by mid-2012, and the parties were told the approximate amount of rights fees that MASN owed the Nationals—an average of approximately $59.6 million per year (Ex. 2 at 19)—but the panel did not issue a formal written award until June 30, 2014 (Ex. 6 (First Award) at 20).

During the period between mid-2012 when the parties were made aware of the approximate amount of the RSDC award, and June 2014 when the RSDC issued the award, MLB arranged to advance the Nationals $25 million in order to facilitate ongoing settlement discussions. Ex. 5 at 7-8. The advance was meant to encourage the Nationals' participation in settlement discussions by addressing the shortfall in 2012 and 2013 between rights fees MASN had unilaterally decided to pay the Nationals and the amount of rights fees the RSDC had determined to award. *Id.* The terms of the advance stated 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 the Commissioner's Office to cover" the advance, and "[a]ny excess amounts would go to the Nationals." Ex. 7 at 2.

C. Vacatur of the First Award

The RSDC issued its initial award on June 30, 2014. The award was far closer to MASN's and the Orioles' proposed valuation than the valuation proposed by the Nationals. Nonetheless, MASN and the Orioles petitioned Supreme Court to vacate the award, and further sought an order compelling a new arbitration in a forum other than the RSDC. The Nationals cross-petitioned to confirm.

On November 4, 2015, Supreme Court (Marks, J.) granted MASN's and the Orioles' petition in part, ***solely*** on grounds related to the Nationals' arbitration counsel, Proskauer, having concurrently represented MLB and certain interests of the RSDC members. *TCR Sports Broad. Holding, LLP v WN Partner, LLC*, 2015 WL 6746689 (Sup. Ct. N.Y. Cnty. Nov. 4, 2015) (Ex. 5).

Supreme Court rejected the MASN's and the Orioles' other arguments in support of vacatur, including the argument that MLB's $25 million advance to the Nationals in 2013 created evident partiality. *Id*. at 18-20. Supreme Court concluded that "MASN and the Orioles have not demonstrated that the circumstances of the advance raise any serious questions about the fairness of the arbitration process" (*id*. at 20), explaining that "the Court cannot see how MASN or the Orioles were actually prejudiced by MLB's financial arrangement with the Nationals, even assuming there was insufficient disclosure of the precise nature of the arrangement" (*id*. at 19). Supreme Court further explained that "the advance was not undertaken in secret"

(*id*. at 20), noting that "MASN and the Orioles were aware that an advance would be made" (*id*. at 8).

Supreme Court also held MLB and the RSDC did not engage in any prejudicial misconduct, rejecting MASN's and the Orioles' claims that MLB improperly influenced the outcome of the proceedings. *Id*. at 16-17. Supreme Court explained:

> MLB provided the sort of support that the parties must necessarily have expected when they entered into the Agreement and there is no evidence that MASN and the Orioles had any expectation that the three Club representatives, when acting in their capacity as members of MLB's standing committee, would eschew assistance from MLB's support staff to the extent customary and appropriate.

Id. at 16. Supreme Court held "Petitioners have not shown any denial of fundamental fairness based on MLB's support role or the informality of the procedures used." *Id*. at 17. Supreme Court also rejected MASN's and the Orioles' argument that the RSDC's interpretation of the 2005 Agreement exceeded the scope of the arbitrators' authority or constituted manifest disregard of the law, and that MLB and the RSDC engaged in prejudicial misconduct by, among other things, denying the Orioles' discovery requests. *Id*. at 12-17.

Supreme Court also ***denied*** MASN's and the Orioles' request to remand the matter for rehearing before an arbitral body other than the RSDC and outside of MLB, explaining that if the Nationals retained new counsel who did "not

concurrently represent MLB or the individual arbitrators and their clubs," the parties could "return to arbitration before the RSDC, however currently constituted, pursuant to the parties' Agreement." *Id*. at 28-29 n.21.

In 2017, MASN and the Orioles appealed to the Appellate Division, First Department, from Supreme Court's denial of their request to remand the parties to a new arbitration in a forum other than the RSDC. The Nationals and MLB cross-appealed the vacatur of the original RSDC award.

The First Department affirmed vacatur of the RSDC's 2014 award based solely on Proskauer's involvement in the proceedings. *See TCR Sports Broad. Holding, LLP v. WN Partner, LLC*, 153 A.D.3d 140 (1st Dep't 2017) (per curiam) (Ex. 8). The First Department also upheld Supreme Court's denial of the Orioles' and MASN's request to require new arbitration in a forum other than the RSDC. *Id*. at 5. Three Justices concurred in that result, holding that the parties must arbitrate in their contractually selected forum—the RSDC. *See id*. at 6-36 (plurality opinion of Andrias, J., joined by Richter, J.); *id*. at 37-38 (Kahn, J., concurring). Two Justices dissented. *Id*. at 39-74 (Acosta, J., joined by Gesmer, J., dissenting).

In rejecting MASN's and the Orioles' arguments for sending the matter to a different arbitral forum, the plurality assumed courts have "inherent power to disqualify an arbitration forum in an exceptional case." *Id*. at 6 (plurality); *see id*. at 24; *id*. at 25 n.3 (both similar). But the plurality concluded that "on the record before

us there is no basis, in law or in fact, to direct that the second arbitration be heard in a forum other than the industry-insider committee that the parties selected in their agreement to resolve this particular dispute, fully aware of the role MLB would play in the arbitration process." *Id*. at 6-7 (emphasis added); *see id*. at 24 (similar).

The plurality observed that the MASN, the Orioles, and the Nationals "expressly chose to carve out disputes over telecast fees for arbitration before the RSDC, an industry-insider committee with specialized knowledge," and that these "sophisticated parties, represented by experienced counsel," elected the RSDC knowing "full well how the RSDC operated." *Id*. at 27-28; *see id*. at 28 ("MASN's counsel acknowledged during proceedings before the motion court that MASN 'bought into whatever the structure was, whatever [MLB]'s role was; we agreed to that, we had to live with that.'") (quoting Ex. 4 at 11). And, "significantly, [MASN] knew that MLB staff would provide administrative, organizational and legal support, including analyzing financial information and preparing draft decisions in accordance with the instructions of the RSDC members who would make the final determinations." *Id*. at 28.

The plurality further explained that "there has been no showing of bias or corruption on the part of the members of the reconstituted RSDC." *Id*. at 7; *see id*. at 32-33 (similar). The plurality wrote that MASN's mere "[s]peculation that MLB will dictate the outcome of the second arbitration by exerting pressure on the new

members of the RSDC does not suffice to establish that they will not exercise their independent judgment or carry out their duties impartially, or that the proceedings will be fundamentally unfair." *Id*. at 7. And the plurality found it was "pure conjecture" to suppose that the new RSDC members would act as "puppets of MLB, rather than exercise [their] independent judgment." *Id*. at 30. The plurality refuted the dissent's reliance on certain public statements made by the MLB Commissioner regarding the first RSDC award, observing that "MLB was merely attempting to protect the binding arbitration process" and that, in any event, "it is the RSDC, not MLB or its Commissioner that will render a final decision in this matter." *Id*. at 32.

In response to the dissent's reliance on MLB's $25 million advance to the Nationals, the plurality stated that "[t]o allow the Orioles to now use the advance, which maintained the status quo [during settlement negotiations], as a sword to disqualify the RSDC defies logic and mischaracterizes MLB's efforts to have the parties negotiate their differences without undue financial pressure on either side." *Id*. at 31. The plurality also noted that the Nationals had resolved that issue by "offer[ing] to post a bond to guarantee repayment of the advance to MLB regardless of the outcome of the arbitration"—leaving MLB with no possible financial stake in the outcome. *Id*. at 30-31.

The plurality explained that "in certain limited circumstances a court has the power to remove an arbitrator pursuant to section 2 of the FAA if the arbitration

agreement itself 'is subject to attack under general contract principles.'" *Id*. at 34 quoting *Aviall, Inc. v. Ryder Sys., Inc*., 110 F.3d 892, 895 (2d Cir. 1997)). But the plurality found that here there were no factual grounds for contract reformation, because the three new RSDC members who would hear the new arbitration had not "shown themselves to be less than impartial." *Id.* at 34-35. Nor had the new RSDC members "demonstrated any bias in the matter" or any "impermissible conflict" between them and MASN or the Orioles. *Id*. at 35. And "MASN and the Orioles have not established that remand to the RSDC will be fundamentally unfair under the particular circumstances before [the court]." *Id*. at 25 n.3. "Thus, MASN and the Orioles have not made the extraordinary showing of grounds needed to reform the agreement or disqualify the RSDC," and "it cannot be said that MASN's and the Orioles' expectation of a reasonably fair and impartial arbitration forum in the RSDC has been frustrated." *Id*. at 35. Absent a such a showing, the court could not reform the contract. *Id*. at 36. And because "MASN and the Orioles have not and cannot show that the agreement is unenforceable under general contract principles," the FAA required that MASN be compelled to arbitrate in the RSDC pursuant to the Agreement. *Id*. at 35-36.

Justice Kahn reached the same conclusion as the plurality. *Id*. at 37-38 (concurrence). As she explained, "in the absence of an established ground for setting [an arbitration] agreement aside, such as fraud, duress, coercion or

unconscionability," the FAA requires that an agreement to arbitrate "must be judicially enforced according to its terms." *Id*. at 37. Justice Kahn found that no such grounds existed. *See id*. at 37-38. To the contrary, "the parties chose" the RSDC to decide this dispute, and "[n]ew arbitrators have been designated to hear the matter for the RSDC." *Id*. On these facts, Justice Kahn found, "[t]his Court may not order that the arbitration take place in a forum other than the one selected by the parties." *Id*. at 38.

The dissent would have directed the parties to a different arbitral forum. *Id*. at 39-74 (dissent). The dissent expressly noted it had no dispute with the plurality on the applicable legal principle. Indeed, as the dissent observed, "the plurality … agrees that the agreement could be reformed if only MASN and the Orioles had 'made the extraordinary showing of grounds needed to reform the agreement or disqualify the RSDC.'" *Id*. at 67-68. The dissent likewise observed the plurality's "acknowledg[ment] that this Court may have the power to refer the matter to a neutral arbitral forum other than that chosen by the parties under the appropriate circumstances"—though the majority "cho[se] not to exercise that power here." *Id*. at 41.

The dissent, however, focused on whether the ***facts*** warranted invoking the court's equitable power of reformation to replace the RSDC with a different arbitral forum:

- Factual findings on bias: Whereas the plurality concluded (in accord with Supreme Court's findings, Ex. 5 at 12-20) that "there has been no showing of bias or corruption on the part of the members of the reconstituted RSDC," Ex. 8 at 7 (plurality); *see id.* at 32-33, 35, the dissent found that MASN "would be unable to obtain a fundamentally fair arbitration if the RSDC were to rehear the matter," *id*. at 60-62 (dissent).
- Factual findings on independence: Whereas the plurality (like Supreme Court, *see* Ex. 5 at 15-17) concluded that there was no evidence that on remand RSDC would act as "puppets of MLB, rather than exercise its independent judgment," Ex. 8 at 30 (plurality), the dissent found that "MLB retain[ed] its significant influence over the panel" and would dictate the result of the rehearing, *id*. at 65-66 (dissent).
- Factual findings on financial interest: While the plurality found that the Nationals' offer to post a bond resolved any possible issue stemming from MLB's $25 million advance to the Nationals, *id*. at 30-31 (plurality), the dissent found such a bond would be insufficient to eliminate bias concerns, *id*. at 64-65 & n.6 (dissent).

Evaluating the facts, the dissent would have found, contrary to the panel majority, that MASN "'made the extraordinary showing of grounds needed to reform the agreement or disqualify the RSDC.'" *Id*. at 68.

D. MASN's and the Orioles' First Attempted Appeal to this Court.

On July 14, 2017, MASN and the Orioles noticed an appeal from the First Department's order. After soliciting letter briefs on the Court's jurisdiction to consider the appeal, this Court dismissed the appeal "sua sponte, upon the ground that the order appealed from does not finally determine the proceeding within the meaning of the Constitution." *TCR Sports Broad. Holding, LLP v. WN Partner, LLC*, 30 N.Y.3d 1005 (2017).[1]

MASN and the Orioles then moved the First Department for leave to appeal to the Court of Appeals, and the same panel that had rendered the underlying decision unanimously denied the motion. *TCR Sports Broad. Holding, LLP v. WN Partner, LLC*, 2018 WL 457101 (1st Dep't Jan. 18, 2018).

E. The 2018 Arbitration Before the RSDC

In 2018, the parties then participated in a new arbitration of the 2012-2016 rights fee dispute before the RSDC. In that new arbitration, the Nationals were represented by counsel who had not participated in the original RSDC arbitration and who also did not concurrently represent MLB, any of the three RSDC members,

[1] Chief Judge DiFiore and Judge Garcia took no part in the decision. *Id*.

or their respective Clubs. None of the RSDC members in the new arbitration had participated in the original arbitration; the RSDC's rotating membership had changed with the passage of time.

The Orioles and MASN nonetheless repeatedly challenged the RSDC's continued role in the arbitration. *See, e.g.*, Ex. 9 at 4 (demanding that MLB and the RSDC "recuse themselves … from this dispute"). The RSDC declined those requests for recusal.

In the new arbitration the RSDC retained separate outside counsel to support the proceedings. The RSDC initially retained Joseph Shenker of Sullivan Cromwell. But after a complaint from the Orioles and MASN, Sullivan & Cromwell stepped aside, and the RSDC instead retained Gregory Joseph of Joseph Hage Aaronson LLC to assist in the proceeding.

After receiving extensive briefing from the parties and addressing numerous issues raised pre-hearing by the parties, the RSDC held a hearing over two days in November 2018. The RSDC issued its award on April 15, 2019. Ex. 10. In the award, the RSDC set forth detailed analysis of the 2005 Agreement and the evidence presented by the parties in order to identify "the RSDC's established methodology for evaluating all other related party telecast agreements in the industry." *Id*. at 10-12, 18-29. The RSDC then applied that methodology to the facts established by the evidence submitted at the hearing, and on that basis determined that the "fair market

value" of the Nationals' rights averaged $59.4 million annually over the 2012-2016 period. *Id*. at 29-48.

F. Confirmation of the New RSDC Award

On April 15, 2019, the Nationals moved to confirm the RSDC's second award in Supreme Court, pursuant to C.P.L.R. § 7502(a)(iii). *See* Ex. 11. On August 22, 2019, Supreme Court issued its decision and order confirming the award (Ex. 12). Supreme Court rejected each of MASN's and the Orioles' arguments in support of vacatur. Supreme Court also rejected MASN's and the Orioles' request to be remanded to a new venue for another rehearing of the dispute.

Specifically, Supreme Court ruled MASN and the Orioles failed to establish "evident partiality" under the FAA. *Id.* at 15. Supreme Court rejected MASN's and the Orioles' argument that the Nationals' agreement to repay a $25 million advance made by MLB created a "glaring conflict of interest." *Id.* at 15-19. Supreme Court reasoned that the agreement "if anything *alleviated* the substantive concerns expressed by the Orioles in connection with the First Award – *i.e.*, that the loan purportedly gave MLB a financial stake in the *outcome* of the arbitration." *Id.* at 16 (emphasis in original). Supreme Court rejected MASN's and the Orioles' argument that the Nationals' agreement to repay MLB disincentivized the RSDC from acceding to MASN's and the Orioles' recusal demands. Noting that the parties agreed certain disputes would be heard by the AAA, Supreme Court observed the

RSDC was "mandated to be the forum under the 2005 Agreement," because the parties agree rights fees disputes "'shall be determined' by RSDC, full stop." *Id.* at 17-18.

