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

TCR SPORTS BROADCASTING HOLDING, LLP,

Petitioner,

-against-

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

Respondents,

-and-

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

Nominal Respondents.

Index No. 652044/2014
(IAS Part 41)

PETITIONER'S CORRECTED REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION FOR LEAVE TO CONDUCT DISCOVERY

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Petitioner TCR Sports Broadcasting Holding, LLP, d/b/a Mid-Atlantic Sports Network ("MASN"), by its attorneys Chadbourne & Parke LLP, respectfully submits this reply memorandum in further support of its motion pursuant to CPLR § 408 to conduct discovery in aid of its Amended Verified Petition ("Petition") (Dkt. No. 202) to vacate the Arbitration Award ("Award") issued by the Revenue Sharing Definitions Committee ("RSDC").[1]

PRELIMINARY STATEMENT

MLB's opposition papers only serve to demonstrate the propriety of MASN's tailored discovery requests and their importance to a proper resolution of this case. As set forth more fully below and in MASN's moving papers, these requests are necessary to shed light on the full scope and nature of MLB's and Mr. Robert Manfred's – now MLB's Commissioner-elect – involvement in the arbitral process and the resulting Award. That factual issue is directly relevant to MASN's claims that the Award was fatally tainted by bias, undue means, and evident partiality because the Arbitrators lacked the requisite independence from MLB's and Mr. Manfred's influence and each of them were concurrently represented by Proskauer Rose LLP at the very same time that firm was representing the Nationals in the Arbitration.

The scope and nature of these intertwined relationships and MLB's and Mr. Manfred's influence over the RSDC are highly relevant to this action and support MASN's discovery requests. The discovery requests are further supported by the fact that MLB had a vested

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[1] Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in MASN's Memorandum of Law in Support of its Motion for Leave to Conduct Discovery ("MASN Br.") (Dkt. No. 401) or the Petition. Unless otherwise indicated, emphasis is added throughout this memorandum. The Thomas J. Hall Reply Affirmation in Support of Motion for Leave to Conduct Discovery, dated November 25, 2014 ("Hall Reply Aff.") and the Alan M. Rifkin Reply Affidavit in Support of Motion for Leave to Conduct Discovery, sworn to November 25, 2014 ("Rifkin Reply Aff.") are submitted in support of this reply memorandum of law and are referred to herein. MLB's opposition papers are referred to herein as follows: Memorandum of Law in Opposition to Petitioner's Motion for Leave to Conduct Discovery, dated November 19, 2014 (Dkt. No. 439) ("MLB Opp.") and Affirmation of Robert D. Manfred, Jr., dated November 19, 2014 (Dkt. No. 445) ("Manfred 2d Aff.").

financial interest in the Arbitration's outcome: it advanced the Nationals $25 million in a then-secret deal, which provided that MLB would recoup its funds from the inflated proceeds of the Award. In doing so, MLB acquired a direct financial stake in the Award and with it a powerful incentive to ensure that the RSDC would return an Award more favorable to the Nationals.

MLB's zeal to enforce the resulting Award, including its threats to sanction MASN for seeking judicial intervention and its efforts to compel MASN to pay amounts purportedly due under the Award while this case was pending, has led MLB to present an ever-shifting characterization of its – and Mr. Manfred's – role with respect to the RSDC and the arbitral process. After first representing that Mr. Manfred and the MLB employees he supervised only provided "administrative" and other unspecified "support" to the Arbitrators, MLB has changed course. Confronted by MASN's evidence that MLB and Mr. Manfred were involved in virtually every aspect of the arbitral process, including the drafting of the Award, MLB tacks and sails to the wind, now describing Mr. Manfred and his office as akin to a "law clerk" to the RSDC. But if that is so, they were akin to a law clerk who takes it upon himself to decide which of the parties' communications and objections to present to the decision-maker in matters where the law clerk has a direct, sizeable, and undisclosed financial stake in the outcome. Tacking again, Mr. Manfred and his office are described as akin to the RSDC's "in-house counsel." But if that is so, they were akin to an in-house lawyer who operates independently of its client, while being represented by the very same lawyers who represent his client and a party in a proceeding before his client. Yet, at the same time, MLB seeks to present the RSDC as independent of MLB.

