ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP
ROBERT R. MOORE (BAR NO. 113818)
MICHAEL J. BETZ (BAR NO. 196228)
ALEXANDER J. DOHERTY (BAR NO. 261552)
GRAYSON (TREY) W. MARSHALL III (BAR NO. 280409)
Three Embarcadero Center, 12th Floor
San Francisco, CA 94111-4074
Phone: (415) 837-1515
Fax: (415) 837-1516
E-Mail: rmoore@allenmatkins.com
mbetz@allenmatkins.com
adoherty@allenmatkins.com
tmarshall@allenmatkins.com

Attorneys for Petitioner
The Franklin Mieuli Trust

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

THE FRANKLIN MIEULI TRUST, a trust,

Petitioner,

v.

SAN FRANCISCO FORTY NINERS, LIMITED, a California limited partnership,

Respondent.

Case No. CPF-18-516338

THE FRANKLIN MIEULI TRUST'S PETITION TO VACATE ARBITRATION AWARD

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Page(s)

Page(s)

Page(s)

Statutes

California Regulations

Petitioner The Franklin Mieuli Trust ("the Trust") hereby petitions the Court, pursuant to section 1285 *et seq.* of the Code of Civil Procedure, for an order vacating the arbitration decision attached hereto as Exhibit "A." The arbitration took place in San Francisco, and therefore venue for this Petition is proper in this Court pursuant to section 1292.2 of the Code of Civil Procedure.

I. INTRODUCTION

This Petition arises from an arbitration conducted under the auspices of the National Football League ("NFL"). In May 2018, Jay Moyer ("Mr. Moyer" or "the Arbitrator") – formerly the NFL's Executive Vice President and League Counsel and currently Special Counsel to the NFL – issued the "Decision and Award" attached hereto as Exhibit "A" ("the Decision"). In the Decision, Mr. Moyer adjudicated a dispute between the San Francisco 49ers football club ("the 49ers") and the Trust – which formerly owned a 5% interest in the 49ers – over how much the 49ers were required to pay the Trust for its 5% interest in the club. Mr. Moyer determined that the Trust's 5% ownership interest in the 49ers was worth only $22.57 million – despite the fact that, at the time the Trust's interest was appraised in 2010, the 49ers were estimated to be worth close to ***$1 billion***. Indeed, the 49ers – one of the top five most valuable NFL franchises – are currently estimated to be worth upwards of ***$3 billion***. Even an elementary school student with a basic knowledge of arithmetic would realize that the Trust was robbed, while the 49ers made out like bandits.

While the outcome of this arbitration is preposterous on its face, that is not even the reason why the Decision cannot stand and must be vacated. As its absurdity suggests, the arbitration outcome was the product of procedural and jurisdictional improprieties that ***do*** necessitate vacating the Decision.

It is almost a cliché to state that law and public policy generally favor arbitration as a means of resolving disputes. But there are limits. And the Decision exceeds them. In fact, there are ***seven*** separate and independent reasons, falling into four broader categories, why the Decision must be vacated.

A. There Was No Valid Arbitration Agreement Binding the Trust and Therefore No Jurisdiction for the NFL to Proceed

First and foremost, the arbitrator must have fundamental subject matter jurisdiction over a dispute in the form of a valid and enforceable arbitration agreement that binds the parties. That was entirely missing here, for a few reasons.

As an initial matter, the Trust ***did not sign or agree to*** the agreement containing the arbitration provision invoked by the 49ers. Instead, the 49ers signed it without the Trust's consent.

By way of background, the arbitration provision invoked by the 49ers in this case (*see* Exhibit B attached hereto) appears not in a contract amongst the parties but rather in an extrinsic document, i.e., the NFL's Constitution and Bylaws ("NFL Bylaws"). (Ex. 1.)[1] In 1992, the general partner of San Francisco Forty Niners, Limited ("Partnership") – the California limited partnership that formerly held the 49ers' franchise – purported to unilaterally amend the parties' original 1977 partnership agreement ("Partnership Agreement") so as to add a new provision stating that the parties' agreement was "subject to" the NFL Bylaws. (Ex. 2 [1992 amendment], ¶ 6; Ex. 3 [original 1977 agreement].) When the present dispute arose several years ago, the 49ers seized on that clause and contended that the Trust was obligated to arbitrate this dispute pursuant to the arbitration provision in the NFL Bylaws, which provides the NFL Commissioner (i.e., Roger Goodell) with "full, complete, and final jurisdiction and authority to arbitrate...." (Ex. 1, Art. 8.3.)

Critically, however, the Trust did not sign or agree to this amendment referencing the NFL Bylaws ("First Amendment"). (Ex. 2.) Rather, Carmen Policy – who was the President of the Partnership's general partner at the time – purported to "sign[] on behalf of each of the limited partners pursuant to authority granted to the general partner in the partnership agreement." (Ex. 2, p. PM0409.) But ***nothing*** in the Partnership Agreement gave the general partner any such attorney-in-fact authority. Put simply, the 49ers' management at the time misread the Partnership Agreement and made a huge mistake, a mistake that renders the First Amendment – ***including the purported arbitration agreement invoked by the 49ers here*** – invalid, ineffective, and not binding on the Trust.

---

[1] All parenthetical citations to exhibits refer to exhibits attached to the supporting Declaration of Michael J. Betz in Support of The Franklin Mieuli Trust's Petition to Vacate Arbitration Award.

In addition, the NFL could not possibly assert jurisdiction over the Trust pursuant to the arbitration provision in the NFL Bylaws because the First Amendment failed to effectuate a valid incorporation-by-reference of the NFL Bylaws into the Partnership Agreement. The three-part test under California law for incorporating by reference an extrinsic document into a contract is well-settled and clear. The reference to the extrinsic document in the contract must be "clear and unequivocal," the reference must be "called to the attention of the other party" and he must provide his consent, and the terms of the incorporated document must be known or easily available to the contracting parties. *DVD Copy Control Assn., Inc. v. Kaleidescape, Inc.*, 176 Cal.App.4th 697, 713 (2009).

Here, the Trust did not provide its consent. In fact, as noted above, the Partnership's general partner did not even ***seek*** the Trust's consent and instead purported to execute the First Amendment on the Trust's behalf pursuant to contractual authority that did not exist.

In addition, the reference to the Bylaws was not "clear and unequivocal." In relevant part, this is all the First Amendment states: "Notwithstanding any agreement to the contrary, this Agreement and any and all other arrangements between or among the parties hereto...which relates to the ownership of [sic] operation of the Franchise as a member club of the National Football League are subject to the Constitution and By-laws of the National Football League...." (Ex. 2, pp. PM0407-0408.) This provision clearly *mentions* the NFL Bylaws, but that is not enough to incorporate those bylaws by reference under California law. Nothing in this provision suggests the Trust is *directly bound* by the Bylaws. Rather, this provision does nothing more than establish the *precedence* of the Bylaws over the Partnership Agreement if, and to the extent to which, anything in the agreement is "to the contrary." Indeed, the paragraph itself is entitled "Precedence of League Policies."

Nor is there any mention of arbitration. That omission is telling given that the original Partnership Agreement already contained an arbitration provision (which is not applicable here). (Ex. 3, ¶ 19.) Nothing in the First Amendment suggests an intent to supersede the original arbitration provision. California courts do not lightly waive a party's right to a judicial forum. The

First Amendment does not come close to evidencing an intent by the Trust to waive that important right.

Finally, the arbitration provision invoked by the 49ers is unconscionable and therefore invalid and unenforceable. The *procedural* unconscionability is readily apparent. As noted above, the Trust – literally – did not sign or agree to the agreement purportedly binding it to arbitration.

The substantive unconscionability is likewise clear. It was manifestly unfair to force the Trust to arbitrate a dispute with an NFL member club in an NFL forum and before an arbitrator who (1) was unilaterally appointed by NFL Commissioner Roger Goodell, (2) was the former NFL Executive Vice President and League Counsel for over twenty years, and (3) remains gainfully and loyally employed by the NFL in the capacity of Special Counsel and, as this case reflects, NFL arbitrator. In short, the Trust was forced to arbitrate its claims in a structurally-biased league forum – a league in which the Trust's adversary was a member and which employed (and still employs) the arbitrator himself. Is it any wonder the arbitrator ruled comprehensively in the 49ers' favor? This game was rigged from the outset, and an arbitration outcome that would please the 49ers was a foregone conclusion.