Supreme Court further rejected MASN's and the Orioles' argument that there was evident partiality because the RSDC failed to disclose MLB's role in the proceedings or MLB's communications with the RSDC. *Id.* at 19-21. Supreme Court explained that the parties' agreement "expressly mandates that disputes regarding telecast rights would be resolved by the RSDC, which all parties understood is composed of *MLB-chosen* executives from other MLB teams – that is, 'industry insiders, with specialized expertise.'" *Id.* at 19 (emphasis in original; citing Ex. 8 at 36 (plurality); *see also id*. at 37-38 (concurrence) ("Here, the conduct of Major League Baseball and its representatives has been far from neutral and balanced. But this was the forum the parties chose, even avoiding the opportunity for a hearing before a panel of the American Arbitration Association and proceeding directly to the [RSDC]."). Citing the First Department's 2017 decision, Supreme Court rejected MASN's and the Orioles' argument that public statements made by the MLB Commissioner evinced bias:

> The plurality opinion in TCR II addressed similar allegations and found them insufficient to warrant removing the MLB-appointed RSDC from the arbitration process: "Nor does the fact that MLB has made certain public statements expressing the view that the RSDC acted within the scope of its authority in setting the rights fees, and that MASN would have to abide by that determination 'sooner or later,' warrant transfer

> to a new forum. Again, it is the RSDC, not MLB or its Commissioner that will render a final decision in this matter."

Id. at 21 (quoting Ex. 8 at 32 (plurality)). Supreme Court concluded "that public statements such as those referenced by the Orioles are insufficient to throw into doubt the fairness of a process that was handled and resolved by the RSDC with obvious thoroughness and care." *Id*.

Supreme Court also rejected MASN's and the Orioles' claim that they were denied the right to present their case under Section 10(a)(3) of the FAA, observing that "[e]ven a cursory review of the voluminous record in this case shows that these parties have suffered through many things over the course of seven years, but one of them was ***not*** the absence of an adequate opportunity to present their evidence and arguments." *Id.* at 22 (emphasis in original). And Supreme Court rejected MASN's and the Orioles' argument that the RSDC exceeded its powers under Section 10(a)(iv) of the FAA, explaining that "the RSDC obviously had the authority to consider the interpretation of relevant language in the agreement and the application of the facts to that language." *Id.* at 24.

Supreme Court also noted that it had "reviewed the Orioles' remaining arguments (mainly, sub-arguments of the above)," including the argument that the court should remand the parties to a new arbitral forum, "and found them to be without merit." *Id*.

In addition, Supreme Court determined the Nationals were entitled to prejudgment interest, Supreme Court ruled "[t]he Second Award constitutes a monetary 'sum awarded' upon which the court may grant interest." *Id*. The court explained: "The RSDC made its determination, which clearly was a monetary award of what 'shall be paid' to the Nationals, down to the single dollar, subject only to deducting the amount previously paid by MASN to the Nationals in respect of the rights fees." *Id*. at 25.

On December 9, 2019, following additional briefing and oral argument, Supreme Court entered judgment in favor of the Nationals in the amount of $99,203,339.14, plus statutory interest running from April 15, 2019 (the date of the RSDC's award) through the date of the judgment, in the amount of $5,821,741.16.

MASN and the Orioles appealed Supreme Court's confirmation of the RSDC's April 2019 award, and Supreme Court's monetary judgment, to the First Department. On October 22, 2020, the First Department affirmed both confirmation of the RSDC award, and the monetary judgment, in a unanimous 4-0 decision. The First Department held that MASN "failed to establish evident partiality in the RSDC in the second arbitration" or that "the RSDC otherwise violated its obligations, exceeded its powers or denied petitioner a fair hearing." Ex. 13 at 2. The First Department also specifically affirmed the monetary judgment entered by Supreme Court. *Id*.

G. MASN's and the Orioles' Second Attempted Appeal to the Court of Appeals

One month after the Nationals moved to confirm the RSDC's 2019 award, MASN and the Orioles on May 14, 2019 noticed an appeal to this Court, seeking review of the First Department's 2017 decision. Ex. 14. On May 31, 2019, the Nationals moved to dismiss the appeal on grounds that this Court did not have jurisdiction under C.P.L.R. § 5601(d). Ex. 15. On August 27, 2019, the Nationals informed this Court of Supreme Court's August 22, 2019 decision confirming the RSDC's 2019 award. Ex. 16. On September 16, 2019, the Chief Clerk of this Court asked MASN and the Orioles whether they had appealed (or would appeal) the August 22, 2019 order of Supreme Court to the First Department and asked all parties to advise whether the inquest directed by Supreme Court would involve "ministerial or quasi-judicial action." Ex. 17. After receiving responses to the jurisdictional inquiry (Exs. 18 & 19), this Court on November 25, 2019 dismissed the Orioles' and MASN's appeal under C.P.L.R. § 5601(d), "on the grounds that the order appealed from does not finally determine an action within the meaning of the Constitution." Ex. 20.

H. MASN's and the Orioles' Now Third Attempted Appeal to this Court.

On November 19, 2020, MASN and the Orioles filed in Supreme Court a new notice of appeal to this Court, purportedly pursuant to C.P.L.R. § 5601(d), from the

First Department's 2017 determination to remand the parties to a new arbitration before the RSDC. Ex. 29.

On November 25, 2020, MASN and the Orioles filed their Preliminary Appeal Statement with this Court. Ex. 30.[2]

At the same time, on November 20, 2020, MASN and the Orioles moved in the First Department seeking reargument of the First Department's unanimous October 22, 2020 order, which affirmed both confirmation of the RSDC's April 2019 award and the Supreme Court monetary judgment. Specifically, the request for reargument asserts that the First Department improperly affirmed the monetary judgment. MASN's and the Orioles' motion in the First Department also requested leave to appeal to this Court from the unanimous October 22, 2020 Appellate Division order. Ex. 21. On November 30, 2020, the Nationals filed their opposition to the motion.

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[2] MASN and the Orioles assert that their appeal is to address: "Whether, as a matter of law, the two dissenting Justices of the Appellate Division correctly concluded that: (1) courts possess the power, after vacating an arbitral award (here unanimously) because of the evident partiality of the governing institution under whose auspices the arbitration was conducted, to order rehearing in a neutral and unbiased forum other than that stated in the arbitration clause, and (2) the legal standards governing such power required its exercise under the circumstances presented here." Ex. 30 at 5. As discussed at Argument Point II, *infra*, it is respectfully submitted that MASN and the Orioles mischaracterize the substance of the dissent, which in fact concurred with the plurality on the applicable and well-established legal standard, but disagreed with the plurality as to whether the unique factual circumstances here satisfied that standard.

ARGUMENT

This putative appeal, purportedly brought as of right under C.P.L.R. § 5601(d), should be dismissed because this Court lacks jurisdiction under the N.Y. Constitution.

C.P.L.R. § 5601 provides, in relevant part:

> (a) Dissent. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, … from an order of the appellate division which finally determines the action, where there is a *dissent by at least two justices on a question of law* in favor of the party taking such appeal.
>
> . . .
>
> (d) Based upon nonfinal determination of appellate division. An appeal may be taken to the court of appeals as of right from a final judgment entered in a court of original instance, from a final determination of an administrative agency or from a final arbitration award, or from an order of the appellate division which finally determines an appeal from such a judgment or determination, where *the appellate division has made an order on a prior appeal* in the action *which necessarily affects the judgment, determination or award and which satisfies the requirements of subdivision (a) … except that of finality*.

C.P.L.R. § 5601 (emphases added).

Here, *first*, the July 2017 First Department order that MASN and the Orioles seek to bring up for review does not satisfy C.P.L.R. § 5601(d), because the order does not "necessarily affect[] the [RSDC's] award." In a long line of cases, this Court has consistently held that an order requiring a new plenary trial does not "necessarily affect" the judgment that ensues from that new trial, because any issues

raised by an order requiring a new trial can be raised again at the new trial itself (and then brought up for review in an appropriate appeal from the new final judgment).

The same principle applies here to the First Department's 2017 order remanding the parties to a new arbitration before the RSDC. At that new arbitration, MASN and the Orioles raised again many of the same issues that had been decided in the First Department's 2017 order—including whether the RSDC was the proper forum for the arbitration—and those issues were again addressed by the RSDC (which declined to recuse itself). Those issues have been raised and determined again in this proceeding, both at Supreme Court and before the First Department. Thus, the prior nonfinal July 2017 Appellate Division order merely remanding for a new arbitration before the RSDC does not necessarily affect the final judgment within the meaning of C.P.L.R. § 5601(d).

Second, the First Department's July 2017 order does not satisfy the requirement that there be a two-justice dissent "on a question of law." The fundamental basis for the dissenting opinion was not a dispute of law, but a dispute of fact. The plurality and the dissent *agreed* on the *legal* principle that in extraordinary circumstances, a court may exercise its equitable authority to reform an arbitration agreement and direct that a dispute be heard in a forum other than one identified in the contract. The plurality and dissent divided only on the *factual*

question of whether sufficient grounds existed to conclude that the RSDC would be biased on remand as to require such a reformation of the arbitration agreement.

The putative appeal should therefore be dismissed for lack of jurisdiction.

I. THIS COURT LACKS JURISDICTION BECAUSE THE PRIOR DECISION DID NOT "NECESSARILY AFFECT" THE RSDC'S AWARD

This Court lacks jurisdiction because the First Department's prior July 2017 nonfinal order did not "necessarily affect[]" the RSDC's new award within the meaning of C.P.L.R. § 5601(d). A prior nonfinal Appellate Division order only necessarily affects a final judgment, such that it is brought up for review on appeal from the final judgment, "if the result of reversing that order would *necessarily* be to require a reversal or modification of the final determination." Karger, Powers of the NY Court of Appeals § 9:5 (emphasis added). That would not be the case here. In fact, "[t]he rule is well established that an intermediate order of the Appellate Division reversing a decision and granting a hearing *de novo* before the original tribunal, does not necessarily affect the final decision of that tribunal after the new hearing, and may not be reviewed upon appeal from such final decision." *Daus v. Gunderman & Sons*, 283 N.Y. 459, 464 (1940). This Court has applied this rule consistently for decades. *See, e.g.*, *Barker v. Tennis 59th Inc.*, 65 N.Y.2d 740, 740-41 (1985) (dismissing appeal "*sua sponte*, upon the ground that the Appellate Division order granting a new trial … did not 'necessarily affect' the final judgment,

as required by CPLR 5601(d)"); *Miocic v. Winters*, 52 N.Y.2d 896, 897 (1981) (similar); *Town of Peru v. State*, 30 N.Y.2d 859, 860 (1972) (similar).

This Court reiterated this rule just two years ago, dismissing a putative appeal because "the prior nonfinal Appellate Division order here granting a new trial is not" an order that "necessarily affects" the subsequent final judgment. *Wintermute v. Vandemark Chem., Inc.*, 30 N.Y.3d 1041 (2017) (applying identical limitation in C.P.L.R. § 5602(a)(1)(ii)).

As Karger explains, "the general rule is that an order of the Appellate Division which directs a complete new trial or hearing without any limitations on its scope, ***is not classifiable as an order that necessarily affects the final determination rendered after the new trial or hearing***." Karger, *supra*, § 9.5 (collecting cases) (emphasis added). "Consequently, such an order is not reviewable on an appeal from the final determination under CPLR 5501(a)(1), ***and it cannot serve as the basis for a direct appeal under CPLR 5601(d)***." *Id.* (emphasis added).

The rationale for this rule is that at the new hearing, "new evidence can be introduced and 'every question of fact or law may be litigated anew,'" such that questions decided in the prior interlocutory decision may be raised again and reviewed in an appeal from the ensuing final judgment. *Id.* Therefore, a "nonfinal order is not considered to have necessarily affected the final determination if the questions decided by it could have been raised again" in subsequent stages of the

case. *Id.* In this situation, there is no need for the fiction of a "merger" to bring up issues decided in an earlier appeal, *cf. Buffalo Elec. Co. v. State*, 14 N.Y.2d 453, 460-62 (1964)[3], because the issues can be fully litigated in the ordinary course based on the final judgment and the appeals that ensue therefrom.[4]

There is no reason why the rule – "that an intermediate order of the Appellate Division reversing a decision and granting a hearing *de novo* before the original tribunal, does not necessarily affect the final decision of that tribunal after the new hearing, and may not be reviewed upon appeal from such final decision," *Daus*, 283

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[3] *Buffalo Elec. Co. v. State*, 14 N.Y.2d 453 (1964) did not involve remand for a plenary new trial: both of the prior Appellate Division decisions there had restricted the scope of proceedings on remand. *See Buffalo Elec. Co. v. State*, 9 A.D.2d 372, 373 (4th Dep't 1959) (reversing and remanding for trial court specifically "to decide the underlying question of fact"); *Buffalo Elec. Co. v. State*, 17 A.D.2d 523, 526-27 (4th Dep't 1963) (reversing and remanding for lower court specifically "to pass upon the merits of the claimant's claim for damages or additional costs"). The Siegel treatise (N.Y. Practice §§ 527, 530 (6th ed.)), like *Buffalo Electric*, does not address a prior interlocutory order granting a plenary new trial. In contrast, the authoritative Karger treatise cited above does address that situation, and explains why dismissal is required in the circumstances here.

[4] "A different rule" applies where the Appellate Division's decision "so limits the scope of the new trial or hearing as to compel a certain result." Karger, *supra*, § 9:5. In that circumstance, the two decisions may fairly be treated as merged, and the "law of the case" doctrine would foreclose relitigating issues previously decided. *Long v. Forest-Fehlhaber*, 55 N.Y.2d 154, 158 & n.5 (1982). Therefore, "the consequent final determination is held to be necessarily affected by the prior order of the Appellate Division." Karger, *supra*, § 9:5. But that circumstance is not present here, since following the First Department's 2017 decision remanding the parties to the RSDC for rehearing, the Orioles and MASN were free to continue litigating – and did litigate – among other things, whether the RSDC is the appropriate forum for the arbitration.

N.Y. at 464 – should apply any differently where the remand is for a plenary proceeding in arbitration. Indeed, here, MASN and the Orioles raised, and the RSDC addressed, the question that the Appellate Division had addressed in its 2017 decision: specifically, whether the RSDC was the proper venue for the new arbitration. MASN and the Orioles pressed these issues before the arbitrators.[5] MASN and the Orioles then raised them again in Supreme Court when opposing Nationals' motion to confirm the RSDC's April 2019 award (Ex. 24 at 26-28), and again in the recent First Department appeal from Supreme Court's orders confirming the RSDC's 2019 award and entering judgment for the Nationals (Ex. 25 at 47-52).

