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

Court of Appeals

of the

State of New York

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

Appellants,

– against –

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

Respondents.

BRIEF OF KENNETH R. FEINBERG AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

Kenneth R. Feinberg, Esq.
The Law Offices of Kenneth R. Feinberg, P.C.
1455 Pennsylvania Avenue NW
#390
Washington, DC 20004
kfeinberg@feinberglawoffices.com

TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. A Rehearing of the Arbitration Before an MLB Panel Appointed by Manfred is Not a Fair and Impartial Arbitration 4

A. The Record Establishes MLB's and Manfred's Evident Partiality 4

B. The Nationals' Retention of Different Lawyers, and Manfred's Appointment of Different MLB Arbitrators, Do Not Cure the Partiality and Bias of MLB, the Arbitral Forum 7

C. This Court Should Confirm that the Proscription Against Evident Partiality in Arbitration Applies to the Arbitral Forum 10

D. The Appellate Division Plurality's Decision Undermines the Integrity of, and Public Confidence in, Industry Arbitration 13

II. The Rehearing Did Not Cure MLB's and Manfred's Evident Partiality 15

CONCLUSION 17

TABLE OF AUTHORITIES

Cases

Commonwealth Coatings Corp. v. Continental Cas. Corp.,
393 U.S. 145 (1968) 12

Erving v. Va. Squires Basketball Club,
349 F. Supp. 716 (E.D.N.Y. 1972) 11

Hyman v. Pottberg's Ex'rs,
101 F.2d 262 (2d Cir. 1939) 10

Matter of Excelsior 57th Corp. (Kern),
218 A.D.2d 528 (1st Dep't 1995) 7, 10

Monster Energy Co. v. City Beverages, LLC,
940 F. 3d 1130 (9th Cir. 2019) 11, 12

Morelite Constr. Corp. (Div. of Morelite Elec. Serv., Inc.) v. New York City Dist. Council Carpenters Benefit Funds,
748 F.2d 79 (2d Cir.1984) 5, 9

Morris v. N.Y. Football Giants, Inc.,
150 Misc. 2d 271 (N.Y. Sup. Ct. 1991) 11

Pitta v. Hotel Ass'n of N.Y. City, Inc.,
806 F.2d 419 (2d Cir. 1986) ..... *passim*

Rabinowitz v. Olewski,
100 A.D.2d 539 (2d Dep't 1984) 11

Sawtelle v. Waddell & Reed, Inc.,
304 A.D.2d 103 (1st Dep't 2003) 10

Stolt-Nielsen v. Animal Feeds Int'l Corp.,
559 U.S. 662 (2010) 1

TCR Sports Broadcasting Holding, LLP v. WN Partner, LLC,
153 A.D.3d 140 (1st Dep't 2017) ..... *passim*

TCR Sports Broadcasting Holding, LLP v. WN Partner, LLC,
2015 WL 6746689 (N.Y. Sup. Ct. Nov. 4, 2015) 2, 4, 13

TCR Sports Broadcasting Holding, LLP v. WN Partner, LLC,
187 A.D.3d 623 (1st Dep't 2020) 15

TCR Sports Broadcasting Holding, LLP v. WN Partner, LLC,
67 Misc.3d 1242(A) (N.Y. Sup. Ct. 2019) 15

U.S. Electronics, Inc. v. Sirius Satellite Radio, Inc.,
958 N.E.2d 891 (N.Y. 2011) 2, 5, 9

Statutes

9 U.S.C. § 10 5

Secondary Sources

Jeffery Commission & Christiane Deniger, *New York Holds Sway as a Preferred Arbitral Seat as Demand for International Arbitration Soars*, New York Law Journal (Mar. 18, 2022) 2

The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts, 30 CARDOZO L. REV. 1475, 1478 (2009) 2

Rules

Court of Appeals Rule 500.23(a)(4)(i) 1

INTEREST OF *AMICUS CURIAE*

I am a member of the New York Bar with over 35 years of alternative dispute resolution experience. I have served as an arbitrator, mediator, and court-appointed Special Master in hundreds of disputes and settlements, including as Special Master of the September 11th Victim Compensation Fund and Special Master for Troubled Assets Relief Program ("TARP") Executive Compensation. I have served as arbitrator in several high-profile arbitrations, including the arbitration to determine the fair market value of the *Zapruder* film of the Kennedy assassination and the arbitration to allocate attorneys' fees in the Holocaust slave labor litigation.