B. This Dispute Was Never Arbitrable Because It Fell Beyond the Scope of the Arbitration Provision on Which the 49ers Relied in Compelling This Matter to Arbitration

The Decision should be vacated for the additional reason that this dispute did not fall within the scope of the NFL arbitration provision. As a result, the NFL had no arbitral authority over this dispute.

The NFL Bylaws provide the commissioner with jurisdiction to arbitrate "[a]ny dispute involving two or more members of the League or involving two or more holders of an ownership interest in a member club of the League...." (Ex. 1, Art. 8.3(A).) Accordingly, the only disputes that qualify for NFL arbitration under this provision are those that involve either "***two or more*** members of the League" or "***two or more*** holders of an ownership interest in a member club." (*Id.* (emphasis added).) However, this dispute was between ***one*** ownership interest holder – i.e., the Trust, with a 5% interest in the 49ers – and ***one*** "member club" – i.e., the 49ers.

What is more, just weeks after the NFL ruled that this dispute was arbitrable pursuant to Article 8.3(A), the 49ers effectuated a conversion of the entity holding the franchise, i.e., San Francisco Forty Niners, Limited, into Forty Niners Holdings, LP, a Delaware limited partnership. (Ex. 4.) In doing so, the 49ers decided to ***extinguish*** the Trust's 5% interest in the club, taking the absurd position that the Trust was not entitled to be a limited partner any more in light of its decision to sell its ownership interest – even though that sale had obviously not been completed and the Trust had not been paid a single cent. (Ex. 125 at Ex. A [list of partners in converted entity does not include the Trust]; *id.*, ¶ 2.8 [stating the Trust has "no rights" under the agreement except to receive payment of appraised value of 5% interest].) But the legal merits of the 49ers' position is irrelevant. All that matters for ***arbitrability*** purposes is the fact that, as of March 22, 2012 (which was months before Mr. Moyer was even appointed as arbitrator), the Trust was no longer a "holder[] of an ownership interest in a member club of the League" within the meaning of Article 8.3(A). (Ex. 125 at Ex. A.) As such, within weeks of the NFL's determination that this dispute was subject to the commissioner's jurisdiction, the 49ers stripped the Trust of its interest and thereby – unwittingly or not – stripped the NFL of its purported jurisdiction.

C. The Arbitrator Had No Legal Authority to Arbitrate This Dispute

The Decision also must be vacated because Mr. Moyer did not just exceed his powers as the arbitrator – he had *no* power whatsoever. Assuming *arguendo* the Trust was bound by the NFL Bylaws – which was not the case – those bylaws bestow the authority to arbitrate disputes only on the NFL *commissioner*. (Ex. 1, Art. 8.3.) The bylaws do not authorize anyone else to serve as arbitrator. Moreover, the Bylaws include nine pages dedicated to setting forth the commissioner's duties and powers in quite significant detail. (*Id.*, Art. VIII.) Appointing a "designee" arbitrator – as Mr. Goodell did here – is *not* one of the commissioner's powers. (Ex. 5.)

The NFL maintains – in a separate document apart from the Bylaws – what it calls the "National Football League Dispute Resolution Procedural Guidelines." (Ex. 6.) However, those guidelines likewise do not provide the commissioner with the power to "appoint" a "designee" arbitrator. The guidelines do allow the commissioner to "be assisted by persons from his staff in conducting arbitration proceedings, including serving as hearing officer." (*Id.*, § 3.2.) But Mr.

Moyer did not *assist* Mr. Goodell in conducting this arbitration; Mr. Moyer *replaced* him. And Mr. Moyer – who retired from the NFL's full-time employ many years ago – is not, in any event, a member of the commissioner's "staff."

But even if the guidelines permitted the commissioner to appoint a "designee" arbitrator, it would not change a thing. The guidelines were not referenced anywhere in the First Amendment. (Ex. 2.) As such, the guidelines were not incorporated by reference into the agreement, and therefore were not binding on the Trust.

Mr. Moyer could not issue a valid arbitration award if he had no contractual authority to do so. For this reason too, the Decision must be vacated.

D. The Arbitrator Prevented the Trust from Obtaining the Testimony of a Vital Witness

Finally, an arbitration award must be vacated if the arbitrator deprived an aggrieved party of material evidence, i.e., by refusing to admit evidence or denying discovery of evidence. Here, Mr. Moyer did exactly that when he rejected the Trust's request to subpoena a critical – perhaps the most important – witness. (Ex. 7, p. 4.)

The principal disputed issue in this case was the value of the Trust's 5% interest in the 49ers. That issue was supposed to be resolved – as provided by the Partnership Agreement – by a panel of three appraisers, with one appraiser selected by the 49ers, one selected by the Trust, and the third appraiser selected by the first two appraisers. (Ex. 3, ¶ 18.2.) For a variety of reasons detailed more fully below, a dispute arose between the Trust and the 49ers over the integrity of the appraisal process, and the appraisal was never completed.

At the time the appraisal ceased, the 49ers' chosen appraiser (Donald Erickson) had concluded that the Trust's 5% interest was worth $18.5 million. (Ex. 8.) The Trust's appraiser (Daniel Barrett) had not completed his analysis but was still working on a preliminary draft. (Ex. 9, p. BSG12978.) With only one valuation purportedly completed, the third appraiser (Jeffrey Phillips) – the only appraiser not selected by one of the parties – was a vital participant in the appraisal process, and thus a critical witness when the parties' dispute arose. And yet when the Trust requested Mr. Moyer's permission to subpoena Phillips, he ***denied*** the request – presumably to

prevent Phillips' testimony from undermining his pre-determined outcome in favor of the 49ers. (Ex. 7, p. 4.)

The importance of Phillips' testimony to the Trust's case cannot be overstated. The 49ers' appraiser Erickson testified that he and Phillips had a two-minute phone conversation in which Phillips purportedly agreed with Erickson's $18.5 million valuation. (Ex. 11, p. 3041:14-15.) Phillips' appraisal firm Stout Risius Ross, Inc. subsequently issued – under duress and in response to the 49ers' threat of legal action against the firm – a letter on which "draft" was stamped on every page and which stated that the value of the Trust's interest "is reasonably stated in the amount of $18.5 million." (Ex. 10, p. SF000861.) The Partnership Agreement called for an appraisal by three independent appraisers, and Phillips was one of them. The Trust had every right to discover, directly from Phillips and not indirectly through the biased testimony of the 49ers' appraiser, the circumstances under which Phillips purportedly reached his $18.5 million valuation opinion – or if he actually reached any final, reasoned valuation decision at all. Phillips' testimony was *vital* to the Trust's case.

Ironically, the Decision itself demonstrates as much. In rejecting several of the Trust's arguments, Mr. Moyer relied extensively on Phillips' purported $18.5 million valuation and the "agreement" between Erickson and Phillips on that figure. (*See, e.g.,* Decision, pp. 102-105.) In fact, the Decision chides the Trust's supposed lack of evidence on such issues – while never once acknowledging that it was Mr. Moyer who denied the Trust the opportunity to obtain that evidence! For this seventh separate and independent reason, the Decision must be vacated.

The outcome of this arbitration is unfair and unjust – but not altogether surprising. The process that led to this outcome was rigged from start to finish, from the time the NFL assumed jurisdiction to adjudicate a dispute over which it had no jurisdiction, to its appointment of an arbitrator it had no authority to appoint, to its arbitration of claims that were not arbitrable, and to the decision of the NFL's hand-picked arbitrator to handicap the Trust's case on the merits by refusing to subpoena a critical witness.

The NFL and its member club the 49ers are so wealthy and powerful that, as the arbitration process in this case demonstrates, they believe they can do whatever they want (including ignoring

not only California law but also their own internal bylaws) and get away with it. However, the Decision is not a judgment, and it does not have the force and effect of one until this Court determines that it is not subject to vacatur and should instead be confirmed under California law. Code Civ. Proc. § 1287.6. For all the foregoing reasons, as more fully set forth below, the Decision cannot be confirmed and instead must be vacated.

