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

Court of Appeals

of the

State of New York

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

Appellants,

– against –

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

Respondents.

BRIEF OF RESPONDENT WASHINGTON NATIONALS BASEBALL CLUB, LLC IN RESPONSE TO THE AMICUS BRIEFS OF KENNETH R. FEINBERG AND THE MAYOR AND CITY COUNCIL OF BALTIMORE

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Dated: January 20, 2023

Rule 500.1(f) 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, respectfully 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 23% 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.

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SUMMARY OF ARGUMENT

Kenneth R. Feinberg, a noted mediator and arbitrator in his own right, offers an amicus brief that is strikingly unmoored from established facts and legal precepts on which this appeal turns. He cites no legal authority suggesting that New York courts can force parties to arbitrate before a *different* arbitral forum, following procedures different from those that have been contractually agreed. Nor does he cite a single case, from any jurisdiction, in which any court in the United States has ever exercised any such power throughout the near-century following passage of the Federal Arbitration Act ("FAA"). Nor does he identify any reason for supposing it would be appropriate here to take the drastic, unprecedented step of remanding to a wholly new forum. Rather, he argues only that the *Commissioner* was biased, quite different from the actual arbitrators who issued the decision in question.

Of course, arbitrators can and should be counted on to perform their duties just as other presiding officers, including judges, invariably are. Mr. Feinberg lacks any sound basis to assume, as he inexplicably assumes, that arbitrators would cave to the Commissioner's preferences merely because the Commissioner appointed them and spoke publicly about the case. Indeed, Mr. Feinberg fails even to establish that the Commissioner betrayed bias by simply defending the integrity of the first arbitration. To state the obvious, this Court would not credit an assumption that lower-court judges are too biased to handle cases simply because the Governor (a)

appointed them and (b) expressed an opinion about a pending case. It would be anomalous, unfair, and violative of the FAA to assume any worse of arbitrators, especially in a case where even Mr. Feinberg, in supporting the Orioles, does not seriously argue that the second arbitral tribunal, which was entrusted with deciding the parties' dispute, was somehow destined to be partial.

Contrary to Mr. Feinberg's premise, the result he urges would discourage parties from selecting New York law to govern their arbitration contracts. The Nationals agreed to cede to the Orioles predominant control over the Mid-Atlantic Sports Network ("MASN") in exchange for ensuring any dispute would be resolved in the uniquely expert forum designated by the parties, the Revenue Sharing Definitions Committee ("RSDC"). The RSDC's award was reached after many years of litigation and delays, and deserves to be reviewed under a highly deferential standard. To vacate and remand at this late stage would be antithetical to the basic premises of arbitration—including that it affords an efficient, dependable path to enforcing private agreements—and would make New York a *sui generis* outlier relative to other states. By comparison, other jurisdictions without exception have barred their courthouse doors to any such effort by an aggrieved party to discount, or, what is worse, rewrite, the terms of an agreed arbitration clause.

As for the amicus submission by the Mayor and City Council of Baltimore, it fails to address any of the legal issues in this case and offers no reason to vacate the

second arbitration award, other than rooting for Baltimore. Baltimore's stated interest in this case is purely pecuniary, and ostensibly no greater than that of Washington, D.C. (and, by extension, the U.S. Government) in seeing the Nationals succeed. What would disadvantage both cities and all concerned, however, is prolonging and complicating this decade-long dispute with a wasteful remand to a different, yet-to-be determined arbitral forum of the First Department's choosing—a disposition that would upend and supplant the express terms of the parties' arbitration agreement.

ARGUMENT

I. MR. FEINBERG FAILS TO ENGAGE WITH THE NATIONALS' ARGUMENTS OR WITH THE FIRST DEPARTMENT AND SUPREME COURT'S FINDINGS

Throughout his brief, Mr. Feinberg disregards fundamental limitations on this Court's authority to review decisions of the Appellate Divisions, particularly when it comes to revisiting affirmed findings of fact. Tellingly, his arguments explicitly rest (Feinberg Br. 1, 4) on the purported findings in "Presiding Justice Acosta's dissent" regarding the RSDC's "fitness to preside over the re-hearing of the arbitration." *See also id.* at 6 ("[T]he facts cited by the [2017] dissent show that MLB and Manfred are biased."). But the 2020 First Department order contradicts those purported findings: The Court specifically held, as a factual matter, that MASN/Orioles "failed to establish evident partiality in the RSDC in the second