MLB's portrayals of Mr. Manfred, his office and the RSDC are not only ever-shifting, but irreconcilably inconsistent. Moreover, the evidence already before the Court demonstrates that after the Award was supposedly finalized, the Commissioner claimed authority to dictate to

the RSDC whether the Award would ever issue, and if so, when. And, if the RSDC acted independently, as MLB claims, then MLB cannot shield its own activities and documents from discovery by hiding behind the cloak of privileges that would be applicable, under the best of circumstances, only if MLB were ***not*** independent of the Arbitrators.

All of these matters raise serious factual questions about whether, contrary to bedrock principles of arbitration law, MLB had its hands on the helm and steered the course for the RSDC. Limited, targeted document discovery is warranted to resolve those crucial questions.

ARGUMENT

I. THE DISCOVERY IS RELEVANT, MATERIAL AND NECESSARY TO MASN'S CLAIMS FOR VACATUR

A. Material and Necessary Evidence is Discoverable in a Special Proceeding

MLB erroneously argues that discovery in a summary proceeding is permitted only under "extraordinary circumstances" (MLB Opp. at 2, 11, 20), citing only a solitary unpublished New York Supreme Court case: *Gisors v. Dep't of Educ.*, No. 116808-08, 2010 WL 2642691 (N.Y. Co. June 22, 2010). But *Gisors* has never been cited by any authority for this proposition, likely because its conclusion rests on a clear misreading of a treatise section addressed to disclosure under CPLR § 3102(c). *See id.* at *11 (*citing* 5 NY Jur. 2d, Arbitration and Award § 115 (2010)). *Gisors* is an outlier decision. It has no application here.

Rather, as set forth in MASN's opening brief, under CPLR § 408, the relevant standard for discovery in special proceedings is whether the information sought is "material and necessary" to the controversy. *Wendy's Rests., LLC v. Assessor, Town of Henrietta*, 74 A.D.3d 1916, 1917, 903 N.Y.S.2d 849, 850 (4th Dep't 2010); MASN Br. at 10-11. "The test is one of usefulness and reason," and it is "interpreted liberally to require disclosure, upon request, of any facts bearing upon the controversy" that will "sharpe[n] the issues" in dispute. *See Allen v.*

Crowell-Collier Publ'g Co., 21 N.Y.2d 403, 406, 235 N.E.2d 430, 432, 288 N.Y.S.2d 449, 452 (1968); *Saratoga Prop. Devs., LLC v. Assessor of City of Saratoga Springs*, 62 A.D.3d 1107, 1108-09, 879 N.Y.S.2d 234, 236 (3d Dep't 2009) (same). MLB's suggestion that the federal standard is more permissive than the New York standard (*see* MLB Opp. at 15) is therefore immaterial. New York also favors liberal discovery.

B. MASN's Requests Are Material and Necessary to MASN's Claims

MLB's assertion that MASN has failed to establish a "factual basis" for its document discovery and that discovery should be denied as a "fishing expedition" rests on the unfounded premise that MASN seeks discovery solely to support its fraud claim. *See* MLB Opp. at 1-2, 3, 11, 20, 21-22. That fictitious characterization ignores MASN's primary justification for the Requests – to obtain material and necessary evidence for MASN's claims of evident partiality and undue influence, and to test claims made by MLB's response to the Petition and MLB's shifting explanations of its conduct. MASN Br. at 4, 9, 12, 13, 17.