To the extent MASN and the Orioles suggest that denial of their request to have the arbitration reassigned to the new venue must have affected the judgment, this does not create a basis for jurisdiction. Indeed, this Court recently held that a decision to deny a request for reassignment of a case to a new judge "does not 'necessarily' affect the judgment sought to be appealed from within the meaning of

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[5] *See* Ex. 22 at 1 n.1 ("MASN and the Orioles continue the objections to this RSDC proceeding they have made in their correspondence, including their objections to the RSDC proceeding itself and their position that section 2.J.3 of the Settlement Agreement must be reformed to permit resolution of this dispute before a panel of arbitrators who are not affiliated with MLB."); Ex. 23 at 2 n.2 ("MASN and the Orioles continue their objections to this RSDC proceeding that they have made in their prior correspondence, including their objections to the RSDC proceeding itself and their position that section 2.J.3 of the Settlement Agreement must be reformed to permit resolution of this dispute before a panel of arbitrators who are not affiliated with MLB.").

5602(a)." *JPMorgan Chase Bank, Nat'l Ass'n v. Caliguri*, 33 N.Y.3d 1046 (2019). Therefore, because the July 2017 prior nonfinal Appellate Division order does not necessarily affect the final Appellate Division order from which MASN and the Orioles have appealed, this Court lacks jurisdiction to entertain their appeal under CPLR 5601(d).

II. THIS COURT LACKS JURISDICTION BECAUSE THE FIRST DEPARTMENT DISSENT IS NOT ON A QUESTION OF LAW

This appeal also should be dismissed for the independent, and compelling, reason that the First Department's 2017 order does not satisfy C.P.L.R. § 5601(a), which is expressly required to take an appeal as of right under C.P.L.R. § 5601(d). In particular, the two-Justice dissent in the July 2017 Appellate Division order is not "on a question of law."

For this Court to have jurisdiction, the double dissent must be based on a *pure* question of law. A dissent on a "mixed question of law and fact" is insufficient to confer jurisdiction under C.P.L.R. § 5601(a). *In re Daniel H.*, 15 N.Y.3d 883, 884 (2010) (collecting authorities); *see Matter of Robert S.*, 76 N.Y.2d 770, 559 N.Y.S.2d 979 (1990) (dissent on whether facts established probable cause raised unreviewable mixed question of fact and law); Karger, *supra*, § 6:5 ("mixed question of fact and law … would not be reviewable by the Court of Appeals"). Moreover, "[w]here it is equivocal whether a dissent rests upon disagreement in fact or law, the

dissent is not on a question of law within the meaning of CPLR 5601(a)." *Gillies Agency, Inc. v. Filor*, 32 N.Y.2d 759, 760 (1973); Karger, *supra*, § 6:5 (same).[6]

For jurisdiction purposes, the Court must "examin[e] the full record," *Merrill by Merrill v. Albany Med. Ctr. Hosp.*, 71 N.Y.2d 990, 991 (1988), and must ascertain whether the question in dispute is truly one of law. *See People v. Holland*, 18 N.Y.3d 840, 841 (2011); *see also* Karger, *supra*, § 6:5 ("The mere fact that a dissent may purportedly be addressed to questions of law is not conclusive.").

Here, the dissent in the First Department's July 2017 order to remand the matter to the RSDC for a new arbitration hearing and award is not "on a question of law." To the contrary, the plurality and the dissent expressly ***agreed*** on the relevant legal principle:

- The plurality assumed that courts have "inherent power to disqualify an arbitration forum in an exceptional case," Ex. 8 at 6 (plurality), and agreed that an arbitration agreement may be reformed "in certain limited

[6] This case is nothing like *Matter of Barnett*, 121 N.Y.S.3d 436, 438 (2020), where the Court was reviewing the legal question of what level deference to give to the fact finding of the Appeal Board, not disagreeing on facts or application of facts to the law. *See also Matter of Vega*, 35 N.Y.3d 131, 136 (2020) (same).

circumstances" where it "'is subject to attack under general contract principles,'" *id.* at 34 (quoting *Aviall*, 110 F.3d at 895).[7]

- The dissent noted that "[e]ven the plurality, while arguing that there is no legal basis for referring the matter to a new arbitral forum, agrees that the agreement could be reformed if only MASN and the Orioles had 'made the extraordinary showing of grounds needed to reform the agreement or disqualify the RSDC.'" *Id.* at 67-68 (quoting *id.* at 35 (plurality)); *see id.* at 41 (dissent noting "Justice Andrias's concurring opinion (the plurality) appears to acknowledge that this Court may have the power to refer the matter to a neutral arbitral forum other than that chosen by the parties under the appropriate circumstances").[8]

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[7] The concurrence agreed that a court may determine not to enforce an arbitration clause (*e.g.*, by reforming it) where there is an "established ground" for doing so, "such as fraud, duress, coercion or unconscionability." *Id.* at 37 (concurrence).

[8] The underlying legal proposition applied by both the plurality and dissent – that § 2 of the applicable Federal Arbitration Act preserves courts' authority to invoke "generally applicable contract defenses," *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017) (citation omitted), and that the doctrine of reformation is one such "generally applicable" defense, *see, e.g.*, *Md. Port Admin. v. John W. Brawner Contracting Co.*, 492 A.2d 281, 288 (Md. 1985); *Chimart Assocs. v. Paul*, 66 N.Y.2d 570, 574 (1986) – is well established. Even the Nationals and MLB agree that an arbitration agreement could be reformed in an appropriate case—though such relief was properly denied on the record here. *See* Ex. 26 (Brief For Washington Nationals Baseball Club, LLC) at 39-41; Ex. 27 (Reply Brief For Washington Nationals Baseball Club, LLC) at 5-8; Ex. 28 (Brief for the Office of the Commissioner of Baseball and the Commissioner of Major League Baseball) at 62-63.

The dissent thus focused on the ***factual*** question of whether MASN and the Orioles had made the "extraordinary showing" that is necessary to invoke the court's power to reform the parties' agreement and remand the dispute to a different arbitral body. *Id.* at 68; *see also id.* at 41, 58, 60, 67, 74. The plurality ruled that MASN and the Orioles had not made this "extraordinary showing" and, thus, *affirmed* Supreme Court's factual findings, which favored the Nationals on every salient issue except those related to Proskauer's involvement in the first arbitration. *Id.* at 5 (per curiam); *see* Ex. 5; *see also* Ex. 8 at 24-33 (plurality endorsing Supreme Court's findings). Noting that the parties freely elected an inside-MLB body to hear the dispute (*see id.* at 28 [plurality]; *id.* at 37-38 [concurrence]), that the Nationals' retention of unconflicted counsel would cure the grounds for Supreme Court's "evident partiality" finding (*id.* at 29 [plurality]), and that the three RSDC members that issued the June 2014 arbitration award were replaced by new panelists on the RSDC (*id.*; *id.* at 38 [concurrence]), a majority of the Appellate Division panel concluded that the Orioles and MASN had not demonstrated that the RSDC would be impermissibly biased or conflicted, or that the new arbitration would otherwise have been unfair. *See id.* at 5 (per curiam); *id.* at 7, 32-33, 35-36 (plurality); *id.* at 37-38 (concurrence finding that the Orioles and MASN had not proven an "established ground" for reformation).

The dissent merely disagreed with that *factual* conclusion. The dissent would have concluded that MASN and the Orioles had shown that they "would be unable to obtain a fundamentally fair arbitration if the RSDC were to rehear the matter" (*id.* at 60 [dissent]), and that they had thus "'made the extraordinary showing of grounds needed to reform the agreement or disqualify the RSDC.'" *Id.* at 68 (quoting *id.* at 35 (plurality)).

This disagreement over whether the evidence here satisfied the standard for contract reformation does not present a pure question of law over which this Court has jurisdiction under C.P.L.R. § 5601(a). It is instead a dispute over what facts may be inferred from the evidence: the majority of the First Department found that the RSDC would not be impermissibly biased against the Orioles and MASN upon remand, while the dissent thought that the evidence established such bias.[9] The Appellate Division dissent's mere factual disagreement regarding the weight and inferences to be drawn from the evidence of purported bias establishes that the dissent is *not* on a pure question of law necessary to bring this appeal within this Court's jurisdiction under C.P.L.R. § 5601(d). *See, e.g., Heary Bros. Lightning Prot. Co. v. Intertek Testing Servs., N.A., Inc.*, 4 N.Y.3d 615, 618 (2005) ("A 'weight of the evidence' determination is a factual one that we have no power to review")

[9] The majority was correct, as Supreme Court and First Department confirmed in 2019 and 2020 after the new RSDC proceeding.

(citing *Cohen v. Hallmark Cards*, 45 N.Y.2d 493, 498-500 (1978)); *Kolchins v. Evolution Markets, Inc.*, 31 N.Y.3d 100, 106 (2018) ("a question of fact arises" in a contract case where there is "evidence from which differing inferences may be drawn"); *see also* Karger, *supra*, § 13:2 ("The basic principle is that a question of fact is presented if there is a conflict either in the evidence or in the inferences which can reasonably be drawn from the evidence. … In addition, though the facts may not be in dispute, a question of fact arises if the inferences from those facts may reasonably lead to differing conclusions.") (collecting cases; footnotes omitted). Indeed, this Court has long recognized that the specific question whether a party "failed to prove facts sufficient to entitle it to the reformation of the contract under the evidence presented to the court … present[s] an issue of fact decisive" such that there is "nothing for [this Court's] consideration." *Westinghouse, Church, Kerr & Co. v. Remington Salt Co.*, 189 N.Y. 515, 515-16 (1907).

Froehlich v. New York State Dep't of Corr. & Cmty. Supervision, 35 N.Y.3d 1031 (2020), is directly on point. In *Froehlich*, this Court dismissed an appeal because "the two-justice dissent at the Appellate Division is not on a question of law." *Id.* at 1032. There, the dispute concerned whether a scuffle between the petitioner, a prison security guard, and a prisoner satisfied the Department of Corrections' definition of assault, which was "an intentional physical act of violence directed toward[] an employee by an inmate or parolee." *Froehlich v. New York*

State Dep't of Corr. & Cmty. Supervision, 179 A.D.3d 1408, 1410-11 (3rd Dep't 2020) (majority); *id*. at 1411 (dissent). The majority held that the prisoner was "combative," but not that he "directed any intentional physical act of violence toward [the guard]". *Id.* at 1411.

The two-justice dissent explained that "the facts of the matter are not in dispute," but found that, during the scuffle, "additional officers, including petitioner, intervened and attempted to physically restrain the combative inmate, during the course of which petitioner sustained injuries to his neck, back and shoulder." *Id.* at 1411-12 (dissent). The dissent added: "Respondent does not dispute that petitioner was injured during this altercation and, in our view, the inmate's acts against, among other officers, petitioner constituted an 'assault,' as that term is defined by respondent." *Id.* (dissent). Thus, the dissent concluded: "Accordingly, we believe that respondent's decision lacked a rational basis and was arbitrary and capricious." *Id*. at 1412 (dissent).

Similarly, in *A.V. v. Presentment Agency,* 34 N.Y.3d 1024 (2019), this Court dismissed an appeal "upon the ground that the two-Justice dissent at the Appellate Division is not on a question of law (see CPLR 5601[a])," where the majority reasoned that the lower court did not abuse its discretion in placing a minor on probation but the two-justice dissent held "*under the circumstances of this case*, the court improvidently exercised its discretion when it adjudicated A.V. a juvenile

delinquent and imposed probation," *In re A.V.*, 173 A.D.3d 556, 557, 561 (1st Dep't 2019) (emphasis added).

At most, it might be said that the dissent in the July 2017 Appellate Division order here raised a *mixed* question of law and fact, *i.e.*, one concerning "application of th[e] facts to the applicable legal principles." *People v. Guay*, 18 N.Y.3d 16, 23 (2011); *accord U.S. Bank N.A. ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 966 (2018) (mixed question is one "ask[ing] whether 'the historical facts … satisfy the [legal] standard'") (quoting *Pullman-Standard Co. v. Swint*, 456 U.S. 273, 289 n.19 (1982)). But this Court also lacks jurisdiction over such mixed questions of law and fact. For example, the question whether an inculpatory statement was "sufficiently attenuated from [an] earlier un-Mirandized statement" to be admitted into evidence is a "mixed question" that is unreviewable in this Court. *In re Daniel H.*, 15 N.Y.3d at 884. So is the question whether the facts are sufficient to establish probable cause. *See Matter of Robert S.*, 76 N.Y.2d 770; Karger, *supra*, § 6:5 n.11 (explaining same).

The same is true of a question such as whether the facts in this case were sufficient to warrant reforming the arbitration agreement. Answering that question required only application of the law on which all 5 Justices of the Appellate Division agreed to the particular facts in the proceeding to confirm or vacate the June 2014 arbitration award. *See Guay*, 18 N.Y.3d at 23. It is *not* a pure question of law, as

would be required for this Court to exercise jurisdiction over MASN's and the Orioles' purported C.P.L.R. § 5601(d) appeal as of right. In any event, this Court lacks jurisdiction under C.P.L.R. § 5601(a) even if it is merely "*equivocal* whether [the] dissent rests upon disagreement in fact or law." *Gillies*, 32 N.Y.2d at 760 (emphasis added); Karger, *supra*, § 6:5. Thus, this Court should dismiss this purported C.P.L.R. § 5601(d) appeal for lack of jurisdiction.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the purported appeal by MASN and the Orioles should be dismissed for lack of jurisdiction.

DATED: New York, New York
December 3, 2020

Respectfully submitted,

By:

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EXHIBIT 7

Supreme Court of the State of New York
Appellate Division, First Judicial Department

Present – Hon. Dianne T. Renwick, Justice Presiding,
Cynthia S. Kern
Saliann Scarpulla
Martin Shulman, Justices.

In re TCR Sports Broadcasting Holding, LLP, Petitioner-Appellant, -against- WN Partner, LLC, et al., Respondents, Washington Nationals Baseball Club, LLC, Respondent-Respondent, - - - - - - - - - - The Baltimore Orioles Baseball Club, et al. Nominal Respondents-Appellants.	Motion No. Index No. Case Nos.	2020-03783 652044/14 2019-05390 2019-05458 2019-05459

Petitioner-appellant TCR Sports Broadcasting Holding, LLP, and nominal respondents-appellants The Baltimore Orioles Baseball Club, et al. having moved for reargument of, or in the alternative, for leave to appeal to the Court of Appeals, from the decision and order of this Court, entered on October 22, 2020 (Appeal Nos. 12147, 12147A, 12147B),

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion is denied.

ENTERED: January 07, 2021

Susanna Molina Rojas
Clerk of the Court

EXHIBIT 8

To be Argued by:
JONATHAN D. SCHILLER
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

TCR SPORTS BROADCASTING HOLDING, LLP,

Petitioner-Appellant,

– against –

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

Respondents-Respondents,

– and –

THE COMMISSIONER OF MAJOR LEAGUE BASEBALL,

Respondent,

– and –

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

Nominal Respondents-Appellants.

Appellate Case Nos.: 2019-05390 2019-05458 2019-05459

BRIEF FOR PETITIONER-APPELLANT AND NOMINAL RESPONDENTS-APPELLANTS

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PRELIMINARY STATEMENT

This appeal arises from a judgment of the New York County Supreme Court (Cohen, J.) that (i) confirmed an April 15, 2019 arbitration award issued by Major League Baseball's ("MLB") Revenue Sharing Definitions Committee ("RSDC") and (ii) entered judgment against TCR Sports Broadcasting Holding, LLP ("MASN") for a sum total of $105,025,080.30. A.90. The RSDC is an MLB arbitration panel of three team representatives who are appointed by the Commissioner of Baseball (the "Commissioner"). MASN is a regional sports network majority-owned by the Orioles. MASN was formed pursuant to a 2005 Settlement Agreement among MLB, the Commissioner, the Orioles, MASN and the Nationals (then-owned by MLB). A.790-97. In the Settlement Agreement, the parties agreed to compensate the Orioles, in perpetuity, for the damages to the Orioles caused by MLB's relocation of the Montreal Expos into Washington, D.C., by granting the Orioles a supermajority share of MASN's profits. A.807-10.