II. FACTUAL BACKGROUND

A. Franklin Mieuli – Bay Area Sports Icon

Franklin Mieuli ("Franklin") was one of the most recognizable and influential figures in the history of Bay Area professional sports.[2] In 1952, Franklin was producing both the radio and television broadcasts for the 49ers and, in 1956, purchased an interest in the club. Franklin later became an owner of the San Francisco Giants and helped purchase and move the (now Golden State) Warriors basketball team from Philadelphia. (Ex. 11, p. 888:5-12, 887:9-21.) Franklin later became the sole owner of the Warriors, leading them to win the NBA championship in 1975. (*Id.*, p. 887:22-888:4.)

In 1977, the original partners in the 49ers decided to sell their interests to Wayne Valley. (Ex. 11, p. 888:13-25.) Upon learning of the sale to Valley, Franklin elected to exercise his right of first refusal and to purchase the 49ers with his friend, and former mayor of San Francisco, Joe Alioto. (*Id.*, p. 888:13-891:16.) However, before Franklin could complete the transaction, Al Davis introduced Eddie DeBartolo, Sr., to the club who presented the then-owners with an offer to buy the 49ers for double what the team had previously been seeking. (*Id.*, p. 890:21-891:16.)

B. The Side Letter Agreements

After purchasing the 49ers in 1977, Eddie DeBartolo, Sr. gave the team to his son, Eddie DeBartolo, Jr. ("DeBartolo"). As consideration for a new limited partnership to be formed for the purpose of holding the 49ers' franchise, the ownership interest holders – i.e., DeBartolo, Franklin, and Marshall E. Leahy, managing partner of an oral partnership of the trusts created for the benefit of Elizabeth Jane Morabito and Richard Carl Morabito (the "Morabitos") – entered into a written

---

[2] *See* Warriors History, Warriors Legend: Franklin Mieuli, *available at* http://www.nba.com/warriors/franklin_mieuli.html (last visited Sept. 7, 2018)

letter agreement dated February 25, 1977 and another updated letter agreement dated March 15, 1977 (the "Letter Agreement"). (Exs. 12, 13.) The Letter Agreement provided the two minority interest holders – i.e., Franklin and the Morabitos – with certain amenities relating to the 49ers, including complimentary box and stadium seats for home games, annual Super Bowl tickets, and first class roundtrip transportation and accommodations to the NFL annual meeting, 49ers away games, and the Super Bowl.

C. The Partnership Agreement

On or about March 25, 1977, the 49ers, Franklin, and the Morabitos formed San Francisco Forty Niners, Limited, a California limited partnership ("Partnership"), for the purpose of owning and operating the 49ers' franchise. (Ex. 3.) For the next thirty-five years until 2012, the Partnership was the entity that held the 49ers' franchise.

There were three partners. The general partner with a 90% ownership interest in the club was San Francisco Forty Niners, Inc., a corporation wholly owned by DeBartolo ("the General Partner"). (Ex. 3, ¶ 4.1.) Franklin and the Morabitos were both limited partners, with each holding a 5% ownership interest. (*Id.*)

The San Francisco Forty Niners, Limited partnership agreement ("the Agreement") set forth the various rights Franklin and the Morabitos had as limited partners of the 49ers. (Ex. 3.) Under paragraph 13.4.2 of the Agreement, upon the death or incompetency of Franklin, his interest would be transferred to his heir, i.e., the Trust, which then had "the privilege of causing the Partnership to liquidate" Franklin's entire interest within 180 days of his death.

Paragraph 18.2.1 of the Agreement provided that the "purchase price to be paid... shall be the Fair Market Value of the... interest." (Ex. 3, ¶ 18.2.1.) Paragraph 18.2.2 of the Agreement set forth how the Fair Market Value of Franklin's 5% interest should be determined:

> 18.2.2 "Fair Market Value" shall be arrived at by three (3) independent appraisers, the Partnership selecting one appraiser and the Terminated Partner [i.e., Franklin/the Trust] selecting a second appraiser and those two selecting a third. In the event the three appraisers are unable to agree on the Fair Market Value, then the Fair Market Value shall be the average of the three appraisals.

(Ex. 3.) The appraisal process delineated in paragraph 18 does not state it will result in an "irrevocable," "binding" or "mandatory" "requirement" by the Trust to sell its interest. Indeed, the 49ers' counsel made clear in 2010 that at the conclusion of the appraisal process the 49ers would ***not*** have any obligation to purchase the Trust's interest "regardless whether the League approves the transaction." (Ex. 14, ¶ 3.)

The Agreement also provided Franklin with rights of first refusal with respect to the sale of any portion of the General Partner's ownership interest or the Morabitos' ownership interest. (Ex. 3, ¶¶ 13.1, 13.2.) As Peter Mieuli ("Mieuli"), Franklin's son and the Trust's trustee, testified at the arbitration, the rights of first refusal were very important: "Well, [Franklin] felt it was really important. It separated his interest from certainly the Morabito interest. He knew it had value, whether he invoked it or sold his interest on the open market." (Ex. 11, p. 892:16-19.)

D. The First Amendment to the Partnership Agreement

In 1992, the Morabito trusts transferred their collective 5% ownership interest to Richard Carl Morabito. (Ex. 2.) To effectuate the transfer and admit Morabito as a limited partner, the General Partner executed a First Amendment to the Partnership Agreement ("First Amendment"). (*Id.*) Paragraph 7 of the original Partnership Agreement authorized the admission of a new partner in this manner so long as "the Partners holding eighty percent (80%) in interest" approved it. (Ex. 3, ¶ 7.) As such, the General Partner – which held a 90% interest – could ***unilaterally*** admit a new partner, regardless of whether the limited partners, including Franklin, approved.

Accordingly, the General Partner's president at the time, Carmen A. Policy, did ***not*** obtain Franklin's – or the other limited partner's – consent to the First Amendment. Instead, Mr. Policy purported to "sign[] on behalf of each of the limited partners pursuant to authority granted to the general partner in the partnership agreement." (Ex. 2, p. PM0409.) In short, Mr. Policy unilaterally approved the First Amendment and signed it "on behalf" of the limited partners, whose inauthentic "signatures" are followed with "/s." (*Id.*)

The problem is that the First Amendment did not effectuate ***only*** the admission of the new limited partner – which Mr. Policy arguably was contractually authorized to do without the limited partners' consent. The First Amendment also added several new paragraphs to the Partnership

Agreement, including one that affirmed the "precedence" of NFL policies over anything contrary within the Partnership Agreement. (Ex. 2, ¶ 6.) More specifically, the First Amendment purported to add to the Partnership Agreement the following clause: "Notwithstanding any agreement to the contrary, this Agreement and any and all other arrangements between or among the parties hereto…which relates to the ownership of [sic] operation of the Franchise as a member club of the National Football League, are subject to the Constitution and Bylaws of the National Football League…." (*Id.*, ¶ 6 [adding ¶ 18.8 to Partnership Agreement].) That paragraph had nothing to do with the admission of a new limited partner. Accordingly, the General Partner did ***not*** have the contractual authority to unilaterally adopt that provision on the limited partners' behalf.

E. The Yorks Take Over and Begin a Destructive Scheme to Diminish Franklin's Rights

From 1977 to 2006, Franklin and his family enjoyed the amenities provided by the Letter Agreement without any dispute. (Ex. 11, p. 899:1-6.) However, in 1998, DeBartolo pled guilty to a felony charge arising from his payment of $400,000 to the Louisiana governor in order to win a casino license.[3] DeBartolo was subsequently suspended by the NFL and ceded control of the 49ers to the York family.[4]

The Yorks quickly yanked out from under Franklin and his family the rights and amenities they had enjoyed since 1977. (Ex. 11, p. 897:23-898:3, 2761:19-23.) In 2003, after nearly 30 years of enjoying his Sunday tradition of attending games with his family, Franklin received a letter from the York's attorney at the time stating that the limited partners were no longer entitled to any discount on a luxury box. (Exs. 15, 16.) Contrary to the explicit terms of the Letter Agreement, which granted Franklin eight complimentary box and stadium seats as long as he was a limited partner, the 49ers demanded that Franklin pay full retail for all 16 seats in a luxury box he and his family had enjoyed for years. (*Id.*; Ex. 13, § 2.) The 49ers claimed that Franklin was no longer entitled to social amenities because the social amenities were included in the Letter Agreement, which the

---

[3] David Dietz, Howard Arceneaux, *DeBartolo Guilty of Felony / $1 million fine, 2 years of probation*, SAN FRANCISCO CHRONICLE (Oct. 7, 1998), available at http://www.sfgate.com/politics/article/DeBartolo-Guilty-of-Felony-1-million-fine-2-2986872.php

[4] Unnamed Author, *DeBartolo Will Be Fined and Suspended by the NFL*, LOS ANGELES TIMES (March 16, 1999), available at http://articles.latimes.com/1999/mar/16/sports/sp-17896

49ers claimed was not binding on the club because it was not integrated into the Partnership Agreement. The 49ers' claim, however, contradicts the Letter Agreement. (Ex. 11, p. 898:19-899:12.)

