TCR Sports Broadcasting Holding, LLP v WN Partner, LLC
2015 NY Slip Op 33004(U)
November 4, 2015
Supreme Court, New York County
Docket Number: Index No. 652044/2014
Judge: Lawrence K. Marks

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

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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 ALLAN H. "BUD" SELIG, AS COMMISSIONER OF MAJOR LEAGUE BASEBALL,

Index No. 652044/2014

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.

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LAWRENCE K. MARKS, J.

This case involves a dispute between professional baseball teams over television fees. It raises the question of whether this Court should vacate an arbitration award, a not uncommon application to a court yet one that is rarely granted.

In motion sequence #018, petitioner TCR Sports Broadcasting Holding, LLP, d/b/a Mid-Atlantic Sports Network ("MASN"), and nominal respondents the Baltimore Orioles Baseball Club and Baltimore Orioles Limited Partnership ("BOLP" or the "Orioles," together with MASN, the "petitioners") seek an order pursuant to CPLR § 7511 and Section 10 of the Federal Arbitration Act, 9 U.S.C. § 10, vacating an arbitration award issued on June 30, 2014 by the Revenue Sharing Definitions Committee of Major League Baseball (the "RSDC Award" at Hall 9/23/14 Aff, Exh 2), as well as certain other related relief. Respondents the Office of Commissioner of Baseball, d/b/a Major League Baseball ("MLB"), Allan H. "Bud" Selig, as Commissioner of Major League Baseball ("Commissioner Selig")[1] and Washington Nationals Baseball Club, LLC ("Nationals") all oppose the petition. The Nationals cross-move to confirm the RSDC Award.[2]

BACKGROUND

For decades, the Orioles were the only MLB club in the Baltimore/Washington, D.C. area. The Orioles developed a regional sports network within a seven-state television territory, and no other MLB club had the right to telecast its games in the vast majority of this territory. Eventually, however, MLB purchased the Montreal Expos (now

[1] The current Commissioner of Major League Baseball is Robert D. Manfred ("Manfred"). Manfred 1/26/15 Aff, ¶ 1.

[2] Respondents WN Partner LLC and Nine Sports Holding, LLC aver that they are not proper parties to this proceeding; but "[t]o the extent the Court determines [otherwise, they] join in the Nationals' cross-motion." Nationals' Opp/Cross-Mot Br, at 1 n.1.

known as the Washington Nationals) and relocated the team to Washington, D.C., pursuant to a vote of the MLB clubs in December 2004, over the Orioles' objections. In March 2005, MLB, TCR (now known as MASN), the Nationals and BOLP entered into an agreement "to resolve various issues and to provide for the presentation and telecast of all available Nationals' baseball games in the Television Territory through a regional sports network along with all available Orioles' baseball games, unifying the games of both Clubs for telecast throughout the entire Television Territory." Hall 9/23/14 Aff, Exh 1 (the "Agreement") at 1.

Among other things, the Agreement established a two-club regional sports network, now known as MASN, and granted it "the sole and exclusive right to present any and all of the Nationals' and the Orioles' baseball games," subject to certain limitations not relevant here. Agreement, ¶ 2.A; *see also id.*, ¶ 2.D ("TCR shall have the sole and exclusive right and the obligation to telecast, using commercially reasonable efforts, all Available Games of the Orioles and the Nationals..."). The Agreement set forth the annual rights fees to be paid by MASN to the Orioles and the Nationals in 2005-2011, and established a mechanism for determining future rights fees. *Id.*, ¶¶ 2.G-J.

With respect to future rights fees, the Agreement provides that "[a]fter 2011, and for each successive five year period, the Orioles, the Nationals and the RSN shall first 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 ...." *Id.*, ¶ 2.I. In case

of any dispute regarding the determination of rights fees pursuant to ¶ 2.I, the Agreement provided for a mandatory 30-day negotiation period, followed by non-binding mediation "under the auspices of the American Arbitration Association or JAMS." *Id.*, ¶ 2.J.1-2. Should both of those steps fail, the Agreement provides:

> Appeal: In the event that the Nationals and/or the Orioles and RSN are unable to timely establish the fair market value of the Rights by negotiation and/or mediation as set forth above, 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. The fair market value of the rights established pursuant to this Subsection for the relevant five year period, or such shorter time as may be agreed to by the parties, shall be final and binding on the Nationals and the RSN, and the Nationals and the RSN 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. Beginning in 2007, the Orioles and the Nationals shall be paid the same rights fees by the RSN.[3] *Id.*, ¶ 2.J.3.

In 2011, MASN retained Bortz Media & Sports Group, Inc. ("Bortz") to determine the fair market value for telecast rights fees for the Orioles and the Nationals for the next five years. The Nationals disagreed with the Bortz recommendation. The parties were

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[3] Section 2.J is one of six dispute resolution provisions set forth in the Agreement. Agreement, ¶ 8. The apparent "catch-all" dispute resolution section (for disputes not covered by more specific sections) provides that the parties will "first seek mediation ... under the auspices of either the American Arbitration Association or JAMS." *Id.*, ¶ 8.A. If mediation is unsuccessful and the dispute is between the Nationals and the Orioles, BOLP and/or MASN, the parties agreed to arbitration before the Commissioner, unless MLB had an "ownership or financial interest in the Nationals or the RSN at the time that the dispute arose." *Id.*, ¶ 8.B. In that case, the parties agreed to arbitrate "before a three-person panel in accordance with the Commercial Rules of the American Arbitration Association," outside of Maryland, Virginia and the District of Columbia. *Id.*, ¶ 8.C.

unable to resolve their disagreement through negotiations, and submitted their dispute to the RSDC, under section 2.J.3 of the Agreement, in January 2012.