arbitration." A.5420. Because this Court lacks "the power to … review [this] finding[] of fact" by the First Department, *Matter of Rochester Urban Renewal Agency*, 45 N.Y.2d 1, 7 (1978), and is limited to ruling on "questions of law only," C.P.L.R. § 5501(b), it is not free to find that the RSDC had "evident partiality" on remand (Feinberg Br. 4) (capitalization altered). Furthermore, MASN/Orioles cannot prevail in challenging the First Department's 2017 decision to remand to the RSDC, rather than a different arbitral forum, unless it shows that this choice was "so arbitrary and without rational basis as to amount to abuse as a matter of law." Nationals Br. 25-26 (quoting Arthur Karger, *Powers of the N.Y. Court of Appeals* 16:4 (Sept. 2021 update)). That is, by design, a high bar, yet Mr. Feinberg never acknowledges it, much less explains how it has been cleared here.

The remaining portion of the response addresses Mr. Feinberg's arguments in the same order reflected in the parties' briefs. *See generally* Nationals Br. 27-53. First, Mr. Feinberg errs in asserting that the First Department had the authority, under principles of New York contract law and the FAA, to disqualify the RSDC and remand to a different arbitral forum. Second, even if the First Department had that authority, it was not an abuse of discretion on these facts for the First Department to decline to disqualify the RSDC and remand to a different arbitral forum. Finally, Mr. Feinberg's contrary arguments, if endorsed in the current procedural posture, would pose a profound, unprecedented threat to private

arbitration, discourage parties from adopting New York choice-of-law and choice-of-forum clauses, and potentially vitiate industry-expert arbitrations.

A. The First Department Had No Authority To Disqualify The RSDC Or To Remand To A Different Forum

Mr. Feinberg fails to refute the First Department's explanation as to why disqualifying the RSDC as a forum and remanding to a new arbitral forum would be inconsistent with generally applicable contract principles such as rescission or reformation. *See* Nationals Br. 27-52. That should be the end of the matter, for 9 U.S.C. § 2 "establishes an equal-treatment principle: A court may invalidate an arbitration agreement based on 'generally applicable contract defenses' like fraud or unconscionability, but not on legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" *Kindred Nursing Centers Ltd. P'ship v. Clark*, 581 U.S. 246, 251 (2017) (quoting *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)). "Under that principle, the FAA 'preempts any state rule discriminating on its face against arbitration,'" as well as "generally applicable principles of state law" that accomplish the same result. *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1917-18 (2022) (quoting *Kindred Nursing*, 581 U.S. at 251).

Accordingly, states *must* "'enforce arbitration agreements according to their terms, including terms that specify *with whom* the parties choose to arbitrate their disputes and *the rules* under which that arbitration will be conducted.'" *Epic Sys.*

Corp. v. Lewis, 138 S. Ct. 1612, 1621 (2018) (emphases in original) (quoting *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013)). Remanding a case to a different arbitral forum than the one selected by the parties "is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent," *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010) (holding that a party may not be forced to submit "class-action arbitration" simply because it agreed "to arbitrate").

To urge a contrary result, Mr. Feinberg resorts to conflating the RSDC as an arbitral forum with the arbitrators themselves. Specifically, Mr. Feinberg submits (Feinberg Br. 12) that "[t]he 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." But the case he relies on, *Monster Energy Co. v. City Beverages, LLC*, 940 F.3d 1130 (9th Cir. 2019), suggests nothing of the sort. *Monster Energy* held only that an arbitrator must disclose his own financial stake in an arbitration's outcome. *See id.* at 1132 (vacating award based on "the Arbitrator's failure to disclose his ownership interest in JAMS, coupled with the fact that JAMS has administered 97 arbitrations for [the prevailing party in the arbitration] over the past five years"). That case has nothing to do with this one, and it by no means endorses the remarkable proposition on which Mr. Feinberg relies, which would impute

across an entire arbitral forum any bias on the part of one or another individual arbitrator.