F. Unbeknownst to Mieuli or the Appraisers, the 49ers Held Discussions in 2008 Regarding the Sale of an Ownership Interest in the Club

In May 2008, Jed York (the 49ers' CEO) and Larry MacNeil (the 49ers' CFO) met with Wyc Grousbeck and Mark Wan, part owners of the Boston Celtics, to discuss the purchase of a limited partnership interest in the 49ers. (Ex. 17; Ex. 11, p. 258:3-24.) As part of the discussion, York told Grousbeck and Wan that they could use the "Raiders and Miami sales" – which were based on enterprise values of $900 million and $1.025 billion, respectively – as "guidelines" to determine what a limited partnership interest in the 49ers might be worth. (Ex. 17, ¶ i.) The Trust was kept in the dark about these conversations because the 49ers did not want these potential purchasers approaching the limited partners directly. (Ex. 17; Ex. 11, p. 905:9-23, 1261:24-1262:12.)

G. The 49ers Attack Franklin's Rights – Despite His Saving the Franchise

In December 2009, the 49ers approached the Trust and the Morabitos proposing a new partnership agreement. (*See* Ex. 18.) The proposed new partnership agreement would have acknowledged the existing amenities but eliminated the Trust's rights of first refusal, inserted a new "put" right, and removed the Trust's entitlement to block the team from leaving the Bay Area. (*Id.*; Ex. 11, p. 903:19-904:24.) The 49ers took the position that the Trust did not have many of the rights contained in the partnership agreement because only Franklin could exercise them. (Ex. 11, p. 907:6-11.) Mieuli testified that, in response to the 49ers' attempt to re-negotiate the terms of the partnership, Franklin, who was then 89 years old, "was just livid. He was – he was a guy who lived his whole career by doing what he felt was right and if you shook on a deal, you put a commitment in the contract and you live by it. Even if at times it's not to your benefit, you do what you say you're going to do." (Ex. 11, p. 906:13-907:1.) Franklin further felt that eliminating the Trust's rights, particularly its rights to liquidate, when he was 89 years old "was a bad-faith way to start a negotiation[.]." (Ex. 11, p. 908:15-909:6.)

H. The Trust Exercises Its Right to Have the Fair Market Value of Its Interest Determined

On April 25, 2010, Franklin passed away. (Ex. 19.) On July 19, 2010, Mieuli, as trustee for the Trust, provided the 49ers with notice that he was invoking the Trust's privilege to have its interest appraised pursuant to paragraph 13.4.2 of the Agreement. (*Id.*) The Trust decided to exercise the privilege to pursue an appraisal, rather than sell the interest on the open market, after extensive conversations with industry experts who informed Mieuli that a ***fair*** market valuation – as required by the terms of the Agreement – should arrive at the same or similar price as a sale in the open market. (Ex. 11, p. 1613:1-1614:20.)

The 49ers' response was to keep Mieuli from receiving a fair appraisal process. First, they suggested that the parties disregard the appraisal process explicitly outlined in the Agreement and instead simply "reach an agreement on value." (Ex. 20, p. 1.) Of course the Trust did not agree, and the 49ers then made a mockery of the bargained-for process.

I. The 49ers Take Advantage of Rick Morabito's Declining Health and Absence of Legal Counsel and Purchase the Morabitos' 5% Interest for Far Less Than Its Fair Market Value

Beginning in March 2010, the 49ers made clear to the Trust and the Morabitos that they only needed an additional 5% to gain "enough control to amend the [partnership] agreement for almost any purpose." (Ex. 21, p. SF038008.) Faced with the threat of being closed out, and with Rick Morabito's serious health condition ongoing and the knowledge that they had no heirs, the Morabitos – without any legal representation or valuation expert – contacted the 49ers and offered to sell their 5% ownership interest for $15 million. (*Id.*, p. SF038009; Ex. 11, p. 1346:3-9.) The 49ers' then low-balled them with a $14 million counter-offer. The Trust was not notified of the offer or counter-offer at the time.

In violation of the Trust's right of first refusal, the Trust was notified that the Morabitos "have" accepted the 49ers' counteroffer without any mention of the Morabitos' prior offer to sell their interest for $15 million. (Exs. 22, 23.) Even the NFL questioned the low price for the Morabito transaction, as evidenced in an e-mail from NFL Senior Vice President Jay Bauman. (Ex. 24.)

The 49ers, of course, reveled in the bargain price obtained for the Morabito interest. York noted to his father the potential to "net $18.8 million for the team" if the interest was resold, indicating a $32.8 million market value of a 5% interest in the 49ers that does not include a right of first refusal. (Ex. 25; Ex. 11, p. 1555:4-8.) In addition to the windfall, the 49ers believed the purchase of the Morabito interest gave the club the ability to amend the partnership agreement without interference from the limited partners – something they had already been doing in practice. (Ex. 26.)

J. The 49ers Refuse to Agree to a Valuation Date

As a first step to rig the appraisal process, the 49ers sought a valuation date of August 31, 2010, or later, so that the distressed sale by the Morabitos could be used as a benchmark for valuing the Trust's interest. (Ex. 27.) Mieuli was ultimately forced to file a Demand for Arbitration with the American Arbitration Association to determine the "valuation date." (Ex. 28; Ex. 11, p. 1370:1-1371:6.) The 49ers fought tooth-and-nail about the date, and also took the position that Mieuli had been terminated from the partnership (a position Mr. Moyer allowed them to retract in order to secure NFL jurisdiction). In the end, respected former Presiding Justice of the California Court of Appeal Carl West Anderson issued an award dated April 6, 2011 finding that the valuation date is June 30, 2010. Judge Anderson ruled that the 49ers' "position leads to an absurdity" and made "no sense." (Ex. 29, p. PM1717.) Understandably, the 49ers then turned to the home field advantage of NFL arbitration, where nobody would question whether their positions made any sense.

K. The 49ers Initially Demand Independent Appraisers and Joint Instructions – All of Which Mr. Moyer Later Ignores

At the same time they were debating the valuation date, the parties were also selecting appraisers. The 49ers' initial response to the appraiser selection process was to urge the Trust to abandon the process altogether. (Ex. 20, p. 1.) When the Trust did not acquiesce, by letter dated August 4, 2010, the 49ers again acknowledged that "it is obviously critical that each of the appraisers be both qualified and independent." (*Id.*) The 49ers' initial position was that a lack of independence would destroy the valuation process, and thus the 49ers wanted the appraisers to be "without preconceived ideas or commitments, already communicated to one of the parties." (Ex. 30, p.

SF001382.) The 49ers stated "[i]t would, moreover, be destructive of the process, and antithetical to the terms of Section 18.4 [of the Agreement], to have each of the three appraisers complete his or her analysis prior to their meeting and discussing a common approach that might actually generate an agreed-upon value." (*Id.*) In reality, what the 49ers appear to have meant is that they did not want the appraiser retained by Mieuli to have preconceived ideas, but it was okay for their appraiser to have them.

L. The Three Appraisers

1. The Trust's Appraiser Dan Barrett

In July 2010, Mieuli selected Dan Barrett, of Barrett Sports Group, LLC, to participate in the appraisal of the Trust's interest. Barrett is a nationally recognized sports industry expert, with specific experience in valuing NFL interests. (Ex. 31; Ex. 11, p. 436:9-16.) Barrett was highly recommended by the then-CEO of the Seattle Seahawks Todd Leiweke, who, until just a few months ago, was the CEO of the NFL. The engagement letter between the Trust and Barrett Sports Group provided that "[i]f at any time during our engagement it is determined by you that the engagement should not proceed, we shall promptly halt our activities and present a final invoice for our services provided . . ." (Ex. 32, p. BSG03358.) Barrett acted as an "independent" appraiser, refraining from substantively communicating with Mieuli regarding the process, his opinions, and the opinions of other appraisers concerning the value of the Trust's interest. (Ex. 11, p. 439:6-440:24.) Barrett was honest and consistently acted with integrity throughout the process.