The RSDC is a standing committee of MLB. Although its membership changes periodically, the committee consists of three representatives from MLB clubs, appointed by the Commissioner of Baseball. As constituted in 2012, the members were 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.[4]

MLB staff oversaw and administered the arbitration. Manfred 10/20/14 Aff, ¶ 6; Manfred 11/19/14 Aff, ¶ 9; Manfred 1/26/15 Aff, ¶ 4; Cohen 10/20/14 Aff, ¶ 38 ("the RSDC arbitration process ... was administered informally by Mr. Manfred"). Manfred, in his then capacity as an Executive Vice President of MLB,[5] presided over an organizational meeting held on February 2, 2012, which was attended by counsel for the parties and MLB staff, and he discussed the procedure and schedule of the proceeding. Both sides raised certain concerns early in the process, which they continue to assert to this day. The Nationals objected to the participation of BOLP in the arbitration proceeding, and "the RSDC chose not to exclude the Orioles from the RSDC

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[4] Members typically reflect "different size markets" within MLB, and these three members were from two smaller-market clubs and one larger-market club. Robert 10/20/14 Manfred, ¶ 4.

[5] Manfred "joined MLB in 1998 and ha[s] served in a number of positions, including as Executive Vice President of Labor Relations and Human Resources and Executive Vice President, Economics and League Affairs." Manfred 10/20/14 Aff, ¶ 1. It appears that he was named Chief Operating Officer of MLB in late 2013 and became the Commissioner in early 2015.

Proceeding." Manfred 10/20/14 Aff, ¶¶ 17-18. The petitioners objected to the participation of Proskauer Rose LLP as counsel for the Nationals, in light of their well-known representation of MLB, and Manfred advised them "that [he] believed the RSDC lacked authority to" disqualify Proskauer from representing the Nationals. Manfred 10/20/14 Aff, ¶¶ 40-41. Although Manfred "viewed the objection as beside the point," he nonetheless "indicated they could object." Manfred 11/19/14 Aff, ¶ 20(c).

The parties made pre-hearing submissions in March 2012. On April 3, 2012, the RSDC held a one-day merits hearing. Counsel for the parties each presented oral argument, and the parties' experts were permitted to make oral presentations as well. Counsel for each party and its experts were permitted to respond to each other's presentations. MLB staff provided behind-the-scenes administrative support and also participated in the hearing by asking questions of each party during their presentations.

It appears that the RSDC originally planned to issue its opinion by June 1, 2012. MLB and the Nationals claim, without contradiction, that the RSDC reached an internal decision about the amount of the rights fees by early summer 2012, all parties were advised of the approximate amounts and these amounts were reflected in the RSDC Award that was eventually released in 2014.[6] Release of the decision was deferred for

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[6] The record does not reveal the exact date on which the arbitrators reached their internal decision, or precisely when, how and by whom the parties were advised of the amounts involved. However, MASN and the Orioles do not appear to dispute that they learned the approximate amounts in the time frame indicated. Although MASN argues, persuasively, that until the award was issued "it was merely in draft form and subject to revision at any time," MASN Reply/Cross-Mot Opp Br, at 21, MASN does not claim that the telecast fees in the RSDC Award differed from what MASN had expected.

approximately two years, while Commissioner Selig attempted to help negotiate a resolution of the dispute; during that period, both sides were advised they would not be pleased with the RSDC decision. Haley 7/25/14 Aff, ¶ 33; Cohen 10/20/14 Aff, ¶ 55. Commissioner Selig's settlement efforts "principally focused on the potential sale of MASN to Comcast" for "well in excess of a billion dollars." Manfred 1/26/15 Aff, ¶ 17; 5/22/14 Tr. at 138 (the Commissioner's settlement efforts "consisted mainly of trying to facilitate the sale or similar transaction of MASN to Comcast for a billion dollars"); *cf.* Cohen 10/20/14 Aff, ¶ 61 (indicating his "understanding" that MASN, the Orioles and MLB "attended several meetings concerning a 'settlement' deal with a major national distributor" in this period).

Meanwhile, MASN was paying the Nationals a mere fraction of the sum the parties understood the RSDC to have decided upon in summer 2012, and the Nationals were pressing for issuance of the award. Accordingly, in August 2013, before the RSDC Award was issued, MLB "step[ped] into MASN's shoes and advance[d] funds to the Nationals." Manfred 1/26/15 Aff, ¶ 18. The avowed purpose of the advance was "to make up the difference between ... what MASN was willing to pay the Nationals for their telecast rights and ... what the RSDC had internally decided MASN should pay" and thus "to allow additional time for the parties to negotiate a settlement." Manfred 10/20/14 Aff, ¶ 33. That is, by the time of the advance,

> the Nationals had operated for almost two full seasons without any adjustment in their telecast rights fees to reflect the fair market value of those rights as determined by the RSDC. Settlement discussions between and among MASN, the Orioles, and the Nationals were still ongoing. Given the ongoing hardship to the Nationals, and to allow the settlement discussions to continue and avoid possible litigation by the Clubs or MASN, Commissioner Selig decided to alleviate that burden by advancing funds to the Nationals to reflect the difference (post-revenue sharing) between what MASN was then willing to pay and what the RSDC had internally decided the Nationals should be paid under the March 28, 2005 Agreement. *Id.*