Notably, Mr. Feinberg concedes that the other cases he cites (Feinberg Br. 10-11) disqualified only the arbitrator, not the forum. That concession alone suffices to confirm that the First Department acted well within its discretion in 2017 by declining to order an extraordinary remand that no U.S. court has ever ordered under the applicable legal standard. *See supra*; Nationals Br. 25-26 (specifying standard of review). The lone arguable exception, *Rabinowitz v. Olewski*, 100 A.D.2d 539 (2d Dep't 1984); differs categorically on its facts, Nationals Br. 38-39; and applied the wrong legal standard. *Rabinowitz* disqualified the arbitrators based on "the *appearance* of bias," 100 A.D.2d at 540 (emphasis added), which even Mr. Feinberg recognizes (*see* Feinberg Br. 5) is *not* a legally sufficient basis to disqualify an arbitrator, let alone every potential arbitrator the forum might appoint. *See U.S. Elecs., Inc. v. Sirius Satellite Radio, Inc.*, 17 N.Y.3d 912, 914 (2011) (rejecting "mere appearance of bias" standard). Simply put, Mr. Feinberg's main case is a one-off, outdated decision that is no longer good law and no other court has followed.

Mr. Feinberg is similarly unpersuasive in arguing, as a matter of policy (Feinberg Br. 12), that an arbitration before an arbitral forum should be treated as "evidently partial," absent any showing of bias on the part of the specific arbitrators appointed. In "unusual" cases, appeals courts sometimes remand to cases to

different judges to avoid the appearance of bias. *L.S. v. Webloyalty.com, Inc.*, 954 F.3d 110, 118 (2d Cir. 2020) (citations omitted). But courts do *not* remand cases to *different judicial systems or jurisdictions* on the assumption that a new judge in the same courthouse would be beholden to his or her predecessor.

By the same token, it is understandable for a court to remand a case to a new *arbitrator* after finding that a prior arbitrator was evidently partial or corrupt, *see* 9 U.S.C. § 10(b), as the same individual arbitrator would have "substantial difficulty in putting [such bias] out of his or her mind." *Martens v. Thomann*, 273 F.3d 159, 174 (2d Cir. 2001) (Sotomayor, J.) (citations omitted) (standard for remanding to a different judge). But it by no means follows that an arbitral forum is so structurally biased that it necessarily taints a new and different tribunal, even after the tribunal receives the remand instruction and cures the purported conflicts. To attribute such systemic bias to an arbitral forum, different from a judicial forum, would amount to disfavoring arbitration in stark violation of the FAA. Indeed, because any supposed structural partiality of an arbitral forum would be evident to sophisticated parties before they agree to arbitrate, it would have been waived by the Orioles here, just as parties waive any other partiality objection when they knew of a purported conflict in advance. *See, e.g.*, *Ecoline, Inc. v. Loc. 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).

Nor would it be equitable or faithful to the parties' agreement to follow Mr. Feinberg's urging by undertaking a partial rescission, confined to the specified arbitration procedure and forum. The underlying contract affords the Orioles super-majority ownership of MASN and thus power to set the Nationals' preliminary rights fees; the Nationals agreed to cede that power (entailing obvious risk of abuse) to the Orioles *only* in exchange for the RSDC being the arbitral forum and bringing its unique expertise to resolve any dispute between the parties specifically over rights fees. *See* Nationals Br. 7-8. By Mr. Feinberg's conception, however, the Orioles would now obtain, *post hoc* and via judicial fiat, the right to have their cake and eat it too—changing the bargained-for playing field by ejecting the RSDC, even while the Orioles' retain their contractual control over MASN. That result would be fundamentally unfair, incompatible with core, interlinked premises of the parties' agreement, and unavailable under settled contract law. *See, e.g.*, *Ripley v. Int'l Rys. of Cent. Am.*, 8 N.Y.2d 430, 437 (1960) (partial rescission is available only if the rescinded part "is separable or divisible" from the rest of the contract (citations omitted)); *Lummus Co. v. Commonwealth Oil Ref. Co.*, 280 F.2d 915, 927-28 (1st Cir. 1960) (rejecting efforts to partially rescind choice of arbitral forum).