2. The 49ers' Appraiser Donald Erickson

In August 2010, the 49ers hired Donald Erickson ("Erickson") of Erickson Partners LLC to serve as the 49ers' "independent" appraiser – despite the 49ers being unaware of Erickson having any experience appraising NFL clubs. (Ex. 33.) The letter agreement between Erickson and the 49ers provides Erickson's "valuation analysis and report will be prepared in accordance with generally accepted valuation standards and will conform to the Uniform Standards of Professional Appraisal Practice[.]" (Ex. 34, p. SF041716.) The letter agreement further provides that it is for the use of the "San Francisco 49ers, Limited (the 'Company'), its directors and shareholders," which includes the Trust as effectively a "shareholder" given the "San Francisco 49ers, Limited" was a

limited *partnership*, not a corporation with directors or shareholders. (*Id.*, p. SF041718.) By virtue of the retainer agreement and Erickson's sworn testimony, the Trust was an "intended user" of Erickson's work, and therefore Erickson owed fiduciary duties to both the 49ers and the Trust to, among other things, follow through on its obligation to provide a report that complied with the Uniform Standards of Professional Appraisal Practice ("USPAP"). (Ex. 35 at U-3 [defining an "intended user"]; Ex. 11, p. 2935:11-2937:17 [Erickson testifying that Mieuli was an "intended user"]; Ex. 36, p. 4 [establishing appraisers owe a fiduciary duty to their intended user].)

Unbeknownst to the Trust, Erickson communicated regularly with the 49ers and its counsel concerning substantive issues outside of the presence of the other appraisers. Unquestionably, the testimony and expert reports of both of the Trust's expert witnesses, i.e., Sal Galatioto[5] and Brian Bergmark, show Erickson failed to maintain his independence from the 49ers, as required by any standard, including his own retainer agreement. (Ex. 11, p. 721:10-723:7; Exs. 37, 38.)

In addition, in October 2008, the Securities and Exchange Commission ("S.E.C.") secured a judgment against Erickson for perpetrating what has been described as one of the worst forms of corporate misconduct: insider trading. (Ex. 39; Ex. 11, p. 2914:1-13.) The judgment ordered him to disgorge "ill-gotten gains," and permanently enjoined him from serving as an officer or director of a public company, which was the maximum penalty he could have received. (Ex. 39.) Erickson expressed no remorse for his fraud and insider trading. (Ex. 11, p. 2924:20-2925:25.) He is a dishonest hack who should have never been permitted to appraise the Trust's interest or testify in the arbitration.

In fact, Erickson has a track record of manipulating his valuation analysis to suit the interests of his client. In December 2011, he provided testimony in another legal action in which he ascribed an absurdly high $750 million valuation to the Seattle Mariners, a small-market baseball franchise, because an inflated valuation served his client's interests in that case. (Ex. 37, p. 41.) Yet his implied enterprise valuation of the large-market 49ers was an absurdly low $514 million. (*Id.*) Since then,

---

[5] Among other things, Galatioto opined that Erickson lacked independence and that the "report" issued by Erickson does not meet generally recognized standards for determining fair market value of a minority ownership interest in an NFL team and contained numerous errors and mistakes. (Ex. 37.)

Erickson's willingness to manipulate his valuation analysis to serve his client's interests has resulted in repeat business, including additional valuation work from the 49ers' counsel in this case.

Underscoring his extreme bias was Mr. Moyer's finding that Erickson's S.E.C. conviction did not undermine his credibility in any way. Decision, p. 78. Mr. Moyer stated that, "having observed Erickson closely over two days of testimony, including vigorous cross-examination, this Tribunal judge him sincere and credible." *Id.* It is almost as though the S.E.C. and the federal court that convicted Erickson, on the one hand, and Mr. Moyer, on the other hand, were perceiving two completely different people. What is more, Mr. Moyer remarkably found a way to use Erickson's insider-trading conviction against *Mieuli*, impugning Mieuli's motives by declaring that "the SEC matter became a predictable ingredient in Peter's attempt to demonize the Club's appraiser...." *Id.* However, Erickson's status as a convicted insider trader speaks for itself with respect to his character and lack of integrity. The Trust did not have to "demonize" anyone.

3. The Third Appraiser Jeffrey Phillips

After contacting several different appraisers, Barrett and Erickson agreed to retain Jeffrey Phillips, of Stout Risius Ross, Inc. ("SRR"), as the third appraiser. The SRR engagement agreement, which is addressed to Mieuli and York, provides that "[a]t the conclusion of our analysis, following your review and comment, we will submit a report containing a determination of the value of the Minority Interest, a description of the methodologies used in arriving at our conclusion of value, and supporting schedules showing details of major calculations and analyses." (Ex. 40, p. SF000285.) The SRR engagement agreement also provides that "[a]ny party may terminate our engagement at any time upon 10 days written notice" – a clause that Mr. Moyer had to ignore for his Decision to work. (*Id.*, p. SF000289.) Finally, Phillips, like Erickson, agreed to conduct his appraisal in compliance with USPAP. (Ex. 41; Ex. 11, p. 3710:15-3712:14.) However, Phillips did not ultimately submit a report that included his methodology as required under his agreement.

4. The Agreement and the Retention Letters

The Erickson, Phillips, and Barrett contracts incorporated the Agreement, which governed the process. On the topic of the role of the independent appraisers, the Agreement states,

> 18.2.2 "Fair Market Value" shall be arrived at ***by three (3) independent appraisers***, the Partnership selecting one appraiser and

the Terminated Partner selecting a second appraiser and those two selecting a third. ***In the event the three appraisers are unable to agree on the Fair Market Value, then the Fair Market Value shall be the average of the three appraisals.***

(Ex. 3, ¶ 18.2.2 [emphasis added].) In his decision, Mr. Moyer entirely ignored the appraisers' retention letters mandating a detailed appraisal analysis (akin to those required by USPAP) to which none of them adhered.

M. The 49ers Were (and Are) One of the Most Valuable Sports Franchises

Mr. Moyer's Decision and the 49ers' testimony make it sound like the 49ers were on the verge of collapse in 2010. To anyone living in the San Francisco Bay Area at the time, that is nonsense. At the same time the Trust sent its July 19, 2010 letter, the 49ers' Executive Vice President of Development MacNeil created a spreadsheet that contemporaneously valued the Trust's interest at $33 million with the team at Candlestick Park in 2010; $32 million with the team at Candlestick Park in 2014; and $40 million with the team at a new stadium in 2014. (Ex. 42, pp. 1-2; Ex. 11, p. 4162:5-18.) On August 9, 2010, Forbes magazine published a list of the 50 most valuable sports teams, ranking the 49ers at number 34 with a value of $875 million.[6] (Ex. 43, p. 5.)

The 49ers were also in talks with individuals looking to purchase a portion of the partnership for top dollar. Specifically, the 49ers and John Sobrato began discussing a potential investment or purchase in 2010, and those talks continued into 2011, culminating in a Memorandum of Understanding for the acquisition of a 16.1765% limited partnership interest for $114 million, implying the Trust's 5% interest – which also benefits from a right-of-first-refusal that the Sobrato interest did not – would be worth at least $35 million. (Ex. 44, p. SF000585.) Meanwhile, in May 2011, Morgan Stanley ascribed a valuation range of $900 million to $1.13 billion to the 49ers.[7]

---

[6] Assuming $144 million of debt obligations, an $875 million enterprise valuation implies an equity value of $731 million and a $36.6 million valuation for a 5% interest.

[7] Assuming $144 million of debt obligations, a $900 million to $1.13 billion enterprise valuation range implies an equity value range of $756 million to $1.0 billion and a $37.8 million to $49.3 million valuation range for a 5% interest.