MLB's counsel has emphasized that this was an advance that gave MLB "no stake in the outcome" because MLB would be repaid no matter what. 5/22/14 Tr. at 140. That is, either the award would eventually issue, and the additional funds that MASN would have to pay to the Nationals over the five-year period would be more than sufficient to repay the advance, or there would be a sale of MASN, in which case MLB would be paid out of the proceeds of that sale. Manfred 1/26/15 Aff, ¶ 21 & Exh 4. MASN and the Orioles were aware that an advance would be made. However, petitioners claim that they thought the amount would be $7.5 million, rather than $25 million, and that they did not know the amount was to be repaid, if a contemplated sale did not go through, from the rights fees payable under the not-yet-issued RSDC Award.

On June 30, 2014, the RSDC issued its written decision. The RSDC Award characterizes the parties' respective positions as follows: "The Nationals contend that the fair market value of their 2012 rights is roughly $109 million, while MASN values those

same rights at roughly $34 million." RSDC Award at 2. The Award included a calculation of telecast rights fees for the Nationals over a five-year period. It values the Nationals' rights fees from MASN at roughly $53 million in 2012. The rights fees rise more than $3 million each year, culminating in approximately $66 million in 2016. *Id.* at 19. The Award also states that, "[n]et of these fees, MASN's projected operating profit would grow from roughly $14 million in 2012 to roughly $24 million in 2016." *Id.*

On July 2, 2014, MASN commenced this proceeding noticing its intent to petition the Court for vacatur of the RSDC Award.[7] In early August, MASN sought a preliminary injunction (motion sequence #006) to toll the running of the period for MASN to cure the alleged default claimed by the Nationals and to enjoin MLB and the Nationals from terminating MASN's license to telecast the Nationals' games pursuant to the Agreement. The preliminary injunction was granted after oral argument on August 18, 2014.

The present Amended Verified Petition to Vacate Arbitration Award was then filed in September 2014. In early November, MASN sought discovery from MLB (motion sequence #019). After full briefing, and argument on December 15, 2014, the motion was granted in part and denied in part. As the Court noted, limited discovery was appropriate because "the question as to whether the process here was a neutral process, or

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[7] A related proceeding, to confirm the RSDC Award, was filed on July 25, 2014, *Washington Nationals Baseball Club LLC v TCR Sports Broadcasting Holdings LLP* 157301/2014. It was discontinued shortly thereafter, and the relief was sought within the instant proceeding and index number.

if there were conflicts, who knew what and when, is central" to the issues before the Court. 12/15/14 Tr. at 113.

DISCUSSION

There is no question that "where a contract containing an arbitration provision 'affects' interstate commerce, disputes arising thereunder are subject to the FAA [Federal Arbitration Act]." *Matter of Diamond Waterproofing Sys., Inc. v. 55 Liberty Owners Corp.*, 4 N.Y.3d 247, 252 (2005); *see also U.S. Elecs., Inc. v. Sirius Satellite Radio, Inc.*, 17 N.Y.3d 912, 913 (2011).[8]

Under the FAA, "judicial review of arbitration awards is extremely limited." *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471, 479 (2006). Further, the party seeking to vacate the award has the burden of proof. *U.S. Elecs.*, 17 N.Y.3d at 915; *Matter of Roffler v. Spear, Leeds & Kellogg*, 13 A.D.3d 308, 309 (1st Dep't 2004). The

[8] Section 11.A of the Agreement, which provides that the Agreement will be construed and governed by *Maryland* law, does not provide a basis for applying New York's state law concerning arbitration. *Cf. Matter of Diamond Waterproofing*, 4 N.Y.3d at 253 (where choice of law provision provides merely that "the Contract shall be governed by the law of the place where the Project is located," but does not express an intent that New York law shall govern "both the agreement *and its enforcement*," the court will not apply New York's rule that threshold statute of limitations questions are for the courts) (emphasis in original); *ROM Reins. Mgmt. Co., Inc. v. Continental Ins. Co., Inc.*, 115 A.D.3d 480, 481 (1st Dep't 2014) (holding that "the specific incorporation of 'the arbitration laws of New York State' in the instant arbitration clause itself constitutes the needed 'more critical language concerning enforcement' within the contemplation of *Diamond Waterproofing*," and therefore concluding that Article 75 of the CPLR applies).

showing required to avoid confirmation is "very high." *U.S. Elecs.*, 17 N.Y.3d at 915; *see also Roffler*, 13 A.D.3d at 309.

Amended Petition to Vacate the RSDC Award

MASN claims that the RSDC Award was procured through bias, evident partiality and misconduct, corruption, fraud, undue means, and rendered beyond the scope of the arbitrators' authority and in manifest disregard of the law; the Orioles adopt MASN's arguments, and also write separately to emphasize that vacatur is required because the RSDC exceeded the scope of its authority and manifestly disregarded the methodology mandated by the Agreement. Their primary arguments focus on several interconnected areas: (1) the Nationals' choice to be represented in the arbitration by Proskauer Rose LLP, a law firm that also concurrently represented MLB and each of the three arbitrators and/or their clubs; (2) a $25 million loan by MLB to the Nationals after the matter was fully submitted and before the RSDC Award was issued, to be paid from the proceeds of the award; (3) MLB's role in the arbitration process; (4) the adequacy of disclosures made by the arbitrators and/or MLB as to these or other possible conflicts; and (5) failure to apply "the RSDC's established methodology for evaluating all other related party telecast agreements in the industry." Agreement, ¶ 2.J.3.