The first arbitration award in this dispute was vacated because of MLB's and its RSDC's evident partiality. *See TCR Sports Broadcasting Holding, LLP v. WN Partner, LLC*, 2015 WL 6746689 (Sup. Ct. N.Y. Cty. Nov. 4, 2015) ("*TCR I*"), *aff'd* 153 A.D.3d 140 (1st Dep't 2017) ("*TCR II*"), *appeal dismissed* 30 N.Y. 3d 1005 (2017). In its July 13, 2017 order, this Court unanimously affirmed vacatur of the first award but divided 2-1-2 on the proper forum for rehearing.

None of the three opinions received a quorum because there was no ground upon which three Justices agreed. N.Y. Const. Art. VI § 4.b. The plurality (Andrias and Richter, JJ.) and concurrence (Kahn, J.) ordered rehearing before the RSDC but on different grounds. *TCR II*, 153 A.D.3d at 143, 161. By contrast, the dissent (Acosta and Gesmer, JJ.) concluded that "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." *Id.* at 181. Forcing MASN and the Orioles to arbitrate again before the same committee (the RSDC) appointed and controlled by the same governing body (MLB), the dissent wrote, would "be all but guaranteed to yield the same result" as the vacated first award. *Id.* at 155, 163. The dissent concluded that the Court should have ordered the arbitration to be reheard before a different and neutral panel outside of MLB's ambit and control. *Id.* at 180-81.

The re-arbitration before MLB's RSDC commenced in January 2018. Unfortunately, the dissent's warning of continued partiality by MLB was prescient. MLB continued its unfair treatment of MASN and the Orioles and, as the dissent predicted, its RSDC *reached the same result* as the vacated first award. Once again, the Federal Arbitration Act ("FAA") requires vacatur of the award. The Supreme Court's confirmation of the award and entry of a money judgment are legal errors and must be reversed on at least one of the following grounds, and the case remanded for decision by a neutral arbitral forum unaffiliated with MLB.

First, MLB permitted the Nationals to buy their preferred partial forum, the RSDC. At oral argument before this Court on March 31, 2017, the Nationals promised to post a bond to "guarantee repayment of" $25 million previously advanced by MLB to the Nationals. *TCR II*, 153 A.D.3d at 158. The plurality relied on the Nationals' promise to *guarantee* repayment of the $25 million when it concluded that MLB would not have a financial interest in the new arbitration and that remand to the RSDC was appropriate. *Id.* (The dissent concluded that a bond would not cure MLB's prejudice and the concurrence did not address it.)

But the Nationals reneged on their promise to the Court. Instead, during the second arbitration, MLB and the Nationals negotiated an agreement to *condition* the Nationals' repayment of the $25 million and signed it on February 9, 2018 without MASN's or the Orioles' knowledge. A.941. Under the February 9, 2018 agreement, the Nationals were *only* required to repay the $25 million to MLB *if the RSDC held the hearing*, which could occur *only* if MLB denied MASN's recusal request and ensured the Nationals received the biased MLB forum. In other words, to ensure that the arbitration occurred before the Nationals' preferred partial MLB forum, and not before an independent arbitrator, the Nationals *conditioned* their repayment of the $25 million on the RSDC holding the hearing.

MASN and the Orioles demanded that MLB and its RSDC recuse themselves on March 6, 2018 on the basis that, due to MLB's public prejudgment

of the dispute in favor of the Nationals, MLB's RSDC could not act as impartial arbitrators. A.1138-42. But unbeknownst to MASN and the Orioles, MLB had a $25 million financial stake in denying that request. A.941. MLB and the Nationals revealed their February 9, 2018 agreement on March 12, 2018, *after* MASN and the Orioles had made their recusal demand on March 6, 2018. A.941. The RSDC denied MASN's and the Orioles' recusal demand. A.953.

An arbitral body's taking a $25 million stake in the arbitrators' recusal decision is abhorrent. Impartial arbitral bodies do not secretly devise agreements with one party to an arbitration giving the arbitral body a financial stake in the arbitrators' decision of whether to recuse themselves. The February 9, 2018 agreement is an "objective fact[] inconsistent with impartiality" which violates section 10(a)(2) of the FAA and requires the Court to vacate the award. *See Pitta v. Hotel Ass'n of N.Y.C., Inc.*, 806 F.2d 419, 423-24 n.2 (2d Cir. 1986). The Supreme Court's confirmation of the award despite the partiality evident from the February 9, 2018 agreement is contrary to governing FAA precedent.

Second, the RSDC refused to disclose *anything* that the Commissioner or his staff told the RSDC about this dispute. The Commissioner appoints the RSDC and exercises plenary power over MLB teams. A.194-95, 245. The record shows that the Commissioner (erroneously) believes that MASN and the Orioles are wrong, and the Nationals are right, and that he has *publicly stated* that he thinks the

Nationals should prevail. A. 1003, 1205. The Commissioner has also declared that MASN "will be required to pay" the rights fees in the vacated first award "sooner or later." A.1009-11. The Commissioner and his staff continued to speak privately to the RSDC about this dispute. MLB's lawyer Joseph Shenker *stated* in a March 22, 2018 letter that MLB staff *were speaking with the RSDC*, and told the parties that "the RSDC is not a separate entity from MLB." A.1051.

In light of the Commissioner's bias, the RSDC's refusal to disclose their communications with the Commissioner or his staff about this dispute violates their obligation under section 10(a)(2) of the FAA to disclose *everything* that "might create an impression of possible bias." *Sanko S.S. Co. v. Cook Indus, Inc.*, 495 F.2d 1260, 1263-64 (2d Cir. 1973). MASN and the Orioles have the right to know what the Commissioner and his agents told the RSDC. The RSDC's failure to disclose these communications violates the FAA and requires vacatur of the award. The Supreme Court's ruling that the RSDC had no obligation to disclose what the Commissioner told them is directly contrary to governing precedent.

Third, the RSDC denied MASN and the Orioles their fundamental right to present their case. The central issue in the arbitration was the valuation methodology required by the 2005 Settlement Agreement, which instructs the RSDC to determine the fair market value of the rights fees "using the RSDC's established methodology for evaluating all other related party telecast agreements

in the industry." A.793. The Nationals relied on a November 2011 letter written by the Commissioner (then deputy Commissioner), A.1153, which MASN contends is wrong and inconsistent with MLB's prior statements, A.1173-75. Thus, MASN requested that MLB disclose all of its statements about "the RSDC's established methodology." A.1012-21. MLB refused to disclose this information, and the RSDC refused to require MLB to disclose it, on the basis that documents after the 2005 Settlement Agreement were *not relevant* and *not probative* to the dispute over the methodology required by the Settlement Agreement. A.1057.

In the award, however, the RSDC *relied on* the Commissioner's November 2011 letter as *dispositive*, and drew an "adverse inference" against MASN based on the lack of evidence about the November 2011 letter, A.762-65, the very type of evidence that MASN requested but which MLB refused to disclose and which the RSDC refused to require MLB to disclose. The RSDC's use of the incomplete evidentiary record that MLB and the RSDC created to rule against MASN was a denial of a fundamentally fair hearing under the FAA and requires vacatur of the award. *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1997).

Fourth, the RSDC "exceeded [its] powers." 9 U.S.C. § 10(a)(4). As stated above, a central issue in the arbitration was the meaning of the RSDC's mandate. In knowing violation of controlling Maryland law that MASN and the Orioles cited, the RSDC refused to determine the parties' intent "*at the time the agreement*

was effectuated." *Schneider Elec. Bldgs. v. Western Surety Co.*, 149 A.3d 778, 787 (Md. App. 2016) (emphasis added). Instead, the RSDC based its interpretation of its mandate—a contractual provision contained in the March 2005 Settlement Agreement—on the RSDC's *opinion* that, in its view, the Orioles had received enough money as of April 2019. A.759-60, 784. The RSDC thus did what Maryland law (and the law of most states) prohibits: it interpreted a contract based on its opinion of the contract's outcome over a decade after it was signed.

The Court should vacate the award on at least one of the above grounds, and should order rehearing of the arbitration before an arbitral forum unaffiliated with MLB. The Court has the power to order rehearing of the arbitration in a new forum to ensure fundamental fairness, and should do so here to finally afford MASN and the Orioles their statutory right to an impartial arbitration.

* * *

Finally, even if the Court affirms the Supreme Court's confirmation of the award, the Court must still reverse the money judgment entered by the Supreme Court. The Settlement Agreement does not give the RSDC any authority to award monetary damages and the RSDC did not. The RSDC stated that "its authority runs no further than determining the fair market value of the rights at issue," and *did not perform a calculation* of any damages. A.754. The only award the RSDC made was a declaration of "the fair market value of MASN's rights to the telecast

of each of the Orioles and Nationals." A.785. The RSDC found that the money due the Nationals would be *less than the fair market valuation the RSDC reached* in its award, because calculating damages would require subtracting the rights fees and profit distributions that MASN had *already paid* to the Nationals during 2012-2016. A.783-84. The Supreme Court's unlawfully modified the RSDC's declaratory award by taking the additional step of calculating damages (and doing so inaccurately). *Zeiler v. Deitsch*, 500 F.3d 157, 170 (2d Cir. 2007).

QUESTIONS PRESENTED

1. Whether the February 9, 2018 agreement, which MLB and the Nationals secretly negotiated during the second arbitration, and which required the Nationals to repay the $25 million to MLB *only if* MLB's RSDC conducted the arbitration, is an objective fact inconsistent with impartiality.

The Supreme Court erroneously answered "no."

2. Whether the RSDC violated the FAA by refusing to disclose all communications with MLB about the dispute, when the MLB Commissioner had publicly argued against MASN's and the Orioles' position and in favor of the Nationals' position, and had publicly stated that "sooner or later" MASN "will be required to pay" the Nationals the telecast rights fees set in the previous arbitration award issued by the RSDC that the court vacated for evident partiality

The Supreme Court erroneously answered "no."

3. Whether the RSDC denied MASN's right to a fundamentally fair arbitration when it refused to require MLB to disclose its communications about "the RSDC's established methodology for evaluating all other related party telecast agreements in the industry" made after the 2005 Settlement Agreement on the ground that these communications were not relevant, but then relied on a November 2011 letter from the Commissioner to rule against MASN.

The Supreme Court erroneously answered "no."

4. Whether the RSDC exceeded its powers under the March 2005 Settlement Agreement by relying on the RSDC's subjective opinion about how much money the Orioles have received under the Settlement Agreement when interpreting the RSDC's mandate to "us[e] the RSDC's established methodology for evaluating all other related party telecast agreements in the industry."

The Supreme Court erroneously answered "no.'

5. Whether, because of the Commissioner's public prejudgment of the dispute, and MLB's refusal to conduct an arbitration free from evident partiality in two successive arbitrations, the Court should order rehearing of the arbitration before a different and neutral panel outside of MLB's ambit and control.

The Supreme Court did not answer this question.

6. Whether the Supreme Court unlawfully modified the arbitration award by performing a calculation of monetary damages due to the Nationals, and

entering a money judgment against MASN for that amount, where the Settlement Agreement did not give the arbitrators authority to award monetary damages and the arbitration award did not include a calculation of monetary damages.

The Supreme Court erroneously held that the arbitration award was an award of monetary damages and that it was exercising a "ministerial" function by calculating what the Supreme Court asserted were the Nationals' damages.

STATEMENT OF THE CASE

The background to this dispute prior to the second arbitration is contained in this Court's July 13, 2017 decision and order. *TCR II*, 135 A.D.2d 140. Since several events that occurred during the first arbitration, including MLB's prejudice and entry into the August 26, 2013 agreement with the Nationals, are relevant to this appeal, MASN and the Orioles will highlight those events where appropriate.

A. The Settlement Agreement

On March 28, 2005, MLB, the Commissioner, the Orioles, MASN and the Nationals (then-owned by MLB) entered into the Settlement Agreement. A.786. The purpose of the Settlement Agreement was to provide the Orioles with monetary compensation in perpetuity for the perpetual damages to the Orioles caused by MLB's relocation of the Montreal Expos to Washington, D.C. A.806-13. From 1973 to 2005, the Orioles were the only MLB team in their exclusive home television territory. MLB's relocation of the Expos into Washington, D.C.,

the most populous part of that television territory, cut the Orioles off from two-thirds of the Orioles' historic fan base and transferred that fan base to the relocated Expos (which MLB subsequently renamed the Nationals). MLB acknowledged that its relocation of the Expos to Washington D.C., just 38 miles from the Orioles' home at Camden Yards in Baltimore, would inflict perpetual financial injury on the Orioles and on the Baltimore and Maryland communities. A.806-13.

The Settlement Agreement provides that the Orioles and Nationals must license the rights to telecast all of their baseball games to MASN (formerly the Orioles' own sports network, TCR, rebranded as MASN) in perpetuity. A.790-91. The Settlement Agreement requires MASN to make equal annual payments to the Orioles and Nationals (rights fees) for the rights to telecast their games. A.793 The Settlement Agreement then grants the Orioles the right to a supermajority share of MASN's residual profits (its revenues remaining after payment of all expenses including rights fees) as compensation. A.794, 808. Since the Nationals receive 50% of all rights fees but only a minority share of MASN's profits, the Settlement Agreement gives the Nationals a strong incentive to seek the highest rights fees possible and to try to ultimately eliminate MASN's profits.

B. The Parties' Agreement to Arbitrate Before the RSDC

The Settlement Agreement set the amount of telecast rights fees to be paid to the teams for the first seven years from 2005-2012. A.792. Starting in

2012, the Settlement Agreement requires MASN, the Orioles, and the Nationals to "negotiate in good faith using the most recent information available which is capable of verification to establish the fair market value of the telecast rights" for each subsequent five-year period (i.e., 2012-2016). A. 793. If the parties cannot agree, they must mediate. *Id.* If mediation fails, MLB's RSDC must determine the fair market value of the rights fees "using the RSDC's established methodology for evaluating all other related party telecast agreements in the industry." *Id.*

MLB's RSDC is a standing committee within MLB that consists of three representatives from MLB teams who are each appointed personally by the Commissioner. A.978, 1051. The RSDC was created as part of MLB's Revenue Sharing Plan to ensure that the teams share all appropriate revenue. As part of this function, "[t]he RSDC typically reviews related-party transactions to see if the revenues that teams declare in the form of license fees are at market value or too low." A.740. Once the RSDC determines the amount of rights fees owed from telecast rights, those rights fees, in turn, are factored into other calculations that affect MLB teams, such as revenue sharing (or, in the case of the Orioles, their compensation for the Expos' relocation through the profits generated by MASN).

The members of the RSDC serve at the pleasure of the Commissioner and the Commissioner can remove them at any time for any reason. Staffed and advised by MLB personnel, MLB lawyers, and MLB consultants, the RSDC has no

separate legal or practical existence; it is part and parcel of MLB. Indeed, in a March 22, 2018 letter, MLB's lawyer Joseph Shenker of Sullivan & Cromwell stated that "the RSDC is not a separate entity from MLB." A.1051.