N. The 49ers Manipulate the Valuation Process

1. The 49ers Make Their Own "Judgment" as to What Information Was Relevant and Provide Incomplete and Misleading Information to The Appraisers

From the start, the 49ers sought to control the appraisal process by providing carefully selected information to the appraisers and concealing other material information. The 49ers also told Erickson, but not the Trust or the other appraisers, that the 49ers would make their own "judgments" as to whether information requested by the appraisers was relevant and would be provided. (Ex. 45; Ex. 46 [questioning the relevance of certain information requests from the appraisers as "outside the scope"].)

While the 49ers determined that data after the settled valuation date of June 30, 2010 was not relevant, the appraisers felt differently – they specifically requested documents and information that post-dated June 30, 2010. (*See, e.g.,* Ex. 46 [Kaple acknowledging the appraisers sought information after June 30, 2010]; Ex. 47, p. SF006045 [initial data request seeking "Summary of Recent Offers for the Team/Company"]; *see also* Exs. 48-50.) Of course, when the 49ers sought financing from financial institutions, they provided those institutions with far more comprehensive, truthful, and accurate information because they wanted these institutions to be aware that the true value of the club was substantial. (Ex. 11, p. 1909:9-1911:19.)

In the exercise of their "judgment," the 49ers withheld each of the following relevant documents and other information:

- **Exhibit 17**: Notes from the meeting with Boston Celtics owners in May 2008 describing the "Raiders and Miami sales" as "guidelines," which occurred at enterprise values of $900 million and $1.025 billion, respectively
- **Exhibit 42**: MacNeil's valuation of the 49ers from February/March 2010 valuing the Mieuli interest as worth $33 million
- **Exhibit 51**: 49ers' responses to due diligence package from J.P. Morgan
  - "Have there been any recent valuation of the team and any team assets… our only recent 'full franchise' valuation discussion was with Morgan Stanley in May 2011. Morgan Stanley placed the current value of the team at between $900 million and $1.13 billion (using a 4x-5x revenue multiple)… The 49ers' 2010 Forbes valuation was $925 million" which "does not include the new stadium." (Ex. 51, p. SF002684.)
  - "The 49ers are unquestionably the most popular sports property in Northern California… and the stadium itself will be a Bay Area icon." (Ex. 51, p. SF002685.)

- **Exhibit 25**: Email correspondence between John and Jed York discussing an $850 million valuation for the team and the potential to "net $18.8m for the team" if the Morabito interest were resold
- **Exhibit 52**: Investment Gold Rush document detailing a potential purchase of a 16.3% limited partnership interest by the Sobrato Family Holdings for $114 million.
- **Exhibit 44**: Memorandum of Understanding for the acquisition of a 16.1765% limited partnership interest for $114 million by the Sobrato Family Holdings (and other details of the discussions with Sobrato)
- **Exhibit 53**: Commitment Letter agreeing to loan the 49ers $850 million for financing Levi's stadium
- **Exhibits 54 and 55**: Stadium projections, which unsurprisingly project a profitable, positive cash flow for the 49ers with a new stadium
- **Ex. 11, p. 1907:25-1908:16**: the fact that the financial institutions assisting the 49ers with obtaining financing for the stadium performed financial modeling
- **Ex. 11, p. 137:21-138:10, 1554:8-16**: the fact that three other 1% interests were sold at $8,500,000 apiece

Despite the Trust's appraiser Barrett repeatedly testifying that he would have wanted to review much of the foregoing information, Mr. Moyer dismissed it all as irrelevant – undoubtedly because it would have decimated the 49ers' contrived valuation. (*See, e.g.,* Ex. 11, p. 466:12-467:21.)

2. The 49ers Exclude Mieuli From The Valuation Process

The 49ers made it very clear they did not want Mieuli involved at all in the valuation process. During the hearing, the 49ers argued that Mieuli was permanently excluded from the process because, after not receiving a response within 50 minutes of transmitting an e-mail to him, the 49ers concluded Mieuli was not interested in a process that would have a huge economic bearing on Mieuli. (Ex. 11, p. 2150:9-2151:17.) 49ers' executive Tim Kaple (CFO of the DeBartolo Corporation) then started sending e-mails to the appraisers (without copying Mieuli) instructing them to begin the valuation process. (Ex. 56.)

Shockingly, ***Erickson testified the 49ers and their counsel instructed him not to communicate with the Trust.*** (Ex. 11, p. 2948:16-2949:2, 2954-2955.) At the same time, Kaple, Jonathan Bass (the 49ers' outside counsel), and Patricia Inglis (the 49ers' Executive VP) were in constant communication with Erickson about the form and content of Erickson's valuation. (Ex. 11, p. 2954:16-2955:25.)

O. The 49ers Improperly Influence the Appraisers – Which Mr. Moyer Praises

In addition to manipulating the flow of information to the appraisers, the 49ers repeatedly spoke directly to the appraisers, providing their spin on significant financial information and critical legal issues, including their view of disputed contract terms. For example:

- MacNeil informs Kaple that he will tell the appraisers the Trust's interest is worth less after the Morabito sale. (Ex. 57.)
- The 49ers agree to give the appraisers all the documents on the discounted Morabito sale but do only a high-level recap on the more recent 1% interest sale. (Ex. 58.)
- The 49ers and Erickson discuss what information the 49ers should provide the appraisers regarding Kaple and York's discussions pre-June 30, 2010. (*Id.*)
- The 49ers use a question Barrett asked about the Trust's rights of first refusal as an opportunity to provide unsolicited opinions that the Trust's social amenities and tag-along rights are not transferable. (Ex. 59; Ex. 11, p. 1303:6-1316:23, 2112:15-2114:4.) During the hearing it was also remarkably revealed the 49ers' attorneys Bass and Inglis were ghost-writing the e-mails for the 49ers to the appraisers. (Ex. 11, p. 1309:16-1310:1, 1310:16-20, 1313:13-1314:2, 1316:20-1318:4.)

Mieuli, of course, was excluded from these substantive communications.

P. The 49ers and Their Counsel Disregard the Requirement of "Independence" and Engage in Numerous Substantive, *Ex Parte* Communications With Erickson, Which is Prohibited Under Any Applicable Appraisal Guidance

From August 2010 to November 2011, the 49ers engaged in almost weekly e-mail exchanges with Erickson regarding the status of the appraisal process, the opinions of the other appraisers, and the content and form of his report.[8] (Ex. 60.)

Perhaps the most remarkable part of Mr. Moyer's carefully crafted ruling is that he managed to dismiss as irrelevant all of the above evidence that the 49ers concealed concerning the value of the Trust's interest. *See* Decision, pp. 81-85. He also excused all of the following improper

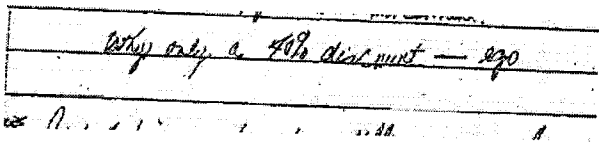
[8] None of the 49ers' substantive communications was posted to the infamous FTP site, which the 49ers disingenuously claim contained all the relevant communications with the appraisers.

communications linking the 49ers and Erickson as they teamed up to perform Erickson's "independent" valuation:

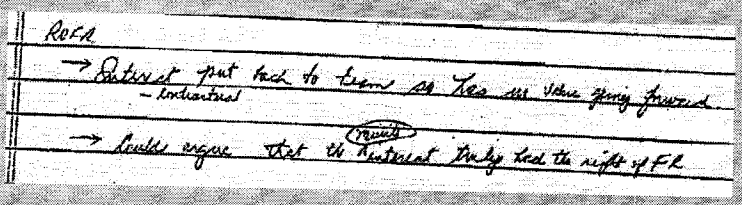
- Erickson and the 49ers engaged in numerous phone conferences during which specific valuation ranges were discussed and tacitly approved by the 49ers. (Ex. 61, p. SF044191-196.)
- The 49ers instructed Erickson on how discussions between the appraisers should be structured, advising him that reports may not be necessary and may end up with appraisers becoming "too dug in" before they meet to arrive at a consensus. (Ex. 62.)
- When Barrett requested the appraisers discuss several outstanding issues, including rights of first refusal, Erickson immediately requested to speak with the 49ers about that issue prior to his discussion with the other appraisers. (Exs. 63, 64.)
- Erickson and the 49ers frequently contacted each other to obtain the substance of Erickson's opinions. (Exs. 46, 65-68.)
- Erickson kept the 49ers informed about his interactions with the other appraisers and coordinated with the 49ers on those interactions. (Exs. 69-82 [reflecting Erickson was blind copying the 49ers on his communications with the other appraisers]; Ex. 83 [49ers tell Erickson they are "anxious to hear the progress made from your call"]; Ex. 61, p. SF0044178, SF0044184 [Kaple's handwritten notes reflecting strategies about how to respond to possible positions by Phillips and Barrett].)