Even if Mr. Feinberg were correct that a court could partially rescind a contract by disqualifying an arbitral forum (he is not), it would not follow that a court could *also* reform the contract "to order the arbitration to proceed before a

neutral arbitral forum" (Feinberg Br. 12). Arbitration agreements are creatures of contract, and judicial enforcement of them is predicated upon parties' voluntary consent, as reflected in their private agreements. No such judicial revisionism would be available, for instance, where a contract's forum-selection clause is held unenforceable. "An agreement to arbitrate before a specified tribunal is," after all, just a "specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974). As the First Department plurality held, the parties "specified that other disputes would be arbitrated before the Commissioner or [American Arbitration Association], evidencing that the decision to carve out telecast fee disputes for arbitration before the RSDC was a conscious choice." A.3778-79 (Andrias, J.); *see* Nationals Br. 31-32. The First Department would have no legal authority to reform the contract so as to compel the parties to arbitrate under procedures and tribunals that were never consented to by the parties. *See, e.g.*, *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019).

B. Even If The First Department *Could* Have Remanded To A Different Forum, It Was Not *Required* To Do So

Not only did the First Department lack any legal basis to disqualify the RSDC and remand to a different arbitral forum, as urged by Mr. Feinberg, but it also lacked any logical reason to do so. By no stretch of imagination did the First Department abuse its discretion in 2017 by remanding to the parties' chosen arbitral forum.

Even if traditional contract principles allowed for partial rescission and reformation of the arbitral forum, it is a *non sequitur* for Mr. Feinberg to fault the *second* tribunal containing *new* arbitrators. *See* Nationals Br. 16. No evidence has been offered or claimed as establishing partiality on the part of the individual arbitrators who were ultimately appointed and issued the operative award on remand. Indeed, the First Department has conclusively found the opposite. *See* A.5420.

Moreover, to the extent any structural bias is alleged, it was baked into the parties' agreement and afforded just as much reason for the RSDC arbitrators to *favor* MASN/Orioles. During the first arbitration, the Orioles sat on MLB's executive committee and entered into financial transactions with the clubs of other RSDC members, paying the New York Mets (whose chief operating officer sat on the RSDC panel at the time) cash for a shortstop, for example. A.1921-22, 1925. Yet the Orioles never expressed any concern about these parallel dealings or the resulting incentives for arbitrators potentially to favor the Orioles. To the contrary, such connections between the arbitrators, the forum, and the parties were part and parcel of the parties' expectations when they signed the arbitration contract.

Mr. Feinberg nonetheless posits (Feinberg Br. 7-8) that the second, entirely new arbitral tribunal would be biased against the MASN/Orioles. But his argument turns solely on the Commissioner's purported bias, not the arbitrators', lacks any

kernel of evidentiary support, and, again, is squarely foreclosed by the First Department's authoritative finding. A.5420.

All that aside, the arbitrators are not answerable to the Commissioner. *See* Nationals Br. 8-9. Nor does any evidence suggest the Commissioner could influence the outcome of the second arbitration. Although Mr. Feinberg asserts (Feinberg Br. 7) that the remand and appointment of new arbitrators did "not cure the partiality and bias" of the RSDC (capitalization altered), he conspicuously does not endorse the MASN/Orioles' contentions to the effect that partiality followed from the prepayment agreement or any supposed role played by MLB. *See* Nationals Br. 54-63. Because the record does not come close to establishing that the RSDC itself was *necessarily* tainted by evident partiality, the First Department had ample reason to decline to remand to an entirely new forum of its own choosing. Nor does any of Mr. Feinberg's arguments fill the obvious evidentiary gap.

1. The Commissioner's Power Of Appointment Did Not Compromise The Second Arbitral Panel

Mr. Feinberg argues (Feinberg Br. 10) that the Commissioner *could have* biased the second arbitral panel because he "control[led] appointment of the arbitral panel." But such reasoning does not hold water: Although the President and U.S. governors likewise appoint judges, judges remain independent. Nor is there any evidence that the Commissioner used his power to appoint RSDC members predisposed to favor the Nationals. Mr. Feinberg offers no reason why this Court

should be any less respectful of arbitrators than it is of judges and jurors in presuming they follow their instructions and oaths. And the FAA flatly prohibits the implied disrespect on which the instant supposition rests. *See, e.g.*, *Kindred Nursing*, 581 U.S. at 251 (A court cannot "invalidate an arbitration agreement based on … legal rules that 'apply only to arbitration ….'" (quoting *Concepcion*, 563 U.S. at 339)).