C. "The RSDC's Established Methodology for Evaluating All Other Related Party Telecast Agreements in the Industry"

Because, in the event of a dispute, the RSDC is required to determine the fair market value of the rights fees using "the RSDC's established methodology for evaluating all other related party telecast agreements in the industry," A.793, in March 2012 MASN used that methodology to determine the fair market value of the rights fees before the negotiation with the Nationals. A.1739. To determine the fair market value of the rights fees, MASN applied the same methodology the RSDC had applied without deviation in every related party telecast agreement evaluation the RSDC had disclosed. The RSDC referred to this methodology as the "Bortz methodology," A.1710-11, a reference to Bortz Media and Sports Group, the firm that MLB hired shortly after MLB created the RSDC to use its methodology in RSDC proceedings. Commissioner Bud Selig directed the RSDC to apply the Bortz methodology without "any material variation." A.1711.

Thus, in January 2012, with MLB's permission, MASN engaged Bortz Media and Sports Group to apply the Bortz methodology to determine the fair market value of the rights fees for the 2012-2016 period. Bortz's calculation yielded a fair market value for 2012-2016 that was, on average, approximately $40

million per team per year (approximately $200 million per team for 2012-2016). A.1739. This was an increase of approximately $65 million over the $135 million in rights fees MASN paid the teams during 2007-2011. A.792. The Nationals rejected MASN's determination at a meeting where Edward Cohen, a Nationals' executive, literally ripped it to pieces, and sought an RSDC arbitration.

During 2012-2016, MASN *paid* the Nationals and the Orioles the rights fees (approximately $200 million) determined using the Bortz methodology. A.1739, 1446. In addition, during 2012-2016, MASN distributed approximately $276 million in profits to the teams in proportion to the teams' ownership interests. A.1446. MASN's profit margin during 2012-2016, about 33%, approximated the industry median and average profit margin during that period. This dispute is an attempt by the Nationals to use an "evidently partial" MLB forum to try to get more money than the Settlement Agreement's methodology provides.

D. MLB Conducts an Evidently Partial Arbitration

The first RSDC arbitration was held on April 4, 2012. During the first arbitration, MLB and its RSDC subjected MASN and the Orioles to a fundamentally unfair and biased proceeding. MLB's partial conduct included permitting MLB's own long-time counsel, Proskauer Rose, to concurrently represent the RSDC arbitrators or their business interests, MLB, and MLB's Commissioner individually at the same time they were representing the Nationals

in the arbitration. Despite MASN's and the Orioles' objections, MLB refused to disclose the nature of these overlapping and conflicting relationships, or take any steps to correct this obvious unfairness. *TCR II*, 153 A.D.3d at 143.

After the hearing and the disclosure of a tentative award, but before the award was actually issued, MLB took a $25 million financial stake in the dispute. On August 26, 2013, MLB entered into an agreement with the Nationals whereby MLB advanced the Nationals $25 million. A.1134-35. Pursuant to the August 26, 2013 agreement, "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 the Commissioner's Office to cover" the $25 million advance. A.1135. For MLB to recover the $25 million from MASN under the August 26, 2013 agreement, (i) the RSDC would have to "issue[] a decision," and (ii) the RSDC decision would need to award the Nationals at least $25 million more than they received from MASN for telecast rights fees in 2012-2013. *Id*. The Commissioner confirmed this in contemporaneous emails. A.464.28.[1]

MLB delivered the first RSDC award to the parties on June 30, 2014. *See* A.815. The RSDC award was replete with legal and factual errors indicating a predetermined result. It set the teams' telecast rights fees for 2012-2016 at

[1] The August 26, 2013 agreement also provided for MLB's recovery of the $25 million out of the proceeds of any settlement (a "Comcast transaction"). A.1135. However, once the RSDC issued its award on June 30, 2014, a Comcast transaction was no longer an option.

approximately $59,600,000 per team per year (about $300 million per team for 2012-2016), and approximately $200,000,000 more than the total rights fees determined by (and paid by) MASN pursuant to the established methodology required by the Settlement Agreement. A.833. The rights fees imposed by the RSDC eliminated almost all of MASN's profits, almost entirely eliminating the compensation MLB promised the Orioles when the parties signed the Settlement Agreement, and threatening MASN's economic viability. It was revealed during the vacatur proceedings in the Supreme Court that MLB staff, not the RSDC, drafted the award. *TCR II*, 153 A.D.3d at 174 (Acosta, P.J., dissenting).

E. The Supreme Court Vacates the First Award

On August 28, 2014, the Supreme Court (Marks, J.) granted a preliminary injunction, finding that MASN was likely to succeed on the merits. *TCR I*, 2015 WL 6746689 at *4. After the Supreme Court's ruling, the Commissioner made public statements against MASN and the Orioles, and in favor of the Nationals. A.1205. He also declared that: "I think the agreement's clear . . . . 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 fees." A.1008-11.

The Commissioner *then submitted three affidavits* to the Supreme Court arguing against MASN and the Orioles, and in favor of the Nationals. A.959-1007. In particular, the Commissioner took a position on a central issue in dispute: the

methodology that the Settlement Agreement requires the RSDC to use to determine the fair market value of the clubs' telecast rights fees. On that issue, the Commissioner argued (wrongly) that MASN's position "does not conform to the text" of the Settlement Agreement. A.1003. The Commissioner has never retracted that statement nor any other he has made about this dispute.

In a November 4, 2015 order, the Supreme Court vacated the award, holding that MLB's conduct "objectively demonstrate[d] an utter lack of concern for fairness of the proceeding," such that it was "inconsistent with basic principles of justice." *TCR I*, 2015 WL 6746689 at *12. However, in a footnote and without citation to authority, the Supreme Court stated that it lacked authority to disqualify the RSDC from presiding over any rehearing of the dispute. *Id.* at *13 n.21.

F. This Court Unanimously Affirms the Supreme Court's Vacatur of the First Award, but Divides 2-1-2 on the Question of Whether MLB's RSDC May Rehear the Dispute

On July 13, 2017, this Court unanimously affirmed the vacatur ruling in a *per curiam* opinion joined by all five Justices. *TCR II*, 153 A.D.3d at 142. However, the panel sharply divided 2-1-2 on the question of the required forum for rehearing the arbitration. The question of the proper forum for rehearing produced three separate opinions, each advocating a different legal standard: a two-Justice plurality, a one-Justice concurrence, and a two-Justice dissent. No opinion received a quorum of three Justices. *See* N.Y. Const. Art. VI § 4.b.

The plurality (Andrias and Richter, JJ.) assumed that courts have the power to disqualify the contractually-designated arbitral forum on the ground that a rehearing before that forum would be fundamentally unfair, but disagreed with the dissent over the standards governing the exercise of the Court's power to reform the agreement. Specifically, the plurality believed that a showing that the *new* RSDC arbitrators were biased would be required in order to reform the arbitration agreement or disqualify the RSDC, and that MASN and the Orioles had not shown that the new arbitrators were biased. *TCR II*, 153 A.D.3d at 143-44, 160. No case cited by the plurality, however, holds that such a standard applies.

The plurality recognized the dissent's point that "MLB has a direct financial stake in the amount of the fees that will be awarded in the second arbitration because MLB will only recoup its $25 million advance if the Nationals are awarded more than the amount MASN and the Orioles have proposed." *Id.* at 157-58. But the plurality concluded it did not disqualify the RSDC because "the Nationals have offered [at oral argument] to post a bond to guarantee repayment of the advance to MLB regardless of the outcome of the arbitration." *Id.* at 158.

The concurrence (Kahn, J.) did not express any view on the reasoning of the plurality. The concurrence voted to remand the arbitration to the RSDC on a "different ground[]" from the plurality—that absent a showing that the arbitration

clause was *procured by* "fraud, duress, coercion or unconscionability," the court had no power to order rehearing before a different arbitral forum. *Id.* at 161.

The two-Justice dissent (Acosta and Gesmer, JJ.) disagreed with the legal standards applied by both the concurrence and the plurality. Citing the decisions of several courts, including the New York Court of Appeals, the dissent concluded that courts "have the obligation, and the power, to ensure fundamental procedural fairness in an arbitration" when "the parties' chosen forum has shown itself to be unwilling to guarantee a baseline of impartiality." *Id.* at 163-64. Applying that standard to the record, the dissent concluded that "reformation of the agreement to require a rehearing not administered by MLB or the RSDC is warranted." *Id.* at 181. The dissent's conclusion that the Court must order rehearing before a neutral arbitral forum that is unaffiliated with MLB was based on several factors:

1. "MLB's apparent lack of concern for fairness at the first proceeding," *id.* at 174;

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

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

4. "evidence that 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," *id.*;

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

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

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

The dissent concluded, based on these factors, that a rehearing before MLB, even with new RSDC members, would be fundamentally unfair. *Id.* at 177.

In response to the plurality's central premise, that "the RSDC [conducting the second arbitration] is comprised of three new members," the dissent concluded that this fact "does not change the analysis, because MLB retains its significant influence over the panel." *Id.* at 176. As the dissent observed, although the Commissioner does not vote, "his influence on the panel, including his ability to marshal and exclude evidence and draft an award, remains substantial." *Id.* The dissent predicted that "[g]iven the Commissioner's public comments touching upon the merits of the dispute and telegraphing his support for the Nationals' position, it is highly unlikely that the RSDC would come to a different conclusion if it were to rehear the case." *Id.* The second arbitration, and the second award issued by the RSDC, demonstrate that the dissent's prediction was correct.

G. MLB Continues to Violate the FAA by Engaging in Additional Evidently Partial Conduct During the Second Arbitration

On January 19, 2018, the Nationals wrote to MLB and asked MLB to schedule a rehearing before the RSDC. Unbeknownst to MASN and the Orioles, the Nationals had reneged on their promise to this Court at oral argument on March 31, 2017 to guarantee repayment of the $25 million in a bond. Instead, in January and early February of 2018, MLB and the Nationals privately negotiated a different agreement that did not guarantee repayment, but instead gave MLB a $25 million incentive to hold the hearing. On February 9, 2018, MLB and the Nationals signed that agreement in secret. A.941-42. The February 9, 2018 agreement *conditioned* the Nationals' repayment of the $25 million on the RSDC's hearing the arbitration, which could only occur if MLB and the RSDC *refused* MASN's request for MLB and the RSDC to recuse themselves. *If a hearing was held before any arbitrator other than the RSDC, the Nationals could keep the $25 million*. *Id.* In sum, with respect to the $25 million, the following occurred, in chronological order:

1. On August 26, 2013, MLB paid $25 million to the Nationals.

2. Under the August 26, 2013 agreement, MLB could only recover the $25 million from MASN, not the Nationals, and only if (i) the RSDC "issue[d] a decision," and (ii) that RSDC decision awarded the Nationals at least $25 million more than the Nationals had already received from MASN for 2012 and 2013. A.1134-35, 464.28.

3. On November 4, 2015, Justice Marks stated in dicta that the August 26, 2013 agreement did not give MLB a financial stake in the arbitration because the RSDC reached its decision in 2012 *before* the

August 26, 2013 agreement was entered. *TCR I*, 2015 WL 6746689 at *8. Justice Marks stated that MASN's and the Orioles' argument that the August 26, 2013 agreement gave MLB a financial stake in the arbitration "would be stronger" if the August 26, 2013 agreement had been made *before* the RSDC had reached a decision. *Id.*

4. On March 31, 2017, at oral argument before this Court, the Nationals promised to "post a bond to guarantee repayment of the advance to MLB regardless of the outcome of the arbitration." *TCR II*, 153 A.D.3d at 158. The plurality concluded that the Nationals promise of a guarantee of repayment would ameliorate the dissent's concern that MLB had a financial stake in the arbitration. *Id.*

5. The Nationals did not post a bond and have never posted a bond, despite the Nationals' express promise to this Court.

6. Instead of posting a bond, MLB and the Nationals entered into an agreement on February 9, 2018 conditioning the Nationals' repayment of the $25 million. A.941-42. Under the February 9, 2018 agreement, the Nationals were only required to repay the $25 million to MLB if the RSDC held the hearing. *If anyone other than the MLB-controlled RSDC presided over the hearing*, *the Nationals could keep the $25 million*. This agreement gave MLB a direct $25 million financial stake in MLB's and the RSDC's decision of whether to recuse.

7. On March 6, 2018, MASN and the Orioles demanded that MLB and the RSDC recuse themselves because, due to MLB's bias and control over the RSDC, the RSDC cannot act impartially. A.1138-42.

8. On March 12, 2018, *after* MASN's and the Orioles' recusal demand, the Nationals revealed the February 9, 2018 agreement. A.940.

9. On April 11, 2018, MASN and the Orioles strenuously objected to the February 9, 2018 agreement on the ground that it gave MLB a $25 million financial interest in holding the hearing. A.943-46.

10. On May 10, 2018, MLB denied MASN's recusal demand, and denied MASN's objection to the February 9, 2018 agreement. A.953-56.

11. On November 5, 2018, ten days before the scheduled hearing, the Nationals repaid the $25 million to MLB. A.556

The Nationals therefore induced MLB to ensure a hearing occurred before the RSDC. Unlike the promised (but never obtained) bond, under which the Nationals' repayment of the $25 million would have been guaranteed "regardless of the outcome of the arbitration," *TCR II*, 153 A.D.3d at 158, under the February 9, 2018 agreement, the Nationals' repayment of the $25 million was *conditioned* on an RSDC hearing. A.941. The Nationals provided a $25 million incentive to MLB to ensure that the hearing occurred before the Nationals' preferred partial forum, knowing that the RSDC would produce the result the Nationals desired and that which had been expressed publicly by the MLB Commissioner.

Predictably, the MLB-controlled RSDC denied MASN's and the Orioles' recusal demand—recusal would have cost MLB $25 million. Despite the fact that the July 13, 2017 plurality only garnered two votes and did not address the RSDC's recusal obligations in the second arbitration, the RSDC relied on the plurality to deny MASN's and the Orioles' recusal demand. A.953-54. The RSDC did not cite any other authority that would justify their refusal to recuse. Due to the Commissioner's bias against MASN and the Orioles, and his and his agents' plenary power over the league, the RSDC, the arbitrators, and their teams, the RSDC could not evaluate this dispute independently and impartially.

MLB and the RSDC did not stop there. Despite MASN's and the Orioles' repeated requests to the RSDC to disclose their communications with the Commissioner and his staff, MLB and the RSDC took the unlawful position that MASN and the Orioles *could not review* what the Commissioner and his staff told the new RSDC about this dispute. A.948, 954-55. MLB confirmed that it was communicating with the RSDC about the dispute in a March 22, 2018 letter from MLB's lawyer, Joseph Shenker of Sullivan & Cromwell. A.1051. In other words, not only did the RSDC deny MASN's recusal request, the RSDC denied it without allowing MASN and the Orioles to review what the prejudiced Commissioner and MLB staff told the RSDC. MLB and the RSDC relied on the July 13, 2017 plurality to support their refusal to disclose these communications, A.948, 954-55, but the plurality had said nothing about the new RSDC's disclosure obligations.