MLB never rebuts the fundamental point that the facts concerning the full scope and nature of MLB's and Mr. Manfred's involvement in the arbitral process are directly relevant to MASN's claims that the Arbitrators were biased and evidently partial to the Nationals, including because they lacked the requisite independence from MLB and Mr. Manfred, both of whom – along with the Arbitrators – were concurrently represented by Proskauer. All three of MASN's Requests seek information that is relevant, material and necessary to these issues:

- **Request 1**: Seeks documents showing the identities of persons in attendance at RSDC meetings and deliberations. MLB's involvement in these meetings is pertinent to MLB's control and influence over the Arbitrators and the Award. This Request is particularly relevant given Mr. Manfred's suggestion that MLB was present at deliberations. Manfred 2d Aff. ¶ 8 ("After a Club has made its oral presentation to the RSDC at the meeting . . . the RSDC members meet to discuss the merits and decide the outcome of the matter. The RSDC then advises the ***MLB staff—either at the meeting*** or at a later date after further deliberations—of how it intends to rule.").

- **Request 2**: Seeks communications between MLB and the Arbitrators concerning the analysis, consideration and application by the Arbitrators of the "established methodology" and the role of MLB in the preparation of the Award. Communications regarding the "established methodology" go directly to MLB's control and influence over the Arbitration. MLB's role in preparing the Award is relevant for the same reason. This request takes on additional significance given Mr. Manfred's concession that "MLB staff had prepared a draft decision for the RSDC's review" (Manfred 2d Aff. ¶ 26) and MLB's $25 million advance to the Nationals in anticipation of the Award.

- **Request 3**: Seeks documents showing transmission of arbitration submissions and rulings from MLB to the Arbitrators. These documents are relevant to whether MLB selectively distributed materials to the Arbitrators which, if true, would show MLB's control over the arbitral process. The need for this request is reinforced by MLB's recent pronouncement that "no one at MLB agreed to play postman." MLB Opp. at 24.

C. The Need for Discovery Is Underscored By MLB's Constantly Mutating Descriptions of its Role in the RSDC Arbitration

The relevance and materiality of MASN's discovery are underscored by MLB's contradictory accounts of the arbitral process, which change every time it suits MLB's purposes. MASN's Petition alleges that MLB exerted improper influence over the arbitral process, biasing the Arbitrators and corrupting the result. *See* Pet. ¶¶ 137-145. In response, MLB first sought to minimize its role, arguing that the RSDC acted independently and that MLB did not control, dictate or direct the Award. MLB Mem. (Dkt. No. 285) at 1; Manfred Aff. ¶¶ 6, 8, 11; *see also* Coonelly Aff. ¶ 10; Sternberg Aff. ¶ 9, Wilpon Aff. ¶ 9.[2] Mr. Manfred claimed that he merely played a "support role" and "***attended*** the hearing and other meetings." Manfred Aff. ¶ 9.

Because these claims are contrary to the facts, MASN sought discovery on the extent of MLB's involvement in the Arbitration. Faced with MASN's discovery requests, MLB now claims that Mr. Manfred and his staff served as the Arbitrators' legal advisors, resolved procedural issues, participated in the hearing and even drafted the Award. *See* Manfred 2d Aff.

[2] The Affirmation of Mr. Manfred and the Affidavits of the Arbitrators (Dkt. Nos. 393-396) were attached as exhibits to the Hall Aff. (Dkt. No. 387) submitted in support of MASN's moving papers.

¶¶ 8–9, 18. What MLB previously described as a limited support role has now blossomed into a full-fledged privileged relationship.

MLB's portrayal of Mr. Manfred's role has also mutated along the way. Although he repeatedly directed the parties to communicate with the RSDC through him (Rifkin Aff. Ex. 4 (Dkt. No. 406)) (instructing the parties "to document your reservation of rights by means of letters ***to me***"), Mr. Manfred now claims he "did not suggest or promise that [he] or MLB would forward every email or letter sent to [him] . . . to the RSDC." Manfred 2d Aff. ¶ 20(a). Likewise, Mr. Manfred's claim that he did not have authority to, and did not in fact, rule on MASN's request to disqualify Proskauer (*id.* at ¶ 20(b)–(c)), is belied by contemporaneous records demonstrating that Mr. Manfred denied the objection and granted MASN and BOLP a continuing objection. *See, e.g.*, Rifkin Aff. Ex. 7 (Dkt. No. 409).