I am currently a national arbitrator for the American Arbitration Association ("AAA"). I previously served as the Vice-Chair of the Committee on Alternative Dispute Resolution of the American Bar Association and am a recognized leader within the alternative dispute resolution community. *See Stolt-Nielsen v. Animal Feeds Int'l Corp.*, 559 U.S. 662, 668 & n.1 (2010) (Ginsburg, J., dissenting).

Pursuant to Rule 500.23(a)(4)(i) of the Court's Rules of Practice, I submit this brief because I expect it to be "of assistance to the Court" and because it may "identify law or arguments that might otherwise escape the Court's consideration." 22 N.Y.C.R.R. § 500.23(a)(4)(i). I have no personal or financial stake in the outcome of this litigation. I have a professional interest in the sound development of the law requiring fairness and impartiality in arbitration. That includes the

decisions of this Court, especially as New York has increased its prominence as a center for arbitration over the last two decades. *See, e.g.*, Theodore Eisenberg and Geoffrey Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 CARDOZO L. REV. 1475, 1478 (2009); Jeffery Commission & Christiane Deniger, *New York Holds Sway as a Preferred Arbitral Seat as Demand for International Arbitration Soars*, New York Law Journal (Mar. 18, 2022), *available at* https://www.law.com/newyorklawjournal/2022/03/18/new-york-holds-sway-as-a-preferred arbitral-seat-as-demand-for-international-arbitration-soars.

SUMMARY OF ARGUMENT

I agree with Presiding Justice Acosta's dissent and "cannot recall having previously encountered such a confluence of factors that call for judicial intervention in an arbitration." *TCR Sports Broadcasting Holding, LLP v. WN Partner, LLC*, 153 A.D.3d 140, 162 (1st Dep't 2017) (Acosta, P.J., dissenting). The evidence cited by the dissent shows that Major League Baseball ("MLB") and its Commissioner, Robert Manfred ("Manfred"), are evidently partial in this dispute under the standard in *U.S. Electronics, Inc. v. Sirius Satellite Radio, Inc.*, 958 N.E.2d 891, 893 (N.Y. 2011) (adopting the Second Circuit's evident partiality standard). Manfred presided over an arbitration that the Supreme Court found demonstrated an "utter lack of concern for fairness." *TCR Sports Broadcasting Holding, LLP v. WN Partner, LLC*,

2015 WL 6746689, at *12 (N.Y. Sup. Ct. Nov. 4, 2015). After presiding over an unfair arbitration, Manfred litigated against two of the parties—the Baltimore Orioles ("Orioles") and Mid-Atlantic Sports Network ("MASN")—submitting affirmations arguing that the opposing side, the Washington Nationals ("Nationals"), was correct on the merits of the dispute. *TCR*, 135 A.D.3d at 169 (Acosta, P.J., dissenting). Manfred "made public statements during post-award litigation indicating a position on the merits of the case." *Id.* at 162 (Acosta, P.J., dissenting).

I respectfully submit that the primary basis upon which the Appellate Division plurality referred the arbitration back to MLB—that Manfred chose three replacement arbitrators to re-hear the arbitration—is fundamentally misguided. An arbitration cannot be fair and impartial, as required by the Federal Arbitration Act ("FAA"), when the *arbitral forum*—the body under whose auspices the proceeding is conducted, in this case MLB—is evidently partial. The Appellate Division's decision, if left to stand, undermines the public's confidence in arbitration as a fair and impartial means of binding dispute resolution. Contracting parties will be discouraged from selecting arbitration as the method of resolving their disputes if, even *after* a Court finds that the arbitral forum acted with an "utter lack of concern for fairness" and the head of the arbitral forum then publicly argues—indeed litigates—against them, they will be forced right back before that arbitral forum for a re-hearing of the dispute. Put simply: The Federal Arbitration Act's proscription

against evident partiality in arbitration applies to the *arbitral forum* as it does to the individual *arbitrators*. The appropriate remedy in this case is to refer the dispute to a neutral arbitrator unaffiliated with MLB. Only then can the parties, and the public, be assured that this dispute, which concerns hundreds of millions of dollars in disputed television rights payments, is decided based solely on its legal merits.