Corruption, Fraud, or Undue Means

The FAA provides for vacatur of an arbitration award "where the award was procured by corruption, fraud, or undue means." 9 U.S.C. § 10(a)(1). Mere speculation is not sufficient; the evidence must be "abundantly clear" that the award was procured through such improper means under § 10(a)(1). *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust*, 729 F.3d 99, 106 (2d Cir. 2013).

In its moving brief, MASN argues that "MLB's fraudulent intent to ensure the Arbitration favored the Nationals began with MLB's sale of the Nationals to the Lerner Group," and that MLB "apparently informed" the purchasers that it "would use its power over the arbitral process to set the telecast rights fees to their advantage" several years in the future, in order to justify the purchase price. MASN Mot Br. at 16. While MASN and the Orioles have established that they are disappointed in the RSDC Award, they have not provided "abundantly clear" evidence of the alleged fraud or conspiracy.[9] Accordingly, the award cannot be vacated on this ground.

Exceeding Scope of Authority and Manifest Disregard

The FAA also provides for vacatur of an arbitration award "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4). "'It is only

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[9] Indeed, this argument appears to have been omitted from petitioners' reply briefs.

when an arbitrator strays from the interpretation and application of the agreement and effectively dispenses his or her own brand of justice' that an arbitration decision may be vacated on this ground." *Tullett Prebon Fin. Servs. v. BGC Fin., L.P.*, 111 A.D.3d 480, 482-83 (1st Dep't 2013) (brackets omitted). Indeed, a party seeking relief under § 10(a)(4) "bears a heavy burden. 'It is not enough ... to show that the [arbitrator] committed an error – or even a serious error.' ... So the sole question for us is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." *Oxford Health Plans LLC v. Sutter*, 133 S.Ct. 2064, 2068 (U.S. 2013). *See also Wien & Malkin*, 6 N.Y.3d at 479-80 ("we have stated time and again that an 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").

Similarly, "an award may be vacated under federal law if it exhibits a 'manifest disregard of law.'" *Wien & Malkin*, 6 N.Y.3d at 480 (noting that this ground is established by federal case law). The Court of Appeals is clear that

> manifest disregard of law is a 'severely limited' doctrine. It is a doctrine of last resort limited to the rare occurrences of apparent 'egregious impropriety' on the part of the arbitrators, 'where none of the provisions of the FAA apply.' The doctrine of manifest disregard, therefore, 'gives extreme deference to arbitrators.' The Second Circuit has also indicated that the doctrine requires 'more than a simple error in law or a failure by the arbitrators to understand or apply it; and, it is more than an erroneous interpretation of the law.' We agree with that premise. To modify or vacate an award on the ground of manifest

> disregard of the law, a court must find 'both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case.'

Id., 6 N.Y.3d at 480-81 (citations and footnote omitted). *See also Matter of ACN Digital Phone Serv., LLC v. Universal Microelectronics Co., Ltd.*, 115 A.D.3d 602 (1st Dep't 2014); *Cheng v. Oxford Health Plans, Inc.*, 45 A.D.3d 356 (1st Dep't 2007) (noting that "the 'manifest disregard' standard rarely results in vacatur").

MASN and the Orioles claim that "the RSDC's established methodology for evaluating all other related party telecast agreements in the industry," Agreement, ¶ 2.J.3, meant applying the Bortz methodology with at least a 20% operating margin. However, they have failed to identify any "well defined, explicit, and clearly applicable" authority, *Wien & Malkin*, 6 N.Y.3d at 481; *Roffler*, 13 A.D.3d at 310, that unequivocally defines "the RSDC's established methodology for evaluating all other related party telecast agreements in the industry" in the manner they prefer. Indeed, the parties made no effort to define the RSDC's established methodology in the Agreement, or even to offer the slightest hint that a specific operating margin might be required.[10] The arbitrators, by contrast, set forth an extensive explanation of their determination of the appropriate methodology to apply. RSDC Award at 4-8. Their explanation, reasonable on its face, is more than sufficient to offer "a barely colorable justification for the outcome" under the

[10] At oral argument on the present motion, BOLP's counsel identified a minimum "20 percent profit margin" as the "core of the methodology." 5/18/15 Tr. at 61.

FAA, and therefore must be upheld even if this Court were to conclude that the RSDC's interpretation of its own established methodology was legally and factually incorrect. *Wien & Malkin*, 6 N.Y.3d at 479; *Roffler*, 13 A.D.3d at 309-10.

In light of this Court's obligation to defer even to a "barely colorable justification" for the arbitrators' interpretation of the contract, the Court declines petitioners' invitation to review extrinsic evidence, such as other RSDC awards, in an effort to discern the "true" methodology that was not set forth in the parties' Agreement, or to assume that the arbitrators did not apply the established methodology they explained at length in the RSDC Award, merely because they also included a statement that "this decision shall not constitute precedent of the RSDC." RSDC Award at 2 n.2.

Prejudicial Misconduct

The FAA further provides for vacatur of an arbitration award "where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or 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." 9 U.S.C. § 10(a)(3). "[M]isconduct occurs under this provision only where there is a denial of fundamental fairness." *Kolel Beth Yechiel Mechil*, 729 F.3d at 104.