2. The Commissioner's Defense Of The RSDC's Integrity Did Not Compromise The Second Arbitral Panel

It is unfair to characterize the Commissioner as taking "the side of" the Nationals in post-arbitral proceedings (Feinberg Br. 9). The Commissioner merely defended the first arbitration's integrity against MASN/Orioles' charges. *See* Nationals Br. 48. Even if Mr. Feinberg's premises were otherwise correct, the Commissioner does not signal partisan bias by maintaining that the RSDC is operating with integrity and deserving of judicial respect. By comparison, politicians may opine publicly (and vociferously) on how judges should resolve high-profile cases or berate them for reaching undesired outcomes. Still, courts rightly "presume that a judicial officer impartially executes his responsibilities" in the face of such pressures, *Cornelio v. Connecticut*, 32 F.4th 160, 179 (2d Cir. 2022), even though judges too "are human beings" (Feinberg Br. 10). Notably, "the standards for disqualification of arbitrators [are] ... less stringent than those for federal judges." *Morelite Const. Corp. (Div. of Morelite Elec. Serv.) v. New York City Dist. Council Carpenters Ben. Funds*, 748 F.2d 79, 83 (2d Cir. 1984).

3. The Commissioner's Participation In The First Arbitration Did Not Compromise The Second Arbitral Panel

Mr. Feinberg notes (Feinberg Br. 8) that the Commissioner "sat with the RSDC arbitrators and asked questions during the [first arbitration] hearing" (quoting A.3816 (Acosta, J., dissenting)). Of course, lawyers ask questions without unduly swaying judges (or arbitrators), or otherwise rendering decisions unfair. In any event, because the Commissioner was empowered to ask questions and sit in the hearings as part of the arbitral process to which both sides agreed, that procedure cannot afford basis for impugning the second arbitral award that issued more than six years later. *See* Nationals Br. 45. Indeed, Mr. Feinberg himself concedes (Feinberg Br. 13) that the RSDC is competent to arbitrate "other disputes" pursuant to the very same procedures, including participation by the Commissioner (emphasis removed).

4. The Commissioner's Supposed Power Over MLB Teams Did Not Compromise The Second Arbitral Panel

Mr. Feinberg passingly references (Feinberg Br. 10) the Commissioner's "power over the arbitral panel members' MLB teams." He cites no evidence, however, that the Commissioner ever invoked or exerted this alleged power in an effort to sway the tribunal in either of the two arbitrations. *See* Nationals Br. 43. "To disqualify any arbitrator who had professional dealings with one of the parties ... would make it impossible, in some circumstances, to find a qualified arbitrator at

all." *Certain Underwriting Members of Lloyds of London v. Fla., Dep't of Fin. Servs.*, 892 F.3d 501, 508 (2d Cir. 2018) (citations and brackets omitted). Moreover, MASN/Orioles specifically agreed to RSDC arbitration "knowing full well" where the Commissioner sits relative to the RSDC. *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527, 548 (2d Cir. 2016) ("*NFL*").

In *NFL*, for example, the Second Circuit held that the NFL Commissioner could act as arbitrator in a challenge to his own purported violation of a Collective Bargaining Agreement (in effect, acting as both judge and defendant) because "the parties contracted ... to specifically allow the Commissioner" to do just that—even though the Commissioner "chose not to hear evidence" in that instance. *Id.* The same holds here: As MASN/Orioles' counsel acknowledged in the Supreme Court, the Orioles and MASN "bought into" and "had to live with" the "structure" of the RSDC proceeding. Nationals Br. 9 (quoting A.3779). If anything, the Orioles' challenge is even weaker than the one that failed in *NFL*. Here, the Commissioner did not violate any contract, was not an adverse party in the arbitration, and had no direct control over the arbitration. Such a record comes nowhere close to affording basis for deeming the second arbitral tribunal to be a mere puppet of the Commissioner.