Indeed, MLB's new claim that Mr. Manfred and his staff were akin to the RSDC's law clerks highlights how inappropriate their conduct was and how much control they had over the Arbitration. "A law clerk is probably the one participant in the judicial process whose duties and responsibilities are most intimately connected with the judge's own exercise of the judicial function." *People v. Suazo*, 120 A.D.3d 1270, 1273, 992 N.Y.S.2d 138, 139 (2d Dep't 2014). A law clerk who "did not . . . promise" to make all of the parties' letters and filings available to the judge (*see* Manfred 2d Aff. ¶ 20(a)) would be subverting the legal process and disregarding her professional obligations. Nevertheless, Mr. Manfred apparently concluded (without ever telling the parties) that he had no obligation to pass their submissions along to the RSDC, and apparently did not do so. That assumed authority to decide what matters will or will not be conveyed to a decision-maker goes far beyond any legitimate conduct and underscores why discovery on the true role that MLB and Mr. Manfred played in the Arbitration is required.

Likewise, a law clerk whose own long-time lawyer represented a party in a matter before her judge would have no business working on that case. But Mr. Manfred – a Proskauer client, both individually and as an MLB executive – asserts that his staff provided legal advice to the RSDC and drafted its Award. *See* Manfred 2d Aff. ¶¶ 5, 21, 26. Through this intimate involvement with Proskauer and the RSDC, they had every opportunity to subvert the process.

And they had every incentive to, as well, supplied by a nearly $25 million loan that MLB made to the Nationals. That payment (which was known to MASN) and its amount and terms (which were long held secret) are documented in a letter agreement dated August 26, 2013, which was recently produced to MASN by counsel for the Nationals, following a meet-and-confer.[3] Hall Reply Aff. Ex. 1. The letter agreement shows that the loan was linked to the then-unissued Award in two ways. First, Mr. Manfred agreed, on behalf of the Commissioner and MLB, to lend the Nationals a sum representing the difference between what MASN had paid the Nationals based upon its "Bortz" calculation and the amount that MLB calculated the Nationals would receive "under RSDC Ruling." Hall Reply Aff. Ex. 1 at 3-4. Second, it linked repayment of that loan to the Award, stating: "Because the payments in paragraph 1 and 2 are 'make whole' payments, if the RSDC issues a decision that covers 2012 and/or 2013, ***any payments from MASN otherwise due to the Nationals will be made first to the Commissioner's Office*** to cover any amounts paid pursuant to paragraphs 1 and 2." *Id.* at 2 ¶ 3. No law clerk could properly advise a judge under any similar circumstance. However MLB chooses to frame its role

[3] MASN addresses the content of the August 26, 2013 letter in response to MLB's unfounded assertion that "MASN has produced no evidence to support its claim that MLB corruptly controlled the RSDC members and fraudulently predetermined the outcome of the proceeding." MLB Opp. at 2.

– administrator, counsel or law clerk – discovery is needed to nail down MLB's actual conduct and prevent MLB from changing its story any further.