Petitioners argue that MLB and the RSDC engaged in persistent procedural misconduct before, during and after the arbitration that prejudiced MASN's ability to

present its case. MASN Mot Br. at 20-21; MASN Reply Br. at 32-34. They claim variously that MLB improperly drafted the award and decided the arbitration in the RSDC's stead, denied requests for the production of other Clubs' telecast rights fees agreements, declined to consider a Fourth Circuit opinion issued after the hearing but before the award was issued, denied MASN's requests to cross-examine certain expert witnesses and otherwise interfered with the flow of information connected to the arbitration. In essence, MASN and the Orioles complain that MLB improperly controlled or influenced the arbitration process, or usurped the arbitrators' decision-making function.

With regard to misconduct solely as to process, very little was establish by those seeking to vacate the award, who have the burden of proof. With regard to certain tasks, 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.

The Court is persuaded by MLB's characterization that Manfred and his staff provided certain procedural support to the arbitrators that is generally akin to the support that a law clerk provides to a judge, or that the staff of an established arbitration organization may provide to its arbitral panels. *See, e.g.,* Manfred 11/19/14 Aff, ¶ 8;

12/15/14 Tr. at 76-77. Petitioners have not shown any denial of fundamental fairness based on MLB's support role or the informality of the procedures used, and, therefore, they have not established prejudicial misconduct warranting vacatur under 9 U.S.C. § 10(a)(3).

The Court notes, however, that questions regarding "fundamental fairness" are being addressed very narrowly here. To the extent that petitioners allege that certain procedural determinations, such as the denial of a request to cross-examine certain witnesses, actually stemmed from bias and resulted in the denial of fundamental fairness, the Court is only addressing the issue of partiality under 9 U.S.C. § 10(a)(2).

Evident Partiality

The FAA provides that an arbitration award may be vacated "where there was evident partiality or corruption in the arbitrators, or either of them." 9 U.S.C. § 10(a)(2). The Court of Appeals has "adopt[ed] the Second Circuit's reasonable person standard" when considering the federal evident partiality standard. *U.S. Elecs.*, 17 N.Y.3d at 915. Pursuant to 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.' The [Second Circuit] reasoned that evident partiality was a stringent standard that could not be satisfied by a mere appearance of bias, but also recognized that proof of actual bias is rarely adduced. Accordingly, the reasonable person standard struck 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. (citations omitted).

MASN and the Orioles argue that evident partiality is shown by MLB's $25 million loan to the Nationals, Proskauer's role in the arbitration and relatedly inadequate disclosures.

A. MLB's $25 Million Loan

It is "axiomatic that a neutral decision-maker may not decide disputes in which he or she has a personal stake." *Pitta v. Hotel Ass'n of N.Y. City, Inc.*, 806 F.3d 419, 423 (2d Cir. 1986). However, MASN and the Orioles have not established that MLB's $25 million loan or advance to the Nationals, repayable from the proceeds of the RSDC Award, gives MLB or its standing committee an impermissible interest in the award under the specific circumstances presented.

In August 2013, MASN knew at least the approximate amount of the telecast fees the RSDC had decided MASN should pay to the Nationals in 2012 and 2013, but was paying the Nationals only a fraction of that amount. MLB then stepped into MASN's shoes and advanced funds to the Nationals, in order to allow Commissioner Selig to continue his efforts to "settle" the parties' dispute by selling MASN to Comcast.

Petitioners knew that an advance was to be made from MLB to the Nationals during that time frame, although petitioners claim that significant details were not disclosed.

The RSDC Award values the Nationals' rights fees from MASN at roughly $53 million in 2012. This amount was already known to all parties as early as summer 2012 and ultimately remained unchanged when the award was finally issued in July 2014. Under these circumstances, 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. Petitioners claim they thought the amount to be advanced was $7.5 million rather than $25 million, and that they did not know that MLB would be reimbursed from the rights fees payable under the not-yet-issued RSDC Award if the proposed billion dollar sale of MASN to Comcast did not go through.

Petitioners' argument on this point would be stronger if the advance had been made before the parties were informed of the RSDC's internal decision. However, petitioners' argument seems to confuse cause and effect. MLB set the amount of the advance with full knowledge of the amount of the planned RSDC Award. Moreover, the Court notes that the RSDC was asked to set rights fees over a five-year period. Even if the RSDC had suddenly decided to reduce the final amount of the award between the time of its internal decision and the date it issued the award, there is no reason to suppose that the award would be reduced to the point that the Nationals would be unable to repay

MLB $25 million from the total amounts due to it over a five-year period. That is, if the petitioners believed the Nationals could repay a $7.5 million dollar advance on *the first year's* rights fees, surely they had no reason to doubt that the Nationals could repay an average of $4.4 million advanced on each of the subsequent years' rights fees.

It may well be that the advance could have been more fully disclosed; and certainly, if there was full disclosure to MASN, it was not fully documented in writing. But the advance was not undertaken in secret, and MASN and the Orioles have not demonstrated that the circumstances of the advance raise any serious questions about the fairness of the arbitration process.

B. Proskauer's Participation in the Arbitration

Petitioners argue that Proskauer's concurrent representation of the Nationals, MLB and the individual arbitrators or their interests shows evident partiality, exacerbated by a failure to investigate or disclose the full extent of such representations. The Nationals and MLB argue that Proskauer's involvement does not demonstrate evident partiality and that MASN has waived any claim for vacatur based on Proskauer's concurrent representations.