ARGUMENT

I. A Rehearing of the Arbitration Before an MLB Panel Appointed by Manfred is Not a Fair and Impartial Arbitration

A. The Record Establishes MLB's and Manfred's Evident Partiality

The Supreme Court and Appellate Division both held that MLB's conduct in the first arbitration "objectively demonstrate[d] 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." *TCR Sports Broadcasting Holding, LLP v. WN Partner, LLC*, 2015 WL 6746689, at *12 (N.Y. Sup. Ct. Nov. 4, 2015) (quoting *Pitta v. Hotel Ass'n of N.Y. City, Inc.*, 806 F.2d 419, 423-24 (2d Cir. 1986)), *aff'd* 153 A.D.3d 140 (1st Dep't 2017). Importantly, the Supreme Court concluded, and the Appellate Division affirmed, that the *arbitral forum*, MLB, not merely the three RSDC members who served as the arbitrators, acted with evident partiality.

The ultimate question in this case is the arbitral forum entity's (here, MLB's) fitness to preside over the re-hearing of the arbitration. Put another way: the issue before the Court is, after an arbitration award has been vacated due to the *arbitral*

forum entity's evident partiality, under what circumstances is a re-hearing before that arbitral forum impartial and fair? Judicial replacement of arbitrators shown to be partial or biased is well-established. *E.g., Pitta v. Hotel Ass'n of N.Y. City, Inc.*, 806 F.2d 419, 423-24 (2d Cir. 1986). This case presents a related question of what happens when the *arbitral forum itself* has acted with evident partiality.

In *U.S. Electronics, Inc. v. Sirius Satellite Radio, Inc.*, 958 N.E.2d 891 (N.Y. 2011), this Court "adopt[ed] the Second Circuit's reasonable person standard and [held that the Court will] apply it when we are asked, as in this case, to consider the federal evident partiality standard of 9 U.S.C. § 10." 958 N.E.2d at 893. Under this standard, "clear and convincing evidence" is not required to show partiality; rather, disqualifying evident partiality is shown "where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." *Id.* at 893-94 (quoting *Morelite Constr. Corp. (Div. of Morelite Elec. Serv., Inc.) v. New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir.1984)). A finding of "evident partiality" does not require "proof of actual bias," but requires more than "a mere appearance of bias." *U.S. Electronics*, 958 N.E.2d at 893.

Applied to MLB and Manfred, a reasonable person would have to conclude that MLB and Manfred are evidently partial in favor of the Nationals' positions, and biased against the positions of the Orioles and MASN. Indeed, as Presiding Justice Acosta noted, Manfred submitted affirmations to the Supreme Court arguing in favor

of the Nationals' positions on the merits, and arguing against the positions of the Orioles and MASN. *TCR*, 153 A.D.3d at 169 (Acosta, P.J., dissenting).

Specifically:

1. While former MLB Commissioner Bud Selig, who preceded Manfred as MLB Commissioner, appointed the arbitrators in the first arbitration, Manfred and his staff were substantively involved in the first arbitration. MLB staff drafted the first arbitration award. *TCR*, 153 A.D.3d at 166 (Acosta, P.J., dissenting).

2. MLB, through its counsel, and Manfred himself, argued to the Supreme Court in favor of the Nationals' positions on the merits of the dispute, and against the Orioles' and MASN's positions. Manfred's affirmation to the Court argued in favor of the Nationals' position on a key issue in the arbitration: the required valuation methodology. *TCR*, 153 A.D.3d at 169 (Acosta, P.J., dissenting).