Nor can MLB's entanglement in every aspect of the proceeding be assuaged with the assertion that MASN agreed to arbitrate before the RSDC and thus knew what it was getting. *See, e.g.*, MLB Opp. at 6. When it signed the Settlement Agreement, MASN could not possibly have known that six years later, Proskauer would represent the Nationals before the RSDC despite its attorney-client relationships with MLB, the Arbitrators' Clubs and their family members. For obvious reasons, MASN and BOLP never would have agreed to such an incestuous arrangement, and, in fact they, objected to it. Rifkin Reply Aff. ¶¶ 15, 17-19, Exs. 2-4. And MLB cannot seriously contend MASN agreed to a process in which MLB would cast its lot with the Nationals by taking a financial stake in the Award and then ghostwrite the Award. Because MASN agreed to conduct an ***arbitration*** before the RSDC, it was entitled to a fair process before a neutral decision-maker.[4] *See, e.g.*, *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 939 (4th Cir. 1999) (collecting authorities discussing the importance of a "fair and impartial" arbitral process, including "the most fundamental aspect of justice, namely an impartial decision maker").

[4] MLB's conduct in prior, non-adversarial RSDC proceedings (*see* Manfred 2d Aff. ¶¶ 4–10) cannot excuse MLB's failure to comply with the minimum standards of fair procedure and unbiased decision-making mandated by the FAA and CPLR § 7511. *Cf. Belanger v. State Farm Mut. Auto. Ins. Co.*, 111 Misc. 2d 481, 483, 444 N.Y.S.2d 406, 407 (Albany Co. 1981) (rejecting argument that petitioner "should not now be heard that he is aggrieved because of the rules and regulations surrounding the forum which he has elected," because he was "entitled to have a fair, impartial, equitable and legal arbitration").

II. MASN'S DOCUMENT REQUESTS DO NOT TARGET THE ARBITRATORS' DECISIONAL PROCESS

MLB next argues discovery should be barred because the Requests seek disclosure of the Arbitrators' decisional process. MLB Opp. at 12-16. But MLB nowhere explains why that general principle is applicable here, where the Requests are not directed to the Arbitrators. And MLB fails to grapple with the rule that ***is*** directly applicable: discovery is ***permissible*** when relevant to claims of arbitrator bias, partiality and misconduct. Instead, MLB simply mischaracterizes the Requests in a misguided attempt to fit a square peg into a round hole.

A. Courts Regularly Permit Discovery that is Relevant to Claims of Arbitral Bias, Misconduct and Undue Influence

In vacatur proceedings, courts regularly grant discovery that is relevant to claims of arbitral bias, misconduct and undue influence. *Nat'l Hockey League Players' Ass'n v. Bettman,* 93 CIV. 5769 (KMW), 1994 WL 38130, at *2 (S.D.N.Y. Feb. 4, 1994) (collecting cases); *see Hoeft v. MVL Group, Inc.*, 343 F.3d 57, 66 (2d Cir. 2003) (trial court appropriately permitted party deposition of an arbitrator regarding an allegation of prejudgment); *Sanko S.S. Co., Ltd. v. Cook Indus., Inc.*, 495 F.2d 1260 (2d Cir. 1973); *Frere v. Orthofix, Inc.*, 99 CIV 4049 (RMB), 2000 WL 1789641 (S.D.N.Y. Dec. 6, 2000); *Davis v. Esikoff*, 105 Misc. 2d 955, 430 N.Y.S.2d 208 (N.Y. Co. 1980).

In *Bettman*, for instance, the court permitted document discovery and depositions targeting (1) the power and duties of the NHL President/Commissioner (who served as arbitrator); (2) whether the arbitrator was given any instructions or advice by the NHL, team owners or their representatives concerning how to exercise his authority in deciding disputes; and (3) the full extent of any contacts between certain team and NHL officials concerning matters related to the dispute. *See* 1994 WL 38130, at *3-5. The court reasoned that these matters were relevant to bias claims relating to the NHL's control of the arbitral process,

including an allegation that the NHL and team owners gave the arbitrator "specific marching orders" regarding its desired outcome. *Id.* at *3.[5] The same is true here.