5. The Commissioner Was Not Biased And Had No Reason To Compromise The Second Arbitral Panel

Nor has Mr. Feinberg shown that the Commissioner himself would be biased against MASN/Orioles on remand, let alone be so biased as to try to manipulate the RSDC. *See, e.g.*, *Westinghouse Elec. Corp. v. New York City Transit Auth.*, 82 N.Y.2d 47, 54 (1993) (courts do not find evident partiality "even in cases where the contract expressly designated a single arbitrator who was employed by one of the parties or intimately connected with him" (citations omitted)). Mr. Feinberg claims (Feinberg Br. 8) that the Commissioner "advocated in favor of the Nationals' position" when defending the first arbitral award. But the Commissioner simply defended the integrity of the arbitral process, and only after MASN/Orioles named him as a party. *See* Nationals Br. 47-48. Just as "[a] judge cannot be disqualified merely because a litigant sues … him or her," *New York State Ass'n of Crim. Def. Laws. v. Kaye*, 95 N.Y.2d 556, 561 (2000) (citations and emphasis omitted), MASN/Orioles cannot fault the Commissioner for properly defending the institutional integrity of his tribunal's decision post-suit.

Even setting that aside and assuming (counter-factually) that the Commissioner were himself an arbitrator, courts do not find partiality when an arbitrator "express[es] an[] opinion before [] reaching [its] ultimate conclusion," *Ballantine Books Inc. v. Capital Distrib. Co.*, 302 F.2d 17, 21 (2d Cir. 1962). By the same token, federal agency commissioners can opine that a company violated

the law and then properly adjudicate an enforcement proceeding against the same company. *See, e.g., F.T.C. v. Cement Inst.*, 333 U.S. 683, 700-01 (1948) (expressing an opinion does not mean that one's mind was "irrevocably closed on the subject"); *Warder v. Bd. of Regents of Univ. of State of N. Y.*, 53 N.Y.2d 186, 197 (1981) (The fact that "two Regents" on the Board of Regents, in a prior hearing, "expressed strong opposition to charter approval for [a religious group's proposed] Seminary, noting the charges of political activity, brainwashing and deception," does not show Regents were biased in denying charter approval.). Likewise, a judge can both "bring and preside over the ensuing contempt proceedings." *Withrow v. Larkin*, 421 U.S. 35, 53 (1975). Mr. Feinberg's assumption that the arbitral forum should be deemed irreparably broken simply because the Commissioner (not even the arbitrators) defended the integrity of the first arbitration, effectively discriminates against arbitration as a mode of dispute resolution.

* * * * *

At bottom, Mr. Feinberg's bias arguments would not pass judicial muster in any other context. Federal and state agencies often bring enforcement proceedings before their own administrative law judges ("ALJs") who (unlike the arbitrators here) are employed, paid and reviewed by the same very same agencies that are urging the ALJs to reach their preferred result. *See* 15 U.S.C. § 78d-1(b) (Securities and Exchange Commission procedures). Yet there is nothing inherently biased

about an agency performing "investigative, prosecutorial[,] and adjudicative functions" in the same proceeding. *Cousin v. Off. of Thrift Supervision*, 73 F.3d 1242, 1250 (2d Cir. 1996). "[S]tatutes doing so are common." *Child. of Bedford, Inc. v. Petromelis*, 77 N.Y.2d 713, 723 (1991), *cert. granted, judgment vacated on other grounds*, 502 U.S. 1025 (1992). Quite different from Mr. Feinberg's suggested approach, New York courts "presume[e] that [administrative] hearing officers and committee members are free from bias," while requiring a "party alleging bias [to] set forth a factual demonstration supporting the allegation as well as prove that the administrative outcome flowed from it." *Lauersen v. Novello*, 293 A.D.2d 833, 834 (3d Dep't 2002) (internal citations omitted).

Likewise, had these parties agreed, for instance, to litigate in a Baltimore court pursuant to a forum-selection clause, that agreement would be binding absent extraordinary evidence of "undue influence, or overweening bargaining power." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972). Even though Baltimore as a whole and its highest officials in particular have an avowed financial interest in the Orioles' success, as reflected in Baltimore's amicus brief and addressed further *infra*, it would not follow that Baltimore judges and jurors are all tainted such that the clause is invalid. *See, e.g., Fear & Fear, Inc. v. N.I.I. Brokerage, L.L.C.*, 50 A.D.3d 185, 186-87 (4th Dep't 2008) (Fahey, J.) (a forum-selection clause is enforceable unless "trial in the contractual forum would be so gravely difficult and

inconvenient that the challenging party would, for all practical purposes, be deprived of his or her day in court" (citations omitted)). Holding, as Mr. Feinberg advocates, that the Commissioner's statements supporting the first award inherently biased the second panel would thus "disfavor[] arbitration" in contravention of the FAA and the U.S. Supreme Court's consistent precedent enforcing that statutory command. *Concepcion*, 563 U.S. at 341.