Kaple's handwritten notes reflect exactly how close the relationship was between the 49ers and Erickson and the substantive nature of their conversations. For example:

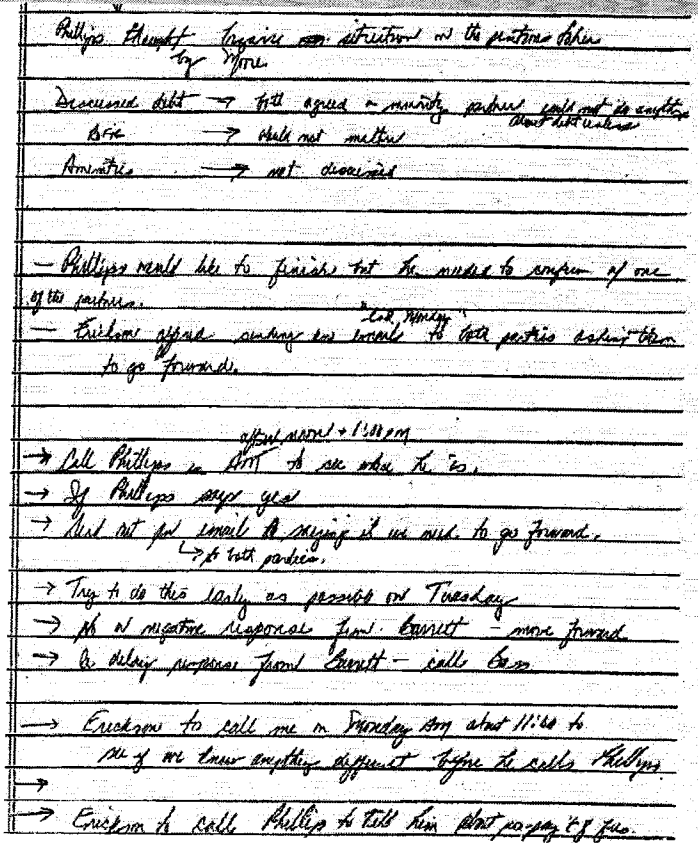
- On August 24, 2011, Kaple, Bass, and Erickson go through valuation calculations in excruciating detail and question "why only a 40% [minority ownership] discount," which is an already an absurdly high discount that is inconsistent with any evidence. (Ex. 61, p. SF044195.)



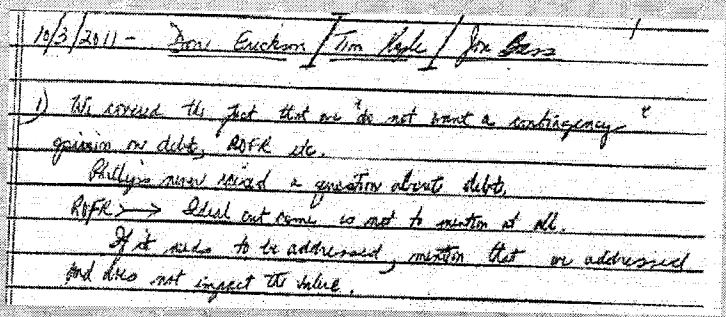
- On September 13, 2011, Kaple, Inglis, and Bass tell Erickson how to treat the right of first refusal and discuss whether Barrett would argue that the right of first refusal should lower any applicable discount. (Ex. 61, p. SF044188; *see also id.* at SF044181, 184.)



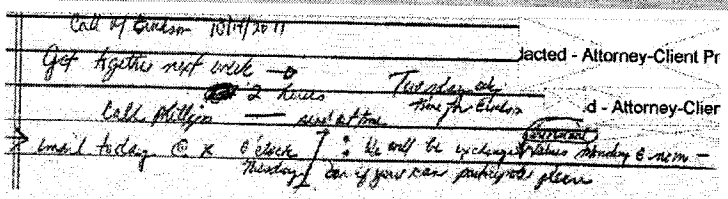
- On September 30, 2011, Kaple, Bass, and Erickson discuss debt, the right of first refusal and amenities. They also discuss Phillips' position and recommend a strategy for handling Phillips, who was an independent appraiser that did not need to be handled. (Ex. 61, p. SF044184.)



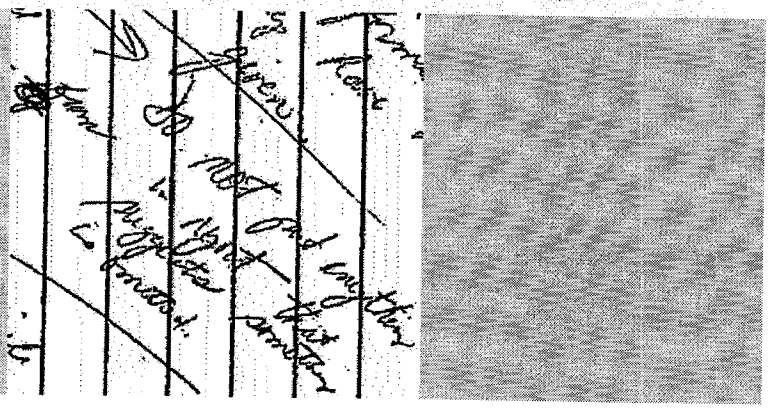
- On October 3, 2011, Kaple, Bass, and Erickson discuss the "ideal outcome" for the treatment of the Trust's rights of first refusal. (Ex. 61, p. SF044181 ["ROFR [*i.e.*, rights of first refusal] → ideal outcome is not to mention at all."].) The 49ers also made clear that "[w]e covered the fact that we do not want a contingency opinion on debt, ROFR etc."


10/3/2011 - Doug Erickson / Tim Kaple / Jon Bass
1) We covered the fact that we do not want a contingency opinion on debt, ROFR etc.
Phillips never raised a question about debt.
ROFR → Ideal outcome is not to mention at all.
If it needs to be addressed, mention that we addressed and does not impact TV value.

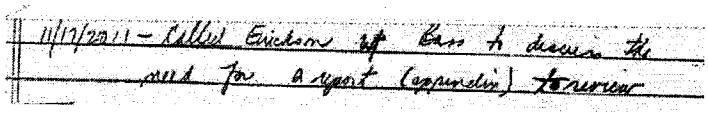
- On October 14, 2011, Kaple and Erickson discuss the need to "get figures next week" and to call Phillips. (Ex. 61, p. SF044179.)


Call w/ Erickson 10/14/2011
Get together next week →
2 hours Tuesday
Call Phillips
Email today @ x o'clock

- October 18, 2011, Kaple instructs Erickson to "not put anything in report that suggests something is omitted," which constituted improper interference into the work of this "independent" appraiser. (Ex. 61, p. SF044178.)



- On November 17, 2011, Kaple, Bass, and Erickson discuss "the need for a report" and its contents. (Ex. 61, p. SF044177.)


11/17/2011 - Called Erickson w/ Bass to discuss the need for a report (appraisal) to review

In stark contrast to his constant communications with the 49ers at the instruction of the 49ers and its counsel, at no time during the course of the entire appraisal process did Erickson ever communicate with the Trust or its counsel. (Ex. 11, p. 2948:16-2949:2, 2954-2955.)

Mr. Moyer's decision entirely and inexplicably diminished the unheard-of *ex parte* communications between Erickson and the 49ers revealed in Tim Kaple's notes, and the fact that the 49ers' outside counsel was ghost writing Kaple's communications to the "independent" appraisers. Further, Mr. Moyer avoided confronting the foregoing damning evidence of the 49ers' misconduct by brushing Kaple's notes aside, calling them "cryptic," "illegible," and/or "inexplicable." Decision, p. 79. The "illegible" remark is especially odd considering that Kaple read his notes into the record.