MLB concedes *Bettman* is analogous to this case but nonetheless cherry picks the court's rulings denying discovery of two documents (a memorandum by an NHL consultant and a draft of the arbitrator's award) and, from this, asserts the case supports MLB's position that the Requests are categorically wrong. MLB Opp. at 15. MLB's reading of the case is implausible. The *Bettman* court endorsed the rule that "***requested discovery that is plainly relevant to colorable claims of arbitral bias or misconduct may properly be granted.***" 1994 WL 38130, at *2. Applying that rule, and only after conducting an *in camera* review, the court concluded that these two documents did not bear on bias and were therefore irrelevant to the plaintiff's claims. *Id.* at *7-8. That document-specific ruling does not provide any support for MLB's position that MASN's discovery requests should be denied in their entirety.

B. MASN's Document Requests Seek Discovery Concerning MLB's Influence and Control, Not the Arbitrator's Deliberations

MASN's Requests are directed to Respondents MLB and the Commissioner – ***not the Arbitrators.*** They probe the level of control that MLB and Mr. Manfred exercised over the Arbitrators and the arbitral process and do not concern the Arbitrators' thought processes or the Arbitrators' understanding of the parties' intentions. None of the cases MLB relies upon support its claim that such targeted discovery is improper.

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[5] Similarly, in *Frere*, the court granted discovery of all communications between the arbitrator and the AAA, including instructions given to the arbitrator on her mandate, holding that these communications were relevant to petitioner's claim that the arbitral process was orchestrated to reach a pre-determined outcome. 2000 WL 1789641 *7-8. The court allowed discovery into "whether the arbitrator was given any reason to believe" that she was authorized to act in a particular fashion. *Id.* at *7. *See also Davis*, 105 Misc. 2d at 956-57, 430 N.Y.S.2d at 209 (allowing arbitrator to be questioned about alleged improper acts, rather than his thought processes or the meaning of the award, and granting discovery of communications from AAA to arbitrator related to the arbitration).

MLB objects to the first request (for lists of attendees at RSDC meetings and deliberations), but never explains why providing that information would invade the Arbitrators' decisional process. MLB Opp. at 16. Further, the case MLB relies upon, *T. McGann Plumbing, Inc. v. Chicago Journey Plumbers' Local 130*, 522 F. Supp. 2d 1009 (N.D. Ill. 2007), is readily distinguishable. In *T. McGann*, the party challenging the award sought, among other things, document production "in order to discover ***if the records in possession of the [arbitrators] support the evidence presented at the arbitration hearing***." *Id.* at 1015. Included in its request were "[a]ll notes, minutes, sign-in sheets, and other records made before, at and after the [arbitral] hearing." *Id.* Given the proffered justification for the request and its scope, the court unsurprisingly denied it. The court would not allow the challenging party to re-litigate its case or to inquire into the accuracy of the hearing record. *Id.* at 1016. *T. McGann* does not render the attendance lists sought here "off limits." MLB Opp. at 16.

Request No. 3 is not a substantive inquiry. It seeks documents showing that Mr. Manfred or his staff provided the Arbitrators with MASN's and BOLP's submissions and Mr. Manfred's rulings. MLB objects to the request, but fails to articulate valid reasons. MLB Opp. at 16. MLB's reliance on *T. McGann* is also misplaced. There, the challenging party sought all documents showing transmittal of the award ***among the arbitrators who participated in the decision***. 522 F. Supp. 2d at 1015. Request No. 3 does not seek such communications. It seeks evidence concerning specific communications ***to*** the Arbitrators from non-arbitrators.[6]

On its face, Request No. 2 does not seek discovery of the ***Arbitrators'*** decisional process: it does not seek discovery of ***Arbitrators'*** communications with each other, the substance of the

[6] MLB also argues *Bettman* supports its objection to Request No. 3, but the comparison it makes between documents recording that filings and rulings were sent to the panel and a memorandum from a consultant to an arbitrator analyzing the dispute is nonsensical. MLB Opp. at 16; *Bettman*, 1994 WL 38130, at *6-7.