C. Reversing The First Department As Urged Would Discourage Parties From Choosing New York's Law And Forum

Mr. Feinberg warns (Feinberg Br. 14-15) that "[f]ailing to replace" the parties contractually-selected forum "with a neutral forum in this case would ... encourage parties to opt out of arbitration altogether." In fact, the opposite is true: Parties select New York law and agree to litigate in New York because they can count on New York courts to respect their contractual rights. *See, e.g., Brooke Grp. Ltd. v. JCH Syndicate 488*, 87 N.Y.2d 530, 534 (1996) ("Forum selection clauses are enforced because they provide certainty and predictability in the resolution of disputes …."). Far from fearing that New York courts will direct litigation into the contractually-specified forum, that is precisely the result that parties bargain for when they invoke New York's law and courts. What would unsettle established expectations and lead contracting parties *away* from New York is for the First Department suddenly to anoint a different arbitral forum of its own choosing that the parties expressly agreed would *not* hear disputes over rights fees.

Mr. Feinberg's own sources illustrate this point: New York dwarfs other states as the forum and law of choice for commercial contracts because it strictly enforces such clauses. *See* Theodore Eisenberg & Geoffrey P. 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, 1484-85, 1511 (2009) (cited in Feinberg Br. 2). To further this dynamic, the Legislature abolished judicially-created exceptions to New York choice-of-law and choice-of-forum clauses in major commercial contracts, *see* N.Y. Gen. Oblig. Law §§ 5-1401 & 5-1402, thereby encouraging "parties to significant commercial contracts ... to submit to the jurisdiction of the New York courts." Committee on Foreign and Comparative Law, *Proposal for Mandatory Enforcement of Governing-Law Clauses and Related Clauses in Significant Commercial Agreements*, 38 Record of the Ass'n of the Bar of the City of New York 537, 538, 549 (1983). The Legislature has similarly viewed strict enforceability of arbitral clauses as integral to maintaining New York's status as "the nation's leading venue for commercial arbitration." Geoffrey P. Miller & Theodore Eisenberg, *The Market for Contracts*, 30 Cardozo L. Rev. 2073, 2080 (2009). New York enacted the first statute in the nation that declared arbitral clauses to be irrevocable and judicially enforceable specifically out of concern that it would otherwise lose "its dominant position in commercial arbitration" to courts in England

and elsewhere that hold parties to arbitrating in whatever forum they select. *Id.* at 2081-82.

To reject and replace the RSDC as evidently partial in this procedural posture—even while applying an abuse-of-discretion standard, *see* Nationals Br. 26 & n.2—would undermine New York's decades-long efforts to enforce arbitration agreements by their terms and foster reliance on same. If the Orioles can continue to prolong this decade-long controversy, following two unsuccessful appeals before the First Department, that will sow grave doubt as to whether parties' choice of an arbitral forum will be reliably respected and enforced by New York courts. Parties that desire certainty and predictability may then flock elsewhere as a result.

Mr. Feinberg's arguments pose particular threat to industry arbitrations. Arbitrators with industry-specific expertise, like the RSDC's, *see* Nationals Br. 8-9, are often "the best informed and most capable potential arbitrators." *U.S. Elecs.*, 17 N.Y.3d at 914 (citations omitted). "Familiarity with a discipline often comes at the expense of complete partiality," however, as "specific areas tend to breed tightly knit professional communities." *Lucent Techs. Inc. v. Tatung Co.*, 379 F.3d 24, 30–31 (2d Cir. 2004) (citations and brackets omitted). As a result, the generic "structural bias" that Mr. Feinberg alleges here—untethered to any alleged bias specific to the arbitrators themselves—may be commonplace in industry arbitrations. *Harter v. Iowa Grain Co.*, 220 F.3d 544, 554-56 (7th Cir. 2000) (citing cases). Mr. Feinberg's