3. MLB took a $25,000,000 financial stake in the outcome of the arbitration in an agreement between MLB and the Nationals. *TCR*, 153 A.D.3d at 169 (Acosta, P.J., dissenting) (noting "the incentive this provides to MLB to do whatever it can to steer a second arbitration in its (and the Nationals') favor").

4. Manfred made public statements attacking the Orioles and MASN on the merits of the dispute. Manfred claimed that "sooner or later" MASN "is going to be required to" make the payments that the vacated first arbitration award directed MASN to make. *Id.* at 168-69, 176 (Acosta, P.J., dissenting) ("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.").

Based on my experience, the facts cited by the dissent show that MLB and Manfred are biased. I am not aware of any case that would support a conclusion that Manfred or MLB are neutral or fit to preside over this dispute. *E.g.*, *Matter of Excelsior 57th Corp. (Kern)*, 218 A.D.2d 528, 529 (1st Dep't 1995) (submission of affidavits taking positions on the merits of the dispute and comments concerning the prior arbitration disqualified the arbitrator from arbitrating the re-hearing).

B. The Nationals' Retention of Different Lawyers, and Manfred's Appointment of Different MLB Arbitrators, Do Not Cure the Partiality and Bias of MLB, the Arbitral Forum

I have reviewed the plurality, concurring, and dissenting opinions of the Appellate Division First Department in *TCR Sports Broadcasting Holding, LLP v. WN Partner, LLC*, 153 A.D.3d 140 (1st Dep't 2017). The plurality opinion (Andrias, J.) did not conclude—and it would be unreasonable to conclude—that MLB or Manfred are impartial in this dispute. Rather, the plurality concluded that a re-hearing before an MLB panel appointed by Manfred was permissible because (1) the Nationals were no longer being represented by MLB's counsel Proskauer Rose, and (2) Manfred replaced the original three RSDC arbitrators with three new arbitrators and those arbitrators, not MLB or Manfred himself, were to vote on the decision.

See TCR, 153 A.D. 3d at 158-59 (Plurality Op. of Andrias, J.).

I agree with Presiding Justice Acosta's dissent that these facts do not eliminate MLB's and Manfred's evident partiality. *See TCR*, 153 A.D.3d at 167-77 (Acosta, P.J., dissenting). Evident partiality of the arbitral forum must disqualify that forum from presiding over an arbitration. Manfred's selection of three new arbitrators is cold comfort to parties in the position of the Orioles and MASN, especially because Manfred had already vigorously advocated in favor of the Nationals' position on the merits of the dispute. What is more, Manfred made it known publicly that he feels strongly about the dispute, going so far to criticize the Orioles and MASN in news interviews. As Presiding Justice Acosta persuasively stated in dissent:

> 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 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.

TCR, 153 A.D.3d at 176-77 (Acosta, P.J., dissenting).

A rehearing of the dispute by an MLB arbitral panel selected by Manfred is not fundamentally fair. Manfred's positions on the merits on the case—which expressly took the side of one party, and argued strenuously against the other party—were public. It must be presumed they were known to the arbitrators Manfred selected. While the arbitrators Manfred selected did not personally make the statements Manfred made, the evident partiality requirement is objective because "proof of actual bias is rarely adduced." *U.S. Electronics*, 958 N.E.2d at 914. As this Court has explained, the reasonable person standard strikes "the proper balance so that 'courts may refrain from threatening the valuable role of private arbitration in the settlement of commercial disputes, and at the same time uphold their responsibility to ensure that fair treatment is afforded those who come before them.'" *Id.* (quoting *Morelite Constr. Corp. (Div. of Morelite Elec. Serv., Inc.) v. New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir.1984)).

Here, proof of actual bias *has been adduced* for Manfred and MLB. As the dissent summarizes—and the neither the plurality nor the concurrence dispute—MLB administered an unfair proceeding; took a $25 million stake in the dispute; threatened the Orioles and MASN with sanctions if they challenged MLB's award; argued that the Nationals were right on the merits and the Orioles and MASN were

wrong; and advocated against the Orioles and MASN in the news media. *TCR*, 153 A.D.3d at 166-167 (Acosta, P.J., dissenting). Significantly, the concurrence agreed with this key point: "the conduct of Major League Baseball and its representatives has been far from neutral and balanced." *Id.* at 161 (Kahn, J., concurring).