their deliberations or drafts of the Award. Rather, like the discovery allowed in *Bettman* and *Frere*, the focus is on the communications between MLB and the Arbitrators concerning the Arbitrators' mandate and the manner in which they were to exercise their authority, including any instructions that MLB gave with respect to these matters. These issues are plainly relevant to bias and misconduct, and are thus permissible lines of inquiry. *Bettman*, 1994 WL 38130, at *4 (granting discovery into whether the arbitrator was given any instructions or advice by the NHL, owners or their representatives regarding the exercise of his authority); *Frere*, 2000 WL 1789641, at *7 (substance of communications from AAA to arbitrator discoverable). MLB's assertion that this Request intrudes into the Arbitrators' decisional process cannot be reconciled with its repeated avowals that MLB, the Commissioner and Mr. Manfred "***were not the decision-makers in the RSDC proceeding***," and that the Arbitrators exercised "***their independent judgment.***" MLB Mem. at 25; *id.* 14-15; *id.* at 19. ***MLB cannot have it both ways.***

In addition, MLB's contention that every document responsive to Request No. 2 is "immune from discovery" cannot be credited. MLB Opp. at 16. Instructions to the Arbitrators, correspondence regarding their mandate and similar communications are clearly discoverable. And given MLB's recent confession that by "administrative and other support," it really meant "provide legal advice and draft the Award," the Court should take appropriate steps to ensure that this objection is not being asserted opportunistically.

III. MLB'S BLANKET ASSERTION OF ATTORNEY-CLIENT PRIVILEGE IS UNSUPPORTED AND PROVES THE RSDC WAS NOT INDEPENDENT

MLB opposes leave for all discovery under Requests Nos. 2 and 3 because it is ***possible*** that ***some*** of the responsive documents ***may be*** privileged and generating a privilege log would be too burdensome. *See* MLB Opp. at 16-17. Claiming now that MLB's attorneys provided legal advice and assisted in drafting the Award, MLB posits "***to the extent*** that MLB attorneys

allegedly provided 'analysis' . . . or assisted in the 'preparation of the Decision,' (Req. No. 2), ***those communications*** are privileged." *Id.* at 17. MLB further argues if Request Number 3 seeks "disclosure of documents reflecting communications between MLB attorneys and the RSDC members ***about*** the various submissions . . . ***those communications***, too, ***likely*** are privileged." *Id.* A valid objection to discovery based on attorney-client privilege requires more than amorphous and abstract suppositions about what responsive documents might contain.

The attorney-client privilege protects only legal advice, not all attorney-client communications or the underlying facts. *Spectrum Sys. Int'l Corp. v. Chemical Bank*, 78 N.Y.2d 371, 377-78, 581 N.E.2d 1055, 1060, 575 N.Y.S.2d 809, 814 (1991). Courts will not grant blanket protection for all documents based on a party's barebones assertion: when the producing party asserts privilege, it is usually required to produce a privilege log, as well as a certification "setting forth with specificity those facts supporting the privileged or protected status of the information" and "the steps taken to identify the documents so categorized." Rule of the Commercial Div. 11-a, 11-b; *see also* CPLR § 3122; *Bettman*, 1994 WL 38130, at *11-12. If there is a dispute over the privileged nature of documents, courts do not simply take the producing party's word for it. Rather, "whether a particular document is or is not protected is necessarily a fact-specific determination . . . most often requiring *in camera* review." *Spectrum Sys. Int'l Corp.*, 78 N.Y.2d at 378, 581 N.E.2d at 1060, 575 N.Y.S.2d at 814.

As drawn, Requests Nos. 2 and 3 do not include attorney-client privileged communications. But if any of the documents include legal advice, it may be appropriately redacted and produced, or logged in a privilege log for further scrutiny. *Bettman*, 1994 WL 38130, at *11-12. There is nothing unique about this case that makes generating a privilege log

more burdensome than in any other. And MLB should not be allowed to bar all discovery on its say-so simply because it is possible that some responsive documents might be privileged.