The relevant time-frame is from the date the arbitration was noticed until the award was issued. *See* 1 Domke on Comm. Arb. § 18:1 (3d ed. 2014) ("the complaining party initiates the arbitration proceedings by serving a notice of intention to arbitrate or of

a demand for arbitration on the other party"); *id.* at § 26:1 (under the common law, "once an arbitrator executes the award he or she does not have the power or authority to proceed further"); *Kalyanaram v. New York Inst. of Tech.*, 91 A.D.3d 532 (1st Dep't 2012). In this matter, the relevant time period is from January 5, 2012 to June 30, 2014. Looking at this period, petitioners have demonstrated that Proskauer represented the Nationals in this arbitration, while concurrently representing MLB, its executives and closely related entities in nearly 30 other matters. *See* Hall 1/13/15 Aff, ¶ 7 & Exh 8.

In addition, Proskauer was also concurrently representing interests associated with all three arbitrators during this period:

- Coonelly's MLB Club (Pittsburgh Pirates) in *Garber* and *Senne*. Coonelly 10/20/14 Aff, ¶¶ 25, 28.[11]

- Sternberg's MLB Club (Tampa Bay Rays) in *Senne* and in an unrelated salary arbitration matter. Sternberg 20/20/14 Aff, ¶¶ 24, 31.

- Wilpon's MLB Club (New York Mets) in *Senne* (Wilpon 10/20/14 Aff, ¶ 22), and both Wilpon's company, Sterling Equities Associates, and the owner of his MLB Club, "in a class action brought on behalf of Sterling's employees arising out Sterling's investments in the Madoff Ponzi scheme." (Hall 9/23/14 Aff, ¶ 12. *Accord*, Wilpon 10/20/14 Aff, ¶ 30).[12]

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[11] In *Garber v. Office of the Commissioner of Baseball*, an antitrust case filed in early 2012, Proskauer represented MLB and nine MLB Clubs, including the Pirates. *See generally* 5/22/15 Tr. 7, 115, 117; Coonelly 10/20/14 Aff, ¶ 25; Hall 9/23/14 Aff, ¶ 9. *Senne v. Office of the Commissioner of Baseball* ("*Senne*"), a league-wide wage and hours act dispute, commenced in February 2014, a few months before the RSDC Award was issued. *See, e.g.*, 12/14/14 Tr. at 58. MLB selected Proskauer to represent MLB and all of the Clubs involved, subject to the Clubs' approval. Sternberg 10/20/14 Aff, ¶ 24; Wilpon 10/20/14 Aff, ¶ 22; Coonelly 10/20/14 Aff, ¶ 28. The Orioles opted out of representation in the *Senne* case. *See* Gonzalez 10/20/14 Aff, Exh 4.

[12] Wilpon and his father are both partners in Sterling Equities Associates. Proskauer represented both Sterling and Wilpon's father, as a trustee of Sterling's pension plan, in the class action lawsuit.

That is, both the Nationals and MLB, as the administrator of the arbitration and the legal entity of which RSDC is a standing committee, as well as the individual arbitrators or their clubs or other interests, retained the same outside counsel between the time the arbitration was commenced and the date the arbitrators issued their decision. Although Proskauer is a large law firm, with more than 700 attorneys, it further appears that the four specific Proskauer attorneys who represented the Nationals in the arbitration also "represented MLB entities" in 27 matters during the pendency of the arbitration. Hall 1/13/15 Aff, ¶ 4.

MASN, and the Orioles as its majority owner, clearly agreed to an "inside baseball" arbitration, where the parties and arbitrators would all be industry insiders who knew each other and inevitably had many connections. What they did not agree to, however, was a situation in which MASN's arbitration opponent, the Nationals, was represented in the 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.

Petitioners' concerns about Proskauer's participation in the arbitration as the Nationals' counsel were timely raised and well-documented. *See* Rifkin 9/23/14 Aff, at Exhs 3-4, 6-7, 10, 12-17. Likewise, petitioners made every effort to reserve their rights, and received assurances that they would not waive their objections by proceeding with the arbitration. *See Id.*, at ¶¶ 49-51, 54; Rifkin 1/12/15 Aff, ¶¶ 28-29, 36-37 & Exhs 9, 15.

Wilpon's father is also an owner of the New York Mets.

Accordingly, the key question here is whether Proskauer's various simultaneous but unrelated representations of virtually every participant in the arbitration *except for* MASN and the Orioles created a situation in which a reasonable person would have to conclude that the arbitrators were partial to the Nationals. To the extent that "there is no authority for a finding of 'evident partiality' in such a relationship," the Court suspects "the simple reason for this lack of precedent is that arbitrators in similar situations have disqualified themselves rather than risk a charge of partiality." *Morelite Constr. Corp. v. New York City Dist. Council Carpenters Ben. Funds*, 748 F.2d 79, 84 (2d Cir. 1984).[13]

If "appearance of bias" were the standard, this Court would have no hesitation in vacating the award. *See Kornit v. Plainview-Old Bethpage Cent. Sch. Dist.*, 49 N.Y.2d 842, 843 (1980). For example, New York courts have vacated the findings of a medical malpractice panel (convened under prior Judiciary Law § 148-a and 22 NYCRR Part 684), following a revelation that a physician defendant's counsel's law firm was also representing one of the panel members in an unrelated medical malpractice action. *See, e.g., Schmitt v. Kantor*, 83 A.D.2d 862, 862 (2d Dep't 1981) (noting that "there is no way