When such proof of actual bias of the arbitral forum *has* been adduced, it is unfair to require parties to submit their disputes to arbitrators appointed by that biased forum. That is especially true here. Manfred not only controls appointment of the arbitral panel; Manfred also exercises power over the arbitral panel members' MLB teams. It is unreasonable to force a party to arbitrate before an MLB panel selected by Manfred in these circumstances. To do so, I respectfully submit, would be to ignore the realities that arbitrators are human beings. The objective evident partiality standard is the law in the State of New York for this very reason.

C. This Court Should Confirm that the Proscription Against Evident Partiality in Arbitration Applies to the Arbitral Forum

For decades, courts in New York and the Second Circuit have held that the contractually-designated arbitrator should be replaced with a different, impartial arbitrator when the record shows that the contractually-designated arbitrator is evidently partial. *See, e.g., Hyman v. Pottberg's Ex'rs*, 101 F.2d 262, 266 (2d Cir. 1939); *Sawtelle v. Waddell & Reed, Inc.*, 304 A.D.2d 103, 117 (1st Dep't 2003); *Matter of Excelsior 57th Corp. (Kern)*, 218 A.D.2d 528, 529 (1st Dep't 1995).

Courts have applied this standard to disqualify industry arbitrators such as a

labor arbitrator, *Pitta v. Hotel Ass'n of N.Y.*, 806 F.2d 419, 420 (2d Cir. 1986), the National Basketball Association ("NBA") Commissioner, *Erving v. Va. Squires Basketball Club*, 349 F. Supp. 716, 718 (E.D.N.Y. 1972), *aff'd*, 468 F.2d 1064 (2d Cir. 1972), and the National Football League ("NFL") Commissioner, *Morris v. N.Y. Football Giants, Inc.*, 150 Misc. 2d 271, 276-78 (N.Y. Sup. Ct. 1991), on the basis of their evident partiality, and replace them with a different, neutral arbitrator. There is no case that I am aware of permitting an evidently partial arbitrator to re-hear the dispute after an award has been vacated; that would be inappropriate and unfair.

In cases such as *Pitta*, *Erving*, and *Morris*, the designated arbitrator was a single arbitrator. In those cases, the arbitrator (the Commissioner of the NBA or NFL) was also the head of the arbitrator forum (such as the NBA or NFL).

While the issue of evident partiality of the *arbitral forum* has arisen less frequently, the same principles that courts apply to disqualify arbitrators on the basis of partiality should apply to disqualifying the arbitral forum on the basis of its evident partiality. For example, a 1984 decision of the Appellate Division, *Rabinowitz v. Olewski*, 100 A.D.2d 539, 540 (2d Dep't 1984), disqualified an industry arbitration forum, the Diamond Dealers Club, from presiding over an arbitration after high-ranking officials of the Diamond Dealers Club received a letter making allegations about one party that risked biasing the Club against that party.

Recently, in *Monster Energy Co. v. City Beverages, LLC*, 940 F. 3d 1130 (9th

Cir. 2019), the U.S. Court of Appeals for the Ninth Circuit disqualified a JAMS arbitrator because the arbitrator had a financial interest in JAMS. Citing the U.S. Supreme Court's seminal decision in *Commonwealth Coatings Corp. v. Continental Cas. Corp.*, 393 U.S. 145 (1968), the Ninth Circuit observed that "the [U.S. Supreme] Court [in *Commonwealth Coatings*] did not distinguish between an arbitrator's organization and other entities, nor do we see any reason to insulate arbitration services from the principles that the Court articulated in *Commonwealth Coatings*." *Monster Energy Co.*, 940 F.3d at 1136. I agree with this proposition. The principles used to assess disqualifying evident partiality should be the same regardless of whether the bias is exhibited by the arbitrator or the arbitral forum.