arguments are less plausible, for example, than claims that a tribunal comprised of financial industry employers would be biased in favor of those employers and against employees, *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 14-16 (1st Cir. 1999) (rejecting such arguments); or that a tribunal of debit balance collectors would be biased against a customer in a debit-collection case, *see Scott v. Prudential Sec., Inc.*, 141 F.3d 1007, 1015-16 (11th Cir. 1998) (same). This Court too has historically rejected attacks on an arbitrator based "on his interest in the subject matter of the controversy or his relationship to the party who selected him." *Astoria Med. Grp. v. Health Ins. Plan of Greater New York*, 11 N.Y.2d 128, 137 (1962) (requiring, for disqualification, "some misconduct on the part of an arbitrator"). Endorsing these structural arguments now, after this Court and other courts elsewhere around the country have rejected them, would position New York as uniquely hostile to such arbitrations and would correspondingly discourage sophisticated commercial parties and industries from selecting New York law and courts when drafting their agreements.

II. BALTIMORE'S BRIEF DOES NOT ILLUMINATE ANY RELEVANT LEGAL ISSUE

Baltimore ignores all the legal issues and offers no reason to vacate the second arbitration award. Rather, its claimed interest in this case is, if anything, purely pecuniary. Baltimore states (Baltimore Br. i) that any decision by this Court "is likely to have a direct impact on the long-term viability of the Baltimore Orioles to

remain in Baltimore City" which implicates "economic and intangible benefits the City derives from the Orioles." Any such interest is not only speculative but far-fetched and contrary to all known facts.

The Orioles are a successful MLB Club by any measure—employing 4,000 people, attracting some 2 million visitors to Baltimore's downtown area annually, receiving $600 million from the State of Maryland to upgrade to a state-of-the-art stadium (Baltimore Br. 3-4), and reportedly sporting a $1.375-billion valuation as a franchise, *see MLB Team Valuations: #22 Baltimore Orioles*, *Forbes* (Mar. 2022), https://www.forbes.com/teams/baltimore-orioles/?sh=3920444976db. It defies all credulity to suppose that the $25-million-per-year difference between the RSDC's award of $59 million in annual license fees for the Nationals (and the Orioles), A.4610, versus the Orioles' proposal of $34 million for each club, A.22-23, poses an existential threat to the Orioles. Nor does the amicus brief offer anything to substantiate overwrought suggestions that "the character and identity of Baltimore" somehow hang in the balance here (Baltimore Br. 16).

At best, Baltimore's interest in seeing the MASN/Orioles' succeed corresponds with Washington, D.C.'s interest in seeing the Nationals succeed. Each city may root for its respective team to prevail, as countless fans do at the stadium, but their cheers are nothing more than noise for present purposes. So long as the arbitral award was consonant with fairness and law (something the Baltimore Brief

does not speak to), everyone benefits from seeing this ten-year old conflict finally resolved without resort to a do-over.

CONCLUSION

For the foregoing reasons, this Court should affirm the decisions below.

DATED: New York, New York
January 20, 2023

Respectfully submitted,

By:_____

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: January 20, 2023

COURT OF APPEALS
STATE OF NEW YORK

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

Appellants,

-against-

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

Respondents.

AFFIDAVIT OF SERVICE VIA OVERNIGHT DELIVERY

Appellate Division, First Department
Case Nos. 2019-05390, 2019-05458, and 2019-05459

New York County
Index No. 652044/14

STATE OF NEW YORK)
):ss.:
COUNTY OF NEW YORK)

IAN WEISS, being duly sworn, deposes and says:

1. I am over eighteen years of age and am not a party to the above entitled action.

2. On January 20, 2023, I served three copies of the Brief of Respondent Washington Nationals Baseball Club, LLC in Response to the Amicus Briefs of Kenneth R. Feinberg and the Mayor and City Council of Baltimore upon counsel for the parties and one copy of the Brief of Respondent Washington Nationals Baseball Club, LLC in Response to the Amicus Briefs of Kenneth R. Feinberg and the Mayor and City Council of Baltimore upon counsel for *Amicus Curiae* at the following addresses:

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Ian Weiss

Sworn to before me this
20th day of January, 2023

Notary Public