The Commissioner *continued* to publicly comment on the dispute during the second arbitration, including at the July 17, 2018 All-Star Game—an event where all or most owners, and many league and team executives, were present and paying particular attention to the statements of the Commissioner. At the All Star Game, the Commissioner referred to the dispute as an "unfortunate boat trip," claimed that MLB treated the Orioles "leniently" in the dispute, and accused the Orioles of failing to "honor" their "agreements." A.1143. He then stated that "the appropriate course is to try and enforce the agreement and get this dispute behind

us." *Id.* The RSDC arbitrators surely understood their marching orders: "enforce the agreement" meant reaching the same result as the first RSDC.

H. The RSDC Issues the Second Award

The RSDC issued the second award on April 15, 2019. A.736-85. As Justice Acosta's dissent predicted, the second RSDC award *reached the same* result as the first, a fair market valuation of approximately $59,400,000 per team per year—an amount that is within 0.2% of the first award. *Compare* A.785 *with* A.833. Yet, remarkably, the second RSDC applied a completely different methodology from the first RSDC to reach that same result, despite the RSDC's contractual mandate to use "the RSDC's established methodology for evaluating all other related party telecast agreements in the industry." A.793. The RSDC's use of two completely different methodologies demonstrates that it is not using any "established methodology for evaluating all other related party telecast agreements in the industry," but rather is simply trying to justify a predetermined result that the Commissioner guaranteed would come "sooner or later." A.1009-11.

The RSDC justified its application of the new methodology by citing a November 2011 letter written by the Commissioner that purports to describe the methodology. A.762. Incredibly, the RSDC relied on this November 2011 letter despite the fact that MLB and the RSDC stated before the hearing that post-Settlement Agreement (post-March 28, 2005) communications were *not relevant* to

and *not probative* of the dispute between the parties over the required methodology. A.1057. In this pre-hearing ruling, the RSDC refused to disclose any of its post-2005 communications about the required methodology on the ground that they were *not relevant or probative.* A.1057. But the RSDC then used that very type of evidence in the award to rule against MASN. A.762, 764-65.

The second award demonstrated that the RSDC imposed disparate and inferior treatment on MASN and the Orioles compared to other team-owned networks (related-party telecast agreements). In the award, the RSDC asserted that, under its "established methodology for evaluating all other related party telecast agreements in the industry," the *maximum* profit margin that a team-owned network is allowed to achieve under a related-party telecast agreement is *20%.* A.678. Yet in its evaluation of the Boston Red Sox telecast agreement with New England Sports Network ("NESN"), the RSDC ruled that NESN may generate a *minimum* margin of 19%, increasing up to *30%* after five years. A.1552. The second award constituted blatant, and unexplained, disparate treatment of MASN compared to the RSDC's evaluations of other team-owned networks.

I. The Supreme Court Confirms the Award and Then Modifies the Award by Calculating Damages Not Calculated in the Award

In an August 22, 2019 decision and order, the Supreme Court confirmed the second award, but then improperly modified it. As explained below, in its confirmation decision, the Supreme Court relied heavily on the two-Justice

plurality opinion in this Court's July 13, 2017 order, despite the fact that the plurality did not receive the support of three Justices and did not address MLB's and the RSDC's FAA obligations on rehearing. The Supreme Court failed to cite, much less substantively address, the FAA precedent, including from the Second Circuit, that MASN and the Orioles discussed at length in their briefing and at oral argument. The Supreme Court also materially misinterpreted the record, including by severely misinterpreting the February 9, 2018 agreement and the prior August 26, 2013 agreement between MLB and the Nationals concerning the $25 million.

The Supreme Court then improperly *modified the award* in its decision confirming it by calculating what the Supreme Court believed were the monetary damages due the Nationals. The arbitration award, however, does not contain such a damages calculation. The RSDC's only conclusion was a declaration of "the fair market value of MASN's rights to the telecast of each of the Orioles and Nationals." A.785. The RSDC observed that the damages due the Nationals would be *lower* than its fair market value determination, because the sum due the Nationals must account for rights fees and profit distributions MASN *had already pai*d the Nationals during the 2012-2016 period. A.784. However, the RSDC did not calculate any damages award to the Nationals. *Id.* By calculating damages that the RSDC did not, the Supreme Court unlawfully modified the award.

The Supreme Court permitted MASN and the Orioles to reargue the issue of whether the award actually awarded the Nationals monetary damages, or was limited to a declaration of the fair market value of the teams' rights. The Supreme Court acknowledged at oral argument that it was a "close question," A.46, but in a November 14, 2019 decision and order the Court adhered to its prior erroneous decision that the Court could calculate monetary damages. A.39.

For the reasons stated herein, the Supreme Court's December 9, 2019 judgment, A.90, and its August 22, 2019 and November 14, 2019 decisions and orders on which the judgment was based, A.7, 39, must be reversed and the RSDC's arbitration award must be vacated. The Court should order rehearing of the arbitration before an independent arbitrator. MLB's and the RSDC's conduct over two consecutive arbitrations, which both exhibited evident partiality in reaching essentially the same result that the Commissioner declared would come "sooner or later," has demonstrated that such a genuinely impartial rehearing before an unbiased arbitral tribunal is the only way to end this matter.

ARGUMENT

I. MLB's Ex Parte February 9, 2018 Agreement with the Nationals Demonstrates Evident Partiality and Requires Vacatur

Section 10(a)(2) of the FAA, 9 U.S.C. § 10(a)(2), requires the Court to vacate an arbitration award "where there was evident partiality." The Second Circuit has held that "evident partiality" exists, requiring vacatur, when there is an

"objective fact inconsistent with impartiality." *Pitta v. Hotel Ass'n of New York City, Inc.*, 806 F.2d 419, 423 n.2 (2d Cir. 1986); *see TCR II*, 153 A.D.3d 140, 169 (Acosta, P.J., dissenting). In *Pitta*, the Second Circuit held that an arbitrator's failure to recuse himself from deciding whether he was properly dismissed from employment as an arbitrator for a hotel association created "evident partiality" because of the "risk of unfairness" in an arbitrator's deciding the validity of the arbitrator's own dismissal from a lucrative position. *Pitta*, 806 F.2d at 424.

Evident partiality requires vacatur of an award even where there is no direct evidence that it affected the result. Thus, the Second Circuit found evident partiality where the father of the arbitrator was the president of an international labor union, and the district union of that international union was a party to the arbitration, despite no evidence that the father-son relationship affected the arbitrator's decision. *Morelite Const. Co. v N.Y.C. Dist. Council Carpenters Ben. Funds,* 748 F.2d 79, 84-85 (2d Cir. 1984); *see U.S. Elecs., Inc. v. Sirius Satellite Radio, Inc.*, 17 N.Y.3d 912, 914 (2011) (adopting Second Circuit's evident partiality test in 9 U.S.C. § 10). This bright-line rule is justified due to the binding nature of arbitration and limited judicial review. As the U.S. Supreme Court has cautioned, "we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free reign

to decide the law as well as the facts and are not subject to appellate review." *Commonwealth Coatings Corp. v. Cont. Cas. Co.*, 393 U.S. 145, 149 (1968).

MLB's February 9, 2018 agreement with the Nationals, an *ex parte* agreement negotiated by MLB and the Nationals in secret,[2] is an "objective fact inconsistent with impartiality." *Pitta*, 806 F.2d at 423 n.2; *U.S. Elecs.*, 17 N.Y.3d at 914 ("adopt[ing] the Second Circuit's reasonable person standard"); *Floss v. Ryan's Family Steak Houses, Inc*., 211 F.3d 306, 314 (6th Cir. 2000). The February 9, 2018 agreement gave MLB, which appoints the RSDC arbitrators, administers the arbitration, and exercises plenary control over the arbitrators' teams, a $25 million financial interest in ensuring that its RSDC did not recuse itself and that it held the hearing. Impartial arbitral forums do not enter into *ex parte* agreements with one party to an arbitration requiring the party to pay $25 million to the forum if a hearing is held, but allowing the party to keep the $25 million if the forum's arbitrators decide to recuse themselves. If the AAA entered into such an agreement with a party, it would shock the arbitration community. The February 9, 2018 agreement gave MLB a $25 million incentive to ensure that

[2] Contrary to the Supreme Court's characterization, A.22, the February 9, 2018 agreement *was* a secret agreement. The record demonstrates that MLB and the Nationals entered into it without the knowledge or consent of MASN or the Orioles. A.940-42. The Nationals revealed the February 9, 2018 Agreement to MASN and the Orioles more than one month after it was signed, A.940, and after MASN and the Orioles made their recusal demand on the RSDC, A.1138.

a hearing was held; it could not consider the issue of recusal impartially. MLB's entry into the February 9, 2018 agreement is the *antithesis* of impartiality.

The Supreme Court cited *no case* stating that the FAA permits MLB to take a substantial financial interest in the arbitrators' decision of whether to recuse. The *only* authority the Supreme Court cited to support its conclusion was the July 13, 2017 plurality opinion. A.21-25. But the plurality *could not and did not address* the February 9, 2018 agreement, which was entered after the July 13, 2017 plurality. Instead, the plurality relied on the Nationals' promise at oral argument to "post a bond to guarantee repayment of the advance to MLB regardless of the outcome of the arbitration," *TCR II*, 153 A.D.3d at 158, which the Nationals never did. Unlike the bond guaranteeing repayment that the Nationals promised this Court they would post, and which the plurality relied upon in denying the motion to remand the arbitration to a neutral forum, the February 9, 2018 agreement *did not* guarantee repayment of the $25 million. The February 9, 2018 agreement *conditioned* repayment of the $25 million *on the RSDC holding a hearing.*

The Supreme Court also materially misinterpreted the relationship between the February 9, 2018 agreement between MLB and the Nationals, A.941, and the prior August 26, 2013 agreement between MLB and the Nationals, A.1134-35. The Supreme Court appeared to believe that the February 9, 2018 agreement could not have influenced the RSDC's recusal decision because MLB would still have

been entitled to repayment of the $25 million under the August 26, 2013 agreement *even if* the RSDC recused itself. A24. But the Supreme Court's interpretation is contrary to the plain terms of the August 26, 2013 agreement. Under the August 26, 2013 agreement, MLB could only recover the money from MASN, not the Nationals, and only if (i) the RSDC "issue[d] a decision," and (ii) the RSDC decision awarded the Nationals at least $25 million more than the Nationals had already received from MASN for 2012 and 2013. A.1135. The Commissioner confirmed these terms in contemporaneous emails. A. 464.28. If the RSDC did not issue a decision, MLB could not recover the $25 million under *either* the February 9, 2018 agreement or the August 26, 2013 agreement. The February 9, 2018 agreement did not, as the Supreme Court asserted, A.24, merely convert a prior obligation to repay the money into a lump sum. The February 9, 2018 agreement *created a new contractual right* of MLB to receive $25 million from the Nationals if MLB held the hearing. Contrary to the Supreme Court's ruling, MLB *did not* have that contractual right under the August 26, 2013 agreement.

The Supreme Court also reasoned that the February 9, 2018 agreement is permissible because, in contrast to the general dispute resolution provision of the Settlement Agreement (section 8), section 2.J.3, which governs disputes over rights fees, does not provide for an alternative forum if MLB has a financial interest in the Nationals. A.23-24. The Supreme Court's reasoning cannot be squared with

the FAA. While section 8 of the Settlement Agreement requires AAA arbitration if MLB has "an ownership or financial interest in the Nationals or [MASN]," A.798, section 8 does not abrogate the FAA's requirement that *all* arbitrations be free from evident partiality. The parties agree that the FAA applies here.

The Supreme Court also based its decision on its apparent view that MASN's and the Orioles' demand that the RSDC recuse itself was "thin and speculative." A.23. But the FAA requires vacatur for evident partiality when the "particular relationship at issue" is inconsistent with impartiality. *Morelite*, 748 F.2d at 84; *see U.S. Elecs.*, 17 N.Y.3d at 914 (adopting Second Circuit's standard in determining "evident partiality" under FAA). The February 9, 2018 agreement, which created a financial stake by MLB in the recusal decision by the arbitrators, is a fact that is inconsistent with impartiality. As the Second Circuit held in *Morelite*, when there is evident partiality, vacatur is required even when there is no evidence that the relationship affected the decision. *Id.* at 84-85.

MASN's and the Orioles' recusal argument was strong and grounded in tangible evidence. The July 13, 2017 plurality, on which the Supreme Court relied, only addressed whether the *Court* must *preemptively* disqualify the RSDC, and only two out of five Justices agreed with the plurality's reasoning. Arbitrators have an independent obligation under the FAA to both "declare any possible disqualification" and "determine whether to withdraw" from sitting on a case.

Marc Rich & Co., A.G. v. Transmarine Seaways Corp. on Monrovia, 443 F. Supp. 386, 388 (S.D.N.Y. 1978); *accord Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 174 (2d Cir. 1984). If the arbitrator's investigation reveals that the arbitrator's continued service is against the interests of the parties, the arbitrator has the "responsibility to resign." *Florasynth*, 750 F.2d at 174. In light of the fact that the Commissioner and his staff, who repeatedly demonstrated bias against MASN and the Orioles, *were communicating* with the RSDC arbitrators about this dispute, A.1051, and held plenary power over the arbitrators and each of their teams, MLB's influence on the arbitrators was all but certain. A.1138-42. The RSDC was required to consider whether to recuse free from evident partiality, which they could not do because recusal would have cost MLB $25 million.

II. The RSDC Arbitrators Violated their Obligation Under the FAA to Disclose Communications with the Commissioner and his Staff About the Subject Matter of the Arbitration

The FAA's prohibition against "evident partiality" also requires arbitrators to disclose, prior to the hearing, "any dealings that might create an impression of possible bias." *Commonwealth*, 393 U.S. at 149 ; *Sanko S.S. Co. v. Cook Indus, Inc.*, 495 F.2d 1260, 1263-64 (2d Cir. 1973); *Marc Rich & Co.*, 443 F. Supp. at 388. "[A]ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth*, 393 U.S. at 150. Because the arbitrators may be in possession, unbeknownst to a

party, of information that would create an impression of bias, the FAA requires arbitrators to *disclose* all such information before the hearing. *Id.*

It cannot be disputed that the Commissioner has prejudged the law and the facts of the arbitration. He has demonstrated evident bias and, in some instances, outright hostility to MASN and the Orioles. The Commissioner has argued in favor of the Nationals' interpretation of what "the RSDC's established methodology" means in the Settlement Agreement, the key issue before the RSDC. The Commissioner has strenuously argued that MASN's and the Orioles' interpretation of the Settlement Agreement "does not conform to its text." A.1003. The Commissioner has publicly accused MASN and the Orioles of "engag[ing] in a pattern of conduct designed to avoid [the Settlement Agreement] being effectuated." A.1205. After the Supreme Court found that MASN and the Orioles were likely to *succeed* on the merits of their vacatur challenge to the first award, the Commissioner declared that MASN "will be required to pay" the rights fees set in the vacated first award "sooner or later." A.1009-11. During the July 2018 All-Star Game, four months before the second hearing, the Commissioner accused MASN and the Orioles of failing to "honor" their "agreement." A.1143.