Holding the arbitrators to a standard of impartiality without doing the same for the arbitral forum would significantly weaken the proscription against evident partiality in arbitration. The Court should confirm that arbitral forums and appointing authorities are subject to the same evident partiality standards—articulated by the U.S. Supreme Court in *Commonwealth Coatings* and subsequently refined in subsequent lower court decisions—as individual arbitrators. When the arbitral forum is evidently partial, an arbitration before that arbitral forum is evidently partial. The proper remedy in such a case is to order the arbitration to proceed before a neutral arbitral forum. As with an arbitration before a partial arbitrator, an arbitration before a partial forum is fundamentally unfair. To suggest

otherwise is unfaithful to the bedrock proscription against evident partiality.

D. The Appellate Division Plurality's Decision Undermines the Integrity of, and Public Confidence in, Industry Arbitration

The plurality suggested that disqualifying MLB in this case "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." *TCR*, 153 A.D.3d at 157 (Plurality Op.) I disagree with this view, and submit that, conversely, the plurality's view compromises the integrity of industry arbitration.

The Supreme Court vacated MLB's RSDC's first award because MLB's conduct "objectively 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." *TCR Sports Broadcasting Holding, LLP v. WN Partner, LLC*, 2015 WL 6746689, at *12 (N.Y. Sup. Ct. Nov. 4, 2015) (quoting *Pitta v. Hotel Ass'n of N.Y. City, Inc.*, 806 F.2d 419, 423-24 (2d Cir. 1986)). As stated above, I respectfully submit that the evidence cited by Justice Acosta's dissent demonstrates Manfred's and MLB's evident partiality in this dispute. However, disqualifying MLB from presiding over an arbitration of *this* dispute would not disqualify MLB (or Manfred) from arbitrating *other* disputes—just as the Commissioners of the NBA and NFL, and JAMS, have arbitrated many disputes despite being disqualified on certain occasions due to evident partiality A disqualification of MLB in this dispute could not be used to disqualify MLB from arbitrating an unrelated dispute.

Nor does disqualifying MLB in this case question the viability of industry-insider arbitrations. By contrast, *failing* to disqualify MLB in this case threatens the integrity of, and undermines public confidence in, industry arbitration. The vast majority of industry arbitrations, in my experience, are impartial and fair proceedings. But when there is objective evidence of partiality, bias or unfairness, it is incumbent on reviewing courts to ensure a fair proceeding is conducted, including, where appropriate, disqualifying the industry arbitral forum.

The Appellate Division's decision permitting MLB to rehear the dispute, despite evidence demonstrating MLB's and Manfred's partiality, will discourage others from designating an industry arbitration forum. Parties may fear that even if the industry forum turns out to be partial and biased against them, they will have no recourse to the courts to substitute a neutral arbitral forum to hear the case.

I agree with Presiding Justice Acosta that if the Court fails to disqualify MLB and replace MLB with a neutral forum in this case, I fail to see what record and what case would warrant replacement of a partial arbitral forum with a neutral one. *See TCR*, 153 A.D.3d at 163 (Acosta, P.J., dissenting). An affirmance by this Court of the Appellate Division's decision would create precedent holding that an agreement to industry arbitration is tantamount to an acceptance of the industry forum *even when* it proves itself to be biased against one side *on the merits.* Failing to replace MLB with a neutral forum in this case would result in a loss of legitimacy for the

arbitral system and encourage parties to opt out of arbitration altogether. By contrast, replacing MLB with a neutral forum is faithful to the parties' agreement to arbitrate their disputes, while removing the fundamental unfairness of requiring parties to arbitrate within an arbitral body with a demonstrated bias against them.

In addition to the aforementioned system-wide legitimacy concerns, holding in MLB's favor would transfer power to future partial arbitrators and arbitral forums intent on reaching a particular result. There is a serious potential for abuse of that improper power that would arise from allowing MLB to continue to serve as the arbitral forum in this case. Future partial arbitral forums would be given license to threaten one side with sanctions if their award is challenged, to litigate against one side, to take public positions on the merits of the dispute, and to make statements in the press on the merits of the dispute favorable to one side and against the other, knowing that they will continue to hold the power to render a binding award.