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[13] Manfred asserts that "MLB's ongoing relationship with the Clubs and their owners is far more significant to MLB staff than MLB's relationship with the various law firms it retains." Manfred 1/26/15 Aff, ¶ 12; *see also id.* ¶¶ 13-14. Counsel for the Nationals echoed this position at the argument on this motion. 5/18/15 Tr. at 85 ("the suggestion that a law firm could have an influence that would trump those relationships among the owners, we think is farfetched"). However, MLB's ongoing relationship with clubs and owners is inherent in the structure of the method of arbitration chosen by the parties; the parties necessarily contemplated and must be deemed to have consented to that sort of relationship between and among the MLB, the arbitrators and the parties to the dispute. By contrast, what the parties did not agree to was that one party to the arbitration – and not the other – would have the opportunity to be represented in the arbitration by the same counsel that represented MLB and the arbitrators and/or their clubs.

of knowing to what extent, if any, the fact that the [party] was being represented in an unrelated malpractice action by the same law firm as one of the codefendants influenced his handling of the case."). *See also De Camp v. Good Samaritan Hosp.*, 66 A.D.2d 766 (2d Dep't 1978). However, the "appearance of bias" is unquestionably not the standard used under the FAA.

Alternatively, the FAA standard might have dictated a simple decision from this Court to confirm the award if MLB, as administrator of the arbitration, had taken MASN's objections seriously, and actually done something about it.[14] Even assuming that MLB and the RSDC lacked the power to disqualify Proskauer from representing the Nationals, as MLB claims, this Court notes that MLB could still have taken reasonable steps to protect the arbitral process against the utterly predictable charges of unfairness that are now before this Court. Common-sense approaches might well have included one or more of the following: (a) encouraging the Nationals to retain other counsel,[15] (b) instructing Proskauer to make sure that the specific attorneys who were representing the Nationals in this arbitration were completely screened from any and all legal

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[14] While it might be a matter of "enlightened self-interest" for a party to minimize conflicts that could jeopardize the integrity of the proceeding, the Nationals were not responsible for ensuring the overall fairness of the arbitration, and presumably Proskauer did not wish to forgo a potentially lucrative representation. Indeed, Proskauer's only response to petitioners' objections was to withdraw from representing the Orioles, a move that only exacerbated the fairness concerns. Rifkin 9/23/14 Aff, at Exh 10.

[15] For example, MLB could have cautioned the Nationals that if they chose to go forward with Proskauer, MASN and the Orioles would likely use this complained-of relationship to seek to vacate any award they considered unfavorable.

representations of MLB, the arbitrators and/or the arbitrators' clubs, from the time the arbitration was initiated until the time the award was issued, (c) fully advising the arbitrators of MASN's concerns and directing them to investigate and fully disclose their and their clubs' current relationships with Proskauer,[16] or even (d) keeping the parties advised of MLB's own various continuing – and increasing[17] – retention of Proskauer during the relevant period. This is not intended as an exhaustive list; doubtless there were other ways the administrator of the arbitration could have protected confidence in the fairness of the process in light of MASN's and the Orioles' concerns. Yet MLB did nothing, except assure petitioners repeatedly that their concerns would be preserved and not waived by their participation before the RSDC.

As a result, this Court has been left to sort through the parties' voluminous submissions and arguments. Neither the parties, nor this Court's own research, have uncovered any precedent involving a substantially similar factual scenario decided under the FAA. The connections here are not as close and direct as an arbitrator who is

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[16] The arbitrators uniformly profess ignorance of petitioners' contemporaneous requests for information about whether and to what extent they or their clubs or other interests were represented by Proskauer. *See* Coonelly 10/20/14 Aff, ¶ 34; Sternberg 10/20/14 Aff, ¶ 34; Wilpon 10/20/14 Aff, ¶ 31. That they did not make any effort at the time to inform themselves of such connections is only underscored by two arbitrators' disclosure of still more connections with Proskauer in a second round of affidavits. *See* Coonelly 1/26/15 Aff, ¶ 12; Sternberg 1/26/15 Aff, ¶ 12; *cf.* Cohen 10/20/14 Aff, ¶ 38 ("there was no process in place for formal arbitrator disclosures").

[17] Proskauer actually undertook additional new representations of MLB while the arbitration was pending.

affiliated with a law firm that represents one of the parties,[18] nor is there any serious question of waiver or consent with respect to Proskauer's abundant concurrent representations.[19]

An important policy reason for requiring full disclosure of possible conflicts in arbitration is that the parties, rather than the courts, can decide how best to address them in the first instance. *Matter of J. P. Stevens & Co. (Rytex Corp.)*, 34 N.Y.2d 123, 128 (1974). But this purpose is surely thwarted in the extraordinarily rare case, such as this one, where a party's repeatedly asserted concerns about fairness, based on the information available to it, are simply ignored and dismissed with repeated assurances that such objections will not be waived by participation in the arbitration.

Under the FAA, evident partiality may be inferred from the circumstances. The Second Circuit has held:

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[18] For example, in *County-Wide Ins. Co. v. New Century Acupuncture P.C.*, 47 Misc.3d 1216(A), 2015 N.Y. Slip Op. 50636(U) (N.Y. City Civ. Ct. 2015), there was evidence to suggest that the arbitrator himself was personally affiliated with counsel to one of the parties, and the arbitrator failed to disclose this connection. This is a more direct connection than that present here, because there was arguably an attorney-client relationship between the arbitrator and one of the parties, whereas here, the arbitrators and the Nationals have both retained the same lawyer. In addition, the dispute was apparently not governed by the FAA, since the court applied a "potential bias" standard under the CPLR.