The Commissioner's public and private statements demonstrate his prejudgment and bias. No one can seriously doubt that if the AAA were to make public comments about a party to an arbitration that it is managing, the AAA

would not be a suitable forum for resolving the dispute. An authority has prejudged a dispute when "a disinterested observer may conclude that the [authority] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." *Cinderella Career & Finishing Sch., Inc. v. F.T.C.*, 425 F.2d 583, 590 (D.C. Cir. 1970) (quoting *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2d Cir. 1970)); *accord 1616 Second Ave. Rest., Inc. v. New York State Liquor Auth.*, 75 N.Y.2d 158, 162 (1990). This standard is met when the authority has made "public statements that indicate prejudgment." *1616 Second Ave., Inc.*, 75 N.Y.2d at 162. Public statements are "especially problematic," *id.*, because once the person overseeing a dispute has publicly taken a position, his statements "have the effect of entrenching [him] in a position which he has publicly stated, making it difficult, if not impossible, for him to reach a different conclusion." *Cinderella,* 425 F.2d at 583; *accord Antoniu v. SEC*, 77 F.2d 721, 723 (8th Cir. 1989).

In light of the Commissioner's clear prejudgment, the FAA required the RSDC arbitrators to disclose, before the hearing, *all communications they had with the Commissioner and his staff about this dispute*. The evidence demonstrates that the Commissioner and his staff unduly influenced the first award. In the prior arbitration, the Commissioner and his staff participated in deliberations, drafted the award, provided factual and legal analysis, and acted as gatekeepers of materials that the parties asked to review or submit to the RSDC. *See* A.975-76.

Although MLB's public participation in the second arbitration was less overt, there is no indication that its behind-the-scenes involvement changed. To the contrary, MLB appointed as legal counsel to the RSDC Joseph Shenker of Sullivan & Cromwell, who previously had advised MLB on the RSDC proceedings and took positions against MASN in those representations. A.1140. Mr. Shenker eventually withdrew in response to MASN's objections. But before he withdrew, Mr. Shenker confirmed that MLB would be communicating *ex parte* with the RSDC arbitrators about this dispute and refused, on behalf of MLB, to provide disclosures of any such communications. A.1051, 948. Indeed, Mr. Shenker went further and *expressly disclaimed* any distinction between the RSDC and MLB. A.1051 (stating that "the RSDC is not a separate entity from MLB").

The FAA required that communications about the dispute between the RSDC, on the one hand, and the biased Commissioner or his staff, on the other hand, be disclosed to the parties before the hearing. The Commissioner has sole authority to appoint or remove the RSDC members at will, exercises enormous control over all of MLB, including the teams of all three RSDC arbitrators, and has advocated publicly against MASN's position. Communications between the Commissioner and the RSDC would clearly create an "impression of possible bias." *Sanko*, 495 F. 2d at 1264; *Nat'l Hockey League Players' Ass'n v. Bettman*, No. 93 CIV. 5769 (KMW), 1994 WL 38130, at *3 (S.D.N.Y. Feb. 4, 1994).

The Supreme Court did not even cite the Second Circuit's decisions in *Commonwealth Coatings* and *Sanko*, which clearly require disclosure of the Commissioner's communications with the RSDC. Nor did the Supreme Court cite any case holding that the arbitrators may *withhold* communications with the Commissioner in these circumstances. Instead, while the Supreme Court found the Commissioner's public statements to be "troubling," the Supreme Court cited the July 13, 2017 plurality opinion as supporting confirmation of the award. A.27. But the plurality *did not address* the second RSDC's *disclosure* obligations under the FAA. Nor did the plurality address Mr. Shenker's statements, which *confirmed* that MLB *would be* communicating with the RSDC, and *disclaimed* the distinction drawn by the plurality between the new RSDC arbitrators and MLB. A.1051.

III. The RSDC Denied MASN and the Orioles Their Right to a Fair Hearing by Committing Prejudicial Misconduct

Section 10(a)(3) of the FAA requires vacatur of an award when the arbitrators "were guilty of misconduct in . . . refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced." One ground for vacatur under section 10(a)(3) is when arbitrators erroneously exclude central relevant evidence. *Hoteles Condado Beach v. Union de Tronquistas*, 763 F.2d 34, 40 (1st Cir. 1985). Courts have *also* vacated arbitral awards when the arbitrator refuses to consider evidence, but then relies on the absence of that same evidence to rule against the party in the award.

For example, in *Tempo Shain Corp. v. Bertek, Inc*., 120 F.3d 16, 20 (2d Cir. 1997), the Court vacated an award where, during the hearing, the arbitrators refused to hear evidence offered by a party on a disputed issue on the basis that the evidence would be cumulative, but then ruled against the party in the award based on a purported lack of evidence presented by the party on that very issue.

Likewise, in *Iran Aircraft Indus. v. Avco Corp*., 980 F.2d 141 (2d Cir. 1992), the arbitrator had directed a party (Avco) not to "burden the Tribunal by submitting" invoices as a means of proof. *Id.* at 146. The arbitral tribunal then ruled in part on the basis of the absence of those invoices. "Having thus led Avco to believe it had used a proper method to substantiate its claim, the Tribunal then rejected Avco's claim for lack of proof." *Id.* By performing what was effectively a bait and switch as to the relevancy of the requested evidence, "the Tribunal denied Avco the opportunity to present its claim in a meaningful manner." *Id.* The Fifth Circuit applied the same principle in *Gulf Coast Indus. Workers Union v. Exxon Co.*, 70 F.3d 847, 850 (5th Cir. 2017). There, the Court vacated an award where the arbitrators prevented a party from presenting evidence on an issue on the ground that it was cumulative, but then issued an award rejecting that party's argument based on a purported lack of evidence,

Together, section 10(a)(3) of the FAA and the cases applying it establish a baseline obligation on the arbitrators to ensure fundamental fairness:

the arbitrators cannot make rulings denying a party access to information on the ground that it is irrelevant, cumulative, or unnecessary, but then turn around and rule against the party based on the incomplete record the arbitrators created.

The RSDC refused to employ a fundamentally fair process in the second arbitration. As summarized above, a central dispute in the arbitration was the methodology required by section 2.J.3 of the March 2005 Settlement Agreement, which requires the RSDC to use "the RSDC's established methodology for evaluating all other related party telecast agreements in the industry." A.793.

Throughout this dispute, the Nationals have relied on a November 10, 2011 letter written by the Commissioner (then deputy Commissioner) that purports to describe "the RSDC's established methodology for evaluating all other related party telecast agreements in the industry." A.1153. MASN and the Orioles believe that MLB's November 10, 2011 letter is incorrect, and that MLB has made statements about "the RSDC's established methodology for evaluating all other related party telecast agreements in the industry" that are inconsistent with the Commissioner's November 10, 2011 letter. For example, in a December 14, 2010 letter, the Commissioner (then deputy Commissioner) agreed with MASN that "the RSDC's established methodology for evaluating all other related party telecast agreements in the industry" was the Bortz methodology. A.1174. That is directly contrary to the November 10, 2011 letter written one year later. In light of the

Commissioner's statements, MASN requested that MLB, a party to the Settlement Agreement, disclose its complete record regarding the meaning of "the RSDC's established methodology" in section 2.J.3. A.1021. MASN also requested that MLB disclose all of its evaluations of related party telecast agreements in the industry, A.1019-21, since, pursuant to section 2.J.3, the RSDC is required to apply the same methodology that the RSDC uses in "all other" evaluations.

Prior to the hearing, however, MLB refused to disclose *any* documents created after the Settlement Agreement was signed (i.e., post-March 2005), on the ground that: "Communications with MASN, the Orioles or the Nationals beyond the time frame of the negotiation of the contractual provision at issue are not probative of the parties' intentions at the time of contracting." A.1057. The RSDC *agreed* with MLB's blanket refusal to disclose any such documents: "To the extent that the intentions of the parties are relevant to the interpretation of ¶ 2.J.3, it is their intentions at the time of contract formation that are germane." *Id.*

MASN and the Orioles therefore went into the arbitration with a materially incomplete record with respect to MLB's statements about "the RSDC's established methodology for evaluating all other related party telecast agreements in the industry." Based on the RSDC's pre-hearing procedural orders, MASN and the Orioles reasonably believed that the RSDC would only consider *pre*-Settlement

Agreement communications and documents when ruling on the dispute between the parties over the methodology required by the Settlement Agreement.

Yet, in an unexplained and prejudicial change in rationale, not only did the RSDC rely on post-Settlement Agreement communications in the award, it found them to be *dispositive* in its ruling against MASN and the Orioles. A.762-65. The RSDC went so far as to draw an *adverse inference against* MASN and the Orioles based on an asserted lack of proof. A.762. In other words, the very post-Settlement Agreement communications that MLB and the RSDC rejected as not relevant later resurfaced as vital to (indeed, dispositive of) the award. MASN was deprived of a fundamentally fair hearing when it was unable to present its case in full. The RSDC's conduct misled MASN prior to the award by professing the utter irrelevance of this evidence before the arbitration, only to rely almost exclusively on that very same evidence in interpreting the Settlement Agreement.

The Supreme Court rejected MASN's and the Orioles' argument that they were denied the right to present their case by characterizing it as merely "an objection based on the RSDC's 'failure' to permit more searching discovery into certain issues during the course of the arbitration." A.28. Consistent with that characterization, the Supreme Court relied solely on cases holding that arbitrators are generally given broad discretion to regulate the scope of discovery. *Id.*

But what happened here is not merely a disagreement about the scope of discovery. What happened here, as in *Tempo Shain*, *Iran Aircraft*, and *Gulf Coast Industries*, was a bait and switch: the RSDC denied MASN access to an entire category of documents and discouraged the use of such documents at the hearing on the basis that they were not relevant, but then, in its award, cherry picked documents in that category as *dispositive* against MASN and the Orioles. The RSDC's pre-award ruling that the documents were irrelevant, and its subsequent contradictory reliance on this very type of evidence to rule against MASN and the Orioles in the award, was a fundamentally unfair process requiring vacatur.

IV. The RSDC Exceeded its Powers Under the Settlement Agreement in Violation of Section 10(a)(4) of the FAA

The second award must also be vacated because the RSDC "exceeded its powers" in violation of section 10(a)(4) of the FAA, 9 U.S.C. § 10(a)(4). In this context, the U.S. Supreme Court has distinguished between challenges to arbitral awards on the basis that the arbitrator exceeded its powers, and challenges to arbitral awards on the basis that the arbitrator misapplied the law. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 672 n.3, 683 (2010).

The plain language of section 10(a)(4) of the FAA requires vacatur of an award when the arbitrator "exceeds its powers." In *Stolt-Nielsen*, the United States Supreme Court held that an arbitrator exceeds its powers when it "strays from interpretation and application of the agreement and effectively dispenses his own

brand of industrial justice." 559 U.S. at 671 (internal quotation marks and citations omitted). "In that situation, an arbitration decision may be vacated under § 10(a)(4) of the FAA on the ground that the arbitrator 'exceeded [his] powers,' for the task of an arbitrator is to interpret and enforce a contract, not to make public policy." *Id.* at 672. Thus, "[w]hether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must give effect to the contractual rights and expectations of the parties." *Id.* at 683. In *Stolt-Nielsen*, the Court held that the arbitrator exceeded its powers when the arbitrator permitted class-wide arbitration of the dispute, despite no provision in the parties' contract or applicable law authorizing class-wide arbitration. *Id.* at 684-85. In so concluding, the Supreme Court explained that the basis for vacatur was its finding that the arbitrator "exceeded its powers," a statutory ground. A showing that the arbitrator manifestly disregarded the law is not required in this context. *Id.* at 672 n.3.

Likewise, in *Barbier v. Shearson Lehman Hutton, Inc.*, 948 F.2d 117, 122 (2d Cir. 1991), the Second Circuit held that, where a contract was governed by New York law, the arbitrators exceeded their powers by awarding punitive damages when caselaw of the New York Court of Appeals prohibited arbitrators from awarding punitive damages. The Court of Appeals cases' prohibition on awards of punitive damages in *Barbier* was sufficient to find that the arbitrator

exceeded its powers in awarding them. Like in *Stolt-Nielsen*, the Second Circuit did not apply a "manifest disregard of the law" standard. *Id.* at 121-22.

The RSDC's "powers" here are *very narrowly circumscribed* by the mandate in section 2.J.3 of the Settlement Agreement. The *only* power the Settlement Agreement gives the RSDC is to "us[e] the RSDC established methodology for evaluating all other related party telecast agreements in the industry" to determine "the fair market value of [the Orioles and Nationals telecast rights]." A.793. The meaning of that mandate to the RSDC is governed by Maryland law, and the RSDC was required to apply Maryland law to determine its meaning. A.800.

Decisions by Maryland's highest court *unambiguously* r*equire* contracts to be interpreted solely by determining the intentions of the parties "at the time of execution." *Ocean Petrol., Co., Inc. v. Yanek*, 5 A.3d 683, 691 (Md. 2010) (parties to a contract are bound by "the plain language of the disputed provisions in context, which includes not only the text of the entire contract but also the contract's character, purpose, and the facts and circumstances of the parties at the time of execution"); *Sy-Lene of Wash., Inc. v. Starwood Urban Retail II, LLC*, 829 A.2d 540, 546 (Md. 2003) (under Maryland law, contracts must be interpreted based on the "intentions of the parties at the time of the execution of the contract." *Schneider Elec. Bldgs. v. Western Surety Co*., 149 A.3d 778, 787 (Md. App. 2016)

(under Maryland law, a contract means what "a reasonable person in the position of the parties would have meant at the time the agreement was effectuated").

The RSDC did not conduct this inquiry. Instead, it "imposed its own policy choice and thus exceeded its powers." *Stolt-Nielsen*, 559 U.S. at 678. The RSDC interpreted its mandate based on the RSDC's subjective opinion that the Orioles "have received substantial compensation such that it is ambiguous, at best, as to whether that purpose [of compensating the Orioles] should have any impact on the setting of telecast rights fees or the interpretation of the phrase 'established methodology.'" A.759; *see also* A.760. In violation of Maryland law, the RSDC based its interpretation of the March 2005 Settlement Agreement, at least in part, on the RSDC's subjective opinion of how much the Orioles were paid in the years after. Maryland law prohibits interpreting the contract based on whether the arbitrator thinks the Orioles received enough money in the decade after it was signed. (The Orioles believe their damages caused by the Nationals' presence in Washington D.C. are much greater than the profits they have received.)

The Supreme Court erred by applying the "manifest disregard" standard of review. *See* A.29-30. The manifest disregard standard does not govern the Court's determination whether an arbitrator exceeded its powers, which is a statutory ground for vacatur under section 10(a)(4) of the FAA. *See Stolt-Nielsen*, 559 U.S. at 672 n.3. The Supreme Court's application of the "manifest disregard" standard

of review is inconsistent with the plain language of section 10(a)(4) as interpreted by the United States Supreme Court. The question for this Court is whether the RSDC exceeded its powers by allowing its subjective view that the Orioles had received enough money to influence the valuation methodology the RSDC used. A.759-60. The RSDC's reliance on that subjective opinion when deciding what "the RSDC's established methodology" was exceeded its powers.

V. Pursuant to its Authority Under Sections 2 and 10 of the FAA, the Court Should Order Rehearing in an Independent Forum

As discussed above, when this Court considered whether to remand the arbitration to an independent forum after the first arbitration, the Court divided 2-1-2 on that decision. The first legal issue, which divided the concurrence from the remaining opinions, was whether the Court had *the power* to order rehearing in a forum other than the contractually designated forum to ensure fundamental fairness. The concurrence's reasoning, that the Court did not have the power to order rehearing in a new forum except when the arbitration clause is *procured by* fraud, duress, coercion, or unconscionability, only received one vote. As the dissent (Acosta and Gesmer, JJ.) described, the concurrence's view is against the weight of authority and it would lead to an unjust and unworkable outcome.