II. The Rehearing Did Not Cure MLB's and Manfred's Evident Partiality

I respectfully disagree with the decisions of the Supreme Court and Appellate Division confirming the subsequent arbitration award issued by MLB's RSDC following the Appellate Division's 2017 decision. *See TCR Sports Broadcasting Holding, LLP v. WN Partner, LLC*, 67 Misc.3d 1242(A) (N.Y. Sup. Ct. 2019), *aff'd* 187 A.D.3d 623 (1st Dep't 2020). Notably, both the Supreme Court and Appellate Division decisions relied principally on the reasoning of the concurring opinion of

Justice Andrias in *TCR*, 153 A.D.3d at 143-61 (Andrias, J., concurring), which I submit, for the reasons stated above, was fundamentally misguided.

Perhaps most significantly, the expressed views of MLB and Manfred on the merits of the dispute were public, in press statements and court filings. I am unaware of any evidence that MLB or Manfred retracted any of their statements. While the Supreme Court reasoned, in confirming the second arbitration award, that there was no "direct" evidence of partiality of the arbitrators in the second arbitration, *TCR*, 67 Misc.3d at *9, there is direct evidence of partiality of MLB, under whose auspices the arbitration was conducted, and Manfred, who appointed the arbitrators. The arbitrators were not sequestered, and it must be presumed that they were aware of MLB's and Manfred's strong positions on the dispute prior to the arbitration.

MLB's, Manfred's and the arbitrators' lack of public statements about the second arbitration does not cure the irreparable bias and partiality of the MLB forum demonstrated in the first arbitration. What has been disclosed shows that MLB and Manfred are partial and biased on the merits of this dispute against the Orioles and MASN, and in favor of the Nationals. As stated above, arbitrators are human beings. It is impossible to ignore that the forum in which the arbitration occurred—including the MLB Commissioner himself—has taken public positions on the merits of the dispute, and the influence that MLB's expressed views likely had on the arbitrators' thought processes and ultimate decision. No party should be forced to arbitrate in

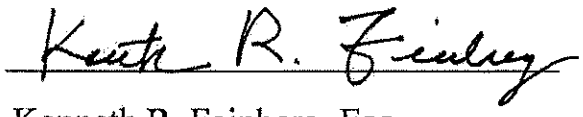
such an environment. That is why an arbitration before an *arbitral forum* that is evidently partial in a dispute cannot be fundamentally fair. A contrary holding would significantly weaken the parties' and the public's confidence in the arbitration process as a fair, neutral and unbiased means of resolving disputes.

CONCLUSION

Removing disputes from biased arbitral forums—especially where the head of the forum has shown bias, approaching outright hostility, towards one party—is an indispensable matter of substantive justice for arbitrating parties, be they individual, corporate or institutional, sophisticated or not, as well as general public perception. The public will lose faith in the systems of arbitration and alternative dispute resolution that have become a parallel component of our justice system if courts fail to intervene to ensure a fair process before an unbiased arbitral forum. This is a case where such intervention is necessary. For the reasons stated herein, I submit that this Court should reverse the Appellate Division's orders.

Dated: New York, New York
December 21, 2022

Respectfully submitted,



Kenneth R. Feinberg, Esq.
The Law Offices of Kenneth R. Feinberg, P.C.
1455 Pennsylvania Avenue NW #390
Washington, DC 20004
kfeinberg@feinberglawoffices.com

NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 N.Y.C.R.R. Part 500.1(j) that the foregoing brief was prepared using Microsoft Word.

Type. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman

Point size: 14

Line Spacing: Double-spaced

Word Count. The total number of words in the brief, inclusive of point headings and exclusive of pages containing the table of contents, table of authorities, proof of service, and this statement, is 4,232.

Dated: New York, New York
December 21, 2022

Kenneth R. Feinberg

Kenneth R. Feinberg, Esq.