[19] For example, in *Aviall, Inc. v. Ryder Sys., Inc.*, 110 F.3d 92 (2d Cir. 1997), KPMG served as arbitrator of the dispute, while also serving as auditor for one party to the dispute. In that case, there was actual consent to the arrangement; perusal of the contract revealed that the parties expressly considered the possibility that KPMG might not serve as the auditor for both sides at the time of arbitration. (While certain arbitral provisions of the contract provided for an alternative arbitrator if KPMG no longer served as auditor for both parties, the dispute was subject to an arbitration provision requiring disputes to go to KPMG and did not provide for an alternative.)

> Evident partiality may be found only where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration. Although a party seeking vacatur must prove evident partiality by showing something more than the mere appearance of bias, proof of actual bias is not required. Rather, partiality can be inferred from objective facts inconsistent with impartiality. A showing of evident partiality must be direct and not speculative.

Kolel Beth Yechiel Mechil, 729 F.3d at 104 (internal citations omitted).

Here, there are objective facts that are unquestionably inconsistent with impartiality. Had MLB, the arbitrators, the Nationals and/or Proskauer taken some reasonable step to address petitioners' concerns about the Nationals' choice of counsel in the arbitration – or indeed *any step at all* – the Court might well have been compelled to uphold the arbitral award under the FAA. But MASN and the Orioles have established that their well-documented concerns fell on entirely deaf ears. Under the circumstances, the Court concludes that this complete inaction 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. *Pitta*, 806 F.2d at 423-24;[20] *cf. Hooters of*

[20] The Second Circuit has recognized that a court need not always inquire into actual rather than merely apparent bias. In *Morelite*, for example, one party to the arbitration was a district union of an international labor union, and the vice president (later the president) of that international labor union was the arbitrator's father. The court declined to delve into the actual degree of closeness or independence between the two: "without knowing more, we are bound by our strong feeling that sons are more often than not loyal to their fathers, partial to their fathers, and biased on behalf of their fathers." *Morelite*, 748 F.2d at 84. There is nothing in the *Morelite* opinion to indicate that the international labor union, let alone its president or vice president, had any involvement in the arbitration. However, this Court recognizes that the familial relationship in *Morelite* is presumptively stronger than the attorney-client relationship here between MLB and Proskauer.

America, Inc. v. Phillips, 173 F.3d 933, 940 (4th Cir. 1999) ("Hooters by contract took on the obligation of establishing [an arbitral] system. By creating a sham system unworthy even of the name of arbitration, Hooters completely failed in performing its contractual duty.").

Evident partiality is no minor issue. Indeed, it may well be that its opposite, neutrality, is so fundamental to any adjudicative process that trust in the neutrality of the adjudicative process is the very bedrock of the FAA. It is upon that foundation, and in great reliance upon it, that courts can defer to processes decided upon and designed by private contract. But without neutrality, where partiality runs without even the semblance of a check, the alternative process created does not warrant – and cannot be given – the great deference that arbitrators, and their awards, are bestowed by courts under the FAA.

Accordingly, the RSDC Award is hereby vacated.

The Court has considered the parties' other arguments, and finds them unavailing.[21]

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[21] For example, the Orioles argue that remand to the RSDC process would be futile, and therefore the matter should be referred to "a panel of neutral arbitrators that is not subject to Baseball's corrupting influence, such as a panel convened under the auspices of the American Arbitration Association." Orioles Mot Br. at 16. The Court, however, notes that re-writing the parties' Agreement is outside of its authority.

The Court emphasizes that because it is ultimately the Nationals' choice of counsel that created the conflict, the parties may wish to meet and confer as to whether the Nationals are willing and able to

Accordingly, it is

ORDERED that the Amended Verified Petition to Vacate Arbitration Award is granted only to the extent that the June 30, 2014 RSDC Award is hereby vacated, and is otherwise denied; and it is further

ORDERED that the Cross-Motion to Confirm Arbitration Award is denied.

This constitutes the Decision and Order of the Court.

Dated: November 4, 2015

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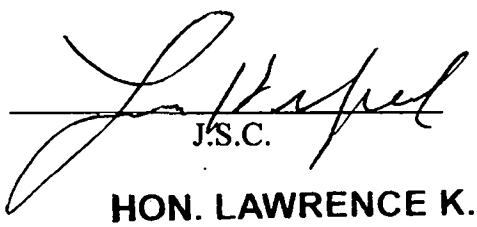

J.S.C.

HON. LAWRENCE K. MARKS

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retain counsel who do not concurrently represent MLB or the individual arbitrators and their clubs, and thereby return to arbitration by the RSDC, however currently constituted, pursuant to the parties' Agreement. Agreement ¶ 2.J.3. If the current conflict remains, the parties might meet and confer regarding whether they can to agree to a different neutral dispute resolution process, such as – but by no means limited to – that in Section 8 of the parties' own Agreement, wherein the parties arbitrate their dispute "before a three-person panel in accordance with the Commercial Rules of the American Arbitration Association," outside of Maryland, Virginia, and the District of Columbia. Agreement ¶ 8.C.