As the dissent explained, the FAA grants the Court the power to order rehearing in an independent forum on the ground that a rehearing in the contractually designated forum would be fundamentally unfair. Section 2 of the

FAA, 9 U.S.C. § 2, grants courts power over arbitration agreements "upon such grounds as exist at law or in equity," which includes the "inherent equitable power to reform the contract and refer the matter to a neutral arbitral forum." *TCR II*, 153 A.D.3d at 170 (Acosta, P.J., dissenting). The dissent specifically cited the equitable doctrine of frustration of purpose as applicable to this case, explaining that where the arbitral forum's "pervasive bias" has "frustrate[d] the parties' intent," "reformation of the agreement to require a rehearing not administered" by the same forum "is warranted." *Id.* at 181. Furthermore, Section 10 of the FAA, 9 U.S.C. § 10(b), "explicitly permits courts 'in their discretion' to 'direct a rehearing' once an arbitral award is vacated." *Id.* at 180 (quoting 9 U.S.C. § 10(b)). The dissent held that these two FAA provisions, sections 2 and 10(b), each provide courts with the "power to order an arbitration in a new forum where the parties' only selected forum is too biased to fairly arbitrate the dispute." *Id.* at 179. Under both FAA provisions, the dissent concluded that the applicable standard for ordering a new forum was whether MLB's conduct "frustrate[d] the parties' intent to submit their dispute to a fundamentally fair arbitration." *Id.* at 174, 181.

As the dissent also recognized, federal courts and New York state courts (applying New York's analogue to the FAA) have ordered rehearing before an arbitrator or forum *other than* that specified in the arbitration clause on the ground that rehearing the arbitration before the contractually-designated arbitrator or

forum would be unfair. In *Erving v. Virginia Squires Basketball Club*, 349 F. Supp. 716, 719 (E.D.N.Y.1972), *aff'd*, 468 F.2d 1064 (2d Cir. 1972), the contract provided for arbitration before the Commissioner of the American Basketball Association. However, because the Commissioner was conflicted, the Court *reformed the contract* to require arbitration for a different arbitrator to "ensure a fair and impartial hearing." *Erving*, 468 F.2d 1064, 1067 n.2 (2d Cir. 1972); *Marc Rich & Co.*, 443 F. Supp. at 388 (explaining that the court in *Erving* was "in effect reforming the contract" to provide for a different, independent arbitrator). In *Seidman v. Merrill Lynch*, 75 Civ. 6316 (S.D.N.Y. Aug. 24, 1977), the Court also reformed the contract, which required arbitration before the New York Stock Exchange, to require rehearing of the arbitration before the American Arbitration Association. *Marc Rich & Co.*, 443 F. Supp. at 388 (describing the decision in *Seidman* as reforming the contact to replace the arbitral forum). And in *Rabinowitz v. Olewski*, 100 A.D.2d 539 (2d Dep't 1984), which arose under New York's analogue to the FAA, the Court ordered rehearing of the arbitration in a different forum on fairness grounds because, due to a letter of which all of the designated forum's potential arbitrators were likely on notice that disparaged one of the parties, "the appearance of bias permeated the entire [forum]." *TCR II*, 153 A.D.3d at 172 (Acosta, P.J., dissenting) (discussing the *Rabinowitz* case).

The concurrence did not address, and is contrary to, this statutory and judicial authority. The cases relied on by the concurrence do not support its conclusion that the Court is simply powerless to reform the contract absent some infirmity in the *inducement* of the arbitration clause. *See Salvano v. Merrill Lynch*, 85 N.Y.2d 173 (1995) (the court did not have the power to order expedited arbitration where the contract did not provide for that procedure); *Matter of Cullman Ventures*, 252 A.D.2d 222 (1st Dep't 1998) (the court did not have the power to consolidate two arbitrations commenced under separate contracts).

Here, the Court should exercise its power to order the arbitration to be reheard before an independent forum unaffiliated with MLB, and allow this dispute to finally be resolved without further partiality. MLB has now conducted not one, but two, arbitrations tainted by evident partiality in favor of the Nationals and against MASN and the Orioles. Even applying the legal standard espoused by the July 13, 2017 plurality (which MASN and the Orioles submit is incorrect), the second arbitration confirms that MLB is irreparably biased and partial. The central difference between the standards applied by the plurality and the dissent regarding when to remand to an independent forum was that the plurality remanded the case back to the RSDC on the basis that *the new arbitrators* had not, as of the time of this Court's July 13, 2017 order, demonstrated any outward bias. *See TCR II*, 153 A.D.3d at 160 (plurality opinion) (disagreeing with the dissent).

The second arbitration demonstrates, however, that MLB's and its RSDC's evident partiality continued. MLB and the Nationals secretly negotiated and entered the February 9, 2018 agreement, giving MLB a $25 million financial interest in its RSDC holding the hearing. A.941-42. The RSDC engaged MLB's counsel Joseph Shenker of Sullivan & Cromwell, who previously represented *MLB* against MASN and the Orioles. A.1140. Mr. Shenker asserted that MLB and the RSDC are one and the same, and that RSDC had communicated, and would continue to communicate, about the dispute with the Commissioner and his agents. A.1051. The RSDC refused to disclose what MLB told them about the dispute. A948, 955. MLB and its RSDC also concealed necessary information, including prior statements by MLB and the RSDC about the RSDC's methodology and the RSDC's evaluations of "other related party telecast agreements in the industry." A.1055-57. The RSDC then ruled *against* MASN and the Orioles on the basis of the very type of evidence that it had ruled before the hearing was irrelevant. A.762-65. Finally, the RSDC imposed disparate treatment on MASN by applying a methodology that permitted a *maximum* profit margin of 20%, A.768, despite using a different methodology for evaluating another related-party network that permitted a *minimum* margin of 19% and a maximum of *30%.* A.1552.

Given the Commissioner's and his staff's plenary power over the administration of the RSDC, the RSDC members' teams, and MLB's demonstrated

refusal to disclose its communications with the RSDC, remand back to the RSDC for a *third* arbitration would lead to the same result. It is time for this dispute to be resolved before an independent arbitrator unaffiliated with MLB, who will act impartially and conduct a fair arbitration in compliance with the FAA.

VI. The Supreme Court Unlawfully Modified the Award in its Confirmation Order by Performing a Calculation of the Nationals' Damages that the RSDC Arbitrators Did Not Perform

Finally, even if this Court affirms the Supreme Court's confirmation of the second award, the Court must still vacate the money judgment entered by the Supreme Court. It is a bedrock principle of arbitration law that "the judgment to be enforced encompasses the terms of the confirmed arbitration awards and may not enlarge upon those terms." *Zeiler v. Deitsch*, 500 F.3d 157, 170 (2d Cir. 2007). A court confirming an award can do "little more than give the award the force of a court order." *Id.* at 169. Thus, a court cannot modify an arbitration award in an order confirming it. *See Daly v. Lehman Bros, Inc.*, 252 A.D.2d 357, 357 (1st Dep't 1998); *City of Troy v. Village of Menands*, 48 A.D.2d 833, 733 (3d Dep't 1975). A narrow exception to this rule exists allowing the Court to modify an award to correct an obvious mathematical miscalculation of figures. However, that exception *does not* authorize the Court to perform a damages calculation that the arbitrator did not perform. This Court has explicitly held that the Court has no

authority to perform a damages calculation when the arbitrators "made no award of damages." *Weiss v. Metalsalts Corp.*, 15 A.D.2d 46, 47 (1st Dep't 1961).

Thus, where an arbitration award is in the nature of a declaratory judgment, a court may not improperly modify the arbitration award by changing it into a monetary judgment. Rather, at most, the court may only confirm the award into a declaratory judgment. *See, e.g., Canada Dry Delaware Valley Bottling Co. v. Hornell Brewing Co*., No. 11 CIV. 4308 PGG, 2013 WL 5434623, at *10 (S.D.N.Y. Sept. 30, 2013) ("The Judgment entered by this Court is in the nature of a declaratory judgment, because it confirms a declaratory award issued by an arbitration panel."); *W. Massachusetts Elec. Co. v. Int'l Bhd. of Elec. Workers, Local 455*, No. Civ.A. 11-30106-DPW, 2012 WL 4482343, at *7-8 (D. Mass. Sept. 27, 2012) (holding that an arbitral decision "was in the nature of a declaratory judgment" where "the arbitrator did not assess any damages that can be enforced through a writ of execution, nor … provide … an equitable remedy.").

The Second Award was only a declaratory award. It was not an award of money damages to the Nationals. The award only addressed the fair market value of the teams' rights licensed to MASN. The award did not calculate any amount of money damages owed by MASN. A.785 (reaching only a conclusion as to "the fair market value of MASN's rights to telecast each of the Orioles and Nationals"). Importantly, the RSDC acknowledged that the damages owed to the Nationals

would be less than the fair market value numbers in the award because MASN *has already paid* $197.2 million in rights fees to the Nationals for the 2012-2016 period, as well as $41.2 million in profit distributions—profit distributions that MASN would not have been able to pay if it had paid the higher telecast rights fees. A.745, 784. The RSDC went on to calculate the total amount of money that it believed the Nationals should have received for the 2012-2016 period: $308.8 million. *Id*. It did not calculate the amount remaining unpaid, i.e., any damages owed the Nationals based on the higher telecast rights fees, which would require subtracting the amount paid from that ultimate total amount. A.785.

The award's rejection of the Nationals' request for pre-award interest also demonstrates that the award is declaratory, not an award of money damages. The RSDC admitted it did not have authority to award prejudgment interest because it "lacks authority to enter a judgment." A.754. The RSDC then stated that calculating any prejudgment interest would require the RSDC to "offset any net increase in Nationals' license fees determined by the Committee by both the $24.6 million loan (less interest payments made) and profit distributions [from MASN] the Nationals have received." *Id.* The RSDC did not perform those calculations.

The Settlement Agreement, which gives the RSDC its authority, and the Nationals' conduct, also demonstrate that the award is declaratory. The Settlement Agreement limits the RSDC's authority to determining "the fair market value of

the Rights[.]" A.793. The Settlement Agreement does not give the RSDC the power to do anything beyond that discrete valuation, and it certainly does not authorize the RSDC to award damages. The RSDC acknowledged this when it held, based on its mandate in the Settlement Agreement, "that its authority runs no further than determining the fair market value of the rights at issue." A.754.

During the arbitration, *the Nationals never provided the RSDC with any proposed calculation of damages*. The Nationals' briefs to the RSDC, like the briefs of MASN and the Orioles, only set forth the Nationals' position as to the fair market value of the rights. A.1865, 1924, 1963. In fact, in the Nationals' pre-hearing submission to the RSDC, the Nationals *argued*:

> "On these facts, the question for the RSDC is *not* whether MASN should be required to draw down on cash reserves in order to pay the Nationals. Rather, the question is whether funds *that MASN has already distributed, primarily to the Orioles*, *should be reallocated* from non-revenue-shareable profits distributions to revenue-shareable rights fees." A.1917 (emphasis added).

Nor did the Nationals submit any proposed calculation of an amount they claimed the RSDC awarded in *either* the Nationals' motion to confirm the second award, or in their reply brief in support of their motion to confirm. A. 508, 1289. It was only *at oral argument* on July 12, 2019, that the Nationals produced, for the first time, a *demonstrative* containing what the Nationals claimed was the amount

of damages that the RSDC awarded them. A.1410-11. But *nowhere in the award* did the RSDC perform any calculation like that in the Nationals' demonstrative.

The Supreme Court unlawfully modified the award by performing a calculation that the award *did not perform*, A.39, and then unlawfully entered a money judgment against MASN based on that calculation. A.89-90. The Supreme Court's calculation of damages that the RSDC did not calculate is not, as the court asserted, "ministerial." A.46. The RSDC *did not perform* that monetary damages calculation. It did the opposite: it acknowledged calculations would have to be performed to calculate the Nationals' damages, but the RSDC did not have authority to perform them. A.754, 784-85. The Supreme Court's unlawful money damages calculation went well beyond its authority to correct *miscalculations* (there were no calculations to correct), and unlawfully modified the award.

Even if this Court determines that the above stated grounds do not require vacatur of the award, the Court must *reverse* the money judgment entered by the Supreme Court, which was based on an unlawful modification of the award.

CONCLUSION

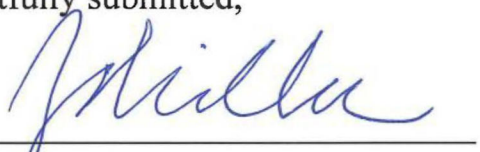
For the foregoing reasons, the Court should reverse the judgment of the Supreme Court of December 9, 2019, A.88-90, the decision and order of the Supreme Court of August 22, 2019, A.7-33, and the decision and order of the Supreme Court of November 14, 2019, A.39-40. The Court should order the

arbitration to be reheard before an independent arbitrator unaffiliated with MLB, pursuant to the Court's authority as summarized herein and in Presiding Justice Acosta's dissent, *TCR II*, 153 A.D.3d at 162-81 (Acosta, P.J., dissenting).

Even if the Court affirms the Supreme Court's confirmation of the award, the Court should reverse the Supreme Court's money judgment, and the portions of the Supreme Court's orders of August 22, 2019 and November 14, 2019 which purported to calculate money damages that the award did not calculate.

Dated: New York, New York
December 30, 2019

Respectfully submitted,



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Dated: New York, New York
December 30, 2019

STATEMENT PURSUANT TO CPLR § 5531

New York Supreme Court

Appellate Division—First Department

TCR SPORTS BROADCASTING HOLDING, LLP,

Petitioner-Appellant,

– against –

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

Respondents-Respondents,

– and –

THE COMMISSIONER OF MAJOR LEAGUE BASEBALL,

Respondent,

– and –

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

Nominal Respondents-Appellants.

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1. The index number of the case in the court below is 652044/14.

2. The full name of the original Petitioner is as set forth above. The original Respondents named in the Summons with Notice were WN Partner, LLC, Nine Sports Holding, LLC, Washington Nationals Baseball Club, LLC, and the Officer of Commissioner of Baseball. Allan H. “Bud” Selig was named as an additional Respondent in the Petition for Confirmation of Arbitration Award, and the Nominal Respondents were added to the caption of the Notice of Appearance.

3. The action was commenced in Supreme Court, New York County.

4. The action was commenced on or about July 2, 2014 by filing of a Summons with Notice. Notice of Verified Petition to Confirm Arbitration Award was filed on July 24, 2014, and Notice of Verified Petition to Vacate Arbitration Award was filed on August 7, 2014. Respondents The Office of Commissioner of Baseball and Alan H. “Bud” Selig, as Commissioner of Major League Baseball, filed a Verified Answer on October 20, 2014. Respondents WN Partner, LLC, Nine Sports Holding, LLC, and Washington Nationals Baseball Club, LLC filed a Verified Answer on October 20, 2014.

5. The nature and object of the action involves parties seeking to Confirm or Vacate the Arbitration Award.

6. This appeal is from the Orders of the Honorable Joel M. Cohen, dated August 22, 2019 and November 14, 2019, and the Judgment, dated December 9, 2019.

7. This appeal is on the Appendix method.