Finally, if MLB and the RSDC really had an attorney-client relationship during the Arbitration, it is ***yet another*** undisclosed relationship that implicates the evident partiality of the Arbitrators. If MLB was providing the Arbitrators with legal advice in connection with the dispute – especially while MLB and the Arbitrators (and/or their Clubs) and the Nationals were all represented by Proskauer – it cannot plausibly be said that the Arbitrators "exercised their own independent judgment." Manfred Aff. ¶ 11.

IV. MLB HAS OPENED THE DOOR TO DISCOVERY

Mr. Manfred's and the Arbitrators' sworn statements plainly put MLB's control and influence over the Arbitrators at issue. MASN Br. at 23-24; Manfred Aff. ¶¶ 6, 8, 9, 11; Coonelly Aff. ¶¶ 5, 10; Sternberg Aff. ¶¶ 4, 9; Wilpon Aff. ¶¶ 4, 9. MLB argues that a "sword-shield" theory does not apply because the sworn statements are "limited to the basic point that the RSDC members reached their decision independently and on the merits, and that their decision was not controlled by MLB." MLB Opp. at 19. However, it is precisely these statements that MASN seeks to test through discovery.

MLB asserted the Arbitrators' independence from MLB as a defense to MASN's claim of evident partiality based on Proskauer's representations of MLB. MLB Mem. at 14-15. This defense opened the door to inquiry as to the extent of the Arbitrators' independence. That door has opened even further now that MLB has asserted a high level of interaction between MLB and the Arbitrators, including legal advice akin to that provided by a law clerk. MLB Opp. at 4-5, 16-17. MLB's denial that it broached these topics is belied by the very facts it has presented. After having injected the Arbitrators and Mr. Manfred into this proceeding and proffered their self-serving testimony, MLB cannot expect now to be shielded from discovery.

V. MASN'S REQUESTS ARE CAREFULLY TAILORED AND WILL NOT PREJUDICE MLB OR FURTHER DELAY THESE PROCEEDINGS

In a series of makeweight arguments, MLB argues discovery should be denied because the Requests are overly broad and will cause delay. *See* MLB Opp. at 2-3, 22-25. The Requests on their face are not overly burdensome. Each of the Requests is bounded by time (4 years for Request No. 1; 2.5 years for Requests Nos. 2 and 3) and a limited number of custodians. The RSDC is a three-person committee that meets infrequently. MLB can easily apply search terms, date restrictors or other devices to narrow the pool of relevant documents. Indeed, MLB has represented that it would only need two weeks to produce – hardly burdensome.

MLB objects to Request No. 3 because it uses the words "concerning" and "rulings." MLB Opp. at 24. Tellingly, MLB rejected MASN's previous attempt to negotiate the scope of the Requests during the parties' meet and confer. *See* Hall Aff. ¶ 5. However, if the Court were to determine the Requests are "overly broad" or "indefinite" (MLB Opp. at 10, 24), the remedy would be to narrow them – not reject them. *See N.Y. Univ. v. Farkas*, 121 Misc. 2d 643, 647, 468 N.Y.S.2d 808, 812 (Civ. Ct. N.Y. Co. 1983) (discovery is appropriate upon a consideration of "whether the prejudice can be diminished or alleviated").

Finally, there is no merit to MLB's assertion that MASN's Requests are motivated by an attempt to delay. *See* MLB Opp. at 2-3. Any delay is the result of MLB's lack of candor and refusal to produce any discovery without a Court order. *See* Hall Aff. ¶ 5. As MLB is aware, the parties diligently worked with the Court's Law Secretary to arrange an efficient briefing and argument schedule for the instant motion and the Petition. *See* Hall Reply Aff. ¶¶ 2-4.

CONCLUSION

For the foregoing reasons, MASN respectfully requests that its motion for leave pursuant to CPLR § 408 be granted in its entirety.

Dated: November 25, 2014

Respectfully submitted,

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