Q. The Trust Discovers the 49ers' Improper Influence on the Appraisers and Calls for the Valuation Process to Temporarily Cease So the Parties Can Resolve the Issue

On September 20, 2011, frustrated by irregularities in the process and based on Barrett's sense that Phillips and Erickson seemed to be in the 49ers' camp, Mieuli informed the 49ers that the appraisal process must be halted. (Exs. 84, 85.) That same day, September 20, 2011, Erickson suggested, and Phillips agreed, that the appraisers should meet to discuss "preliminary value ranges." (Ex. 86.) Erickson immediately notified the 49ers of Phillips' agreement to meet.

The following morning of September 21, 2011 – by which point the 49ers knew Mieuli intended to request a temporary halt to the process – the 49ers requested a call with Erickson. (Ex. 86.) Soon thereafter, the 49ers threatened Mieuli that if Barrett refused to proceed, the 49ers would unilaterally "base the buy-out price on the decision of the two remaining appraisers." (Ex. 87.)

In response to the 49ers' threats, on September 23, 2011, Mieuli requested that the appraisers cease work on the valuation project so that the parties could resolve their issues and "make certain that this process results in an equitable 'fair market value' appraisal." (Ex. 88.) Halting the process to resolve a difference between the 49ers and Mieuli was not an unusual step. The 49ers had previously halted the process for some nine months when they disputed the appropriate valuation date, as well as the need to arbitrate the issue. Stopping an appraisal process while the parties work out a disputed issue is also common practice in this context. (Ex. 11, p. 735:25-737:12 [Bergmark testifying it was proper for the Trust to halt the process and that it has "happened in a number of case that I've been involved in."].) What is more, it was specifically allowed by the Retainer Agreements and well-established law. *Humphries Investments Inc. v. Walsh*, 202 Cal.App.3d 766 (1988); *Doan v. State Farm General Ins. Co.*, 195 Cal.App.4th 1082 (2011).

Undeterred by the 49ers' own conduct, the law, or the retainer agreements, Mr. Moyer managed to conclude that the Trust acted in bad faith in exercising its right to temporarily halt the arbitration process. With zero supporting evidence, Mr. Moyer even accused Mieuli of stopping the appraisal because he did not like Erickson's $18.5 million figure. Mr. Moyer simply made this up.

While he simply ignored the law and retainer agreements, Mr. Moyer doubled down by noting that there was no testimony from any expert stating that parties are permitted to halt an appraisal process to seek judicial guidance. Mr. Moyer obviously was not listening to Bergmark's testimony.

R. Barrett Ceases Work at the Trust's Request

On September 26, 2011, the 49ers responded by telling the appraisers that Mieuli had no authority to disrupt the appraisal work. (Ex. 89.)

On September 29, 2011, Barrett informed the 49ers that he was contractually and ethically bound to follow Mieuli's instruction. (Ex. 90.) Barrett had not reached a final conclusion nor had he completed his report: "there was still quite a bit heavy lifting to do in the last throes of [his] report and ultimately developing the conclusions." (Ex. 11, p. 562:7-563:17.) Barrett testified that he had gone through ten or so drafts up to that point which included a wide range of values, including, for example, enterprise values that ranged from $865 million to $937 million. (Ex. 11, p. 472:12-473:5.)

S. Erickson Frantically Rushes to Complete His Appraisal as Directed by the 49ers

After Barrett stopped work, the 49ers/Erickson pressured Phillips to issue an appraisal without complete information. (Exs. 91, 92.) On October 5, 2011, Phillips informed Erickson that because "we have been jointly retained, and one of the parties has asked us to stop, we are not comfortable proceeding until the issue has been resolved." (Ex. 78.) The 49ers immediately reached out to Phillips to request a phone conference – again, without Mieuli present – to determine "whether there are circumstances under which your firm would be willing to move forward." (Exs. 93, 94.)

According to Erickson, on October 18, 2011, he had ***two-minute*** conversation with Phillips – on which Mr. Moyer based a $20+ million decision – and the two of them "negotiated an agreed upon 18.5" million dollar valuation for the Trust's interest. (Ex. 11, p. 3041:14-15.)[9] Erickson

[9] The fact that this conversation regarding value occurred between two appraisers is, in and of itself, curious and in contravention of the process dictated by the Agreement. Since Barrett was not participating in the call, there could be no agreement on a fair market value by the three appraisers. Instead of speaking on the phone without an appraiser present, Erickson and Phillips should have been preparing their independent valuation conclusions.

testified he told Phillips he had a range of "15 to 22" million dollars in mind and then Phillips stated his range: "We first started out by saying what we thought was the most reasonable answer, because valuation is always in a range. I suggested 18. And a very small change, he suggested he could live with 18.5, but that's certainly within my range." (Ex. 11, p. 3160:17-3161:8.) Phillips never told Erickson "what his independent opinion was." (Ex. 11, p. 31633-11.)[10] What we do know from the 49ers' expert Christopher Mercer is that the $18.5 million figure does *not* represent the average of Erickson and Phillips' individual values.[11]

Mr. Moyer, for his part, had no questions about the two-minute conversation, which was apparently plenty of time for him to feel comfortable resolving an eight-figure valuation. Mr. Moyer was also more than happy to take Erickson's word for it, while omitting the fact that he deprived the Trust from obtaining Phillips' testimony by refusing to sign a subpoena.

T. The 49ers Coerce Phillips Into Releasing His Incomplete, Draft Report

On October 20, 2011, Erickson sent a draft of his "report" to the 49ers under the guise of asking Inglis to see if "we have the names correct." (Ex. 96.) At this point in the process, Erickson surely knew how to spell the parties' names. The 49ers winked back, approving of the spellings and the low-ball $18.5 million valuation. Moments after receiving the report, and before she could have spell-checked it, Inglis sent the Erickson draft report to Bass – from whom Inglis surely did not need help on how to spell "49ers." (*Id.*)

On October 21, 2011, the 49ers reached out to Erickson to find out from Phillips if his opinion would be released that day. (Ex. 97.) Phillips informed Erickson that SRR's in house attorney intended to speak with Mieuli's counsel before moving forward. (Ex. 98.)

On October 28, 2011 after being fired, SRR acknowledged that it had been terminated as an appraiser and was "excused from further performance under the Engagement Letter." (Ex. 99.) Nowhere in the October 28, 2011 letter is there any mention of having reached an agreement with

---

[10] After four weeks of testimony, each of the appraisers testified except for Phillips.

[11] Mercer's report states "Erickson's and Phillips's indications of value reflect adjustments that each made in order to reach agreements... However, if they had been unable to reach agreement, the value of $18.5 million would not be representative of their conclusions to be averaged with Barrett's conclusion" (Ex. 95, Master Page 31.)

Erickson. The 49ers immediately contacted Erickson upon receipt of SRR's letter, requesting a "discussion about this and what we are thinking." (Exs. 100, 101.) Importantly, as of that date and SRR's termination at which point SRR was "excused from further performance under the Engagement Letter," no draft opinion letter – and certainly no final opinion letter – had been issued to anyone by SRR. In fact, the draft opinion letter had not yet been reviewed by either of the parties, which according to the engagement letter, was a necessary prerequisite to issuing the final opinion letter.[12]

On October 28, 2011, the same date as the SRR letter acknowledging it had been terminated, the 49ers wrote to Mieuli stating that the 49ers' appraiser Erickson "will issue his opinion." (Ex. 102.) The 49ers also claimed that Mieuli had waived his right to have the fair market value determined by three appraisers and would proceed with the liquidation despite Mieuli's halting of the appraisal process. (*Id.*)

That same day, October 28, 2011, Mieuli received a letter dated a week earlier, October 21, 2011, from Erickson to Inglis and purporting to contain Erickson's "report." (Ex. 8.) The letter states that Erickson – despite being previously told to cease all work – had "conducted a valuation discussion with the third appraiser, Jeffrey Phillips of Stout Risius Ross, Inc., [on October 18, 2011] and agreed on the Fair Market Value as eighteen million, five hundred thousand dollars ($18,500,000) for the Mieuli interest as of June 30, 2010." (*Id.*) The letter further acknowledges that it does not discuss "the steps, process and analysis" used in arriving at the valuation" – rendering it meaningless. (*Id.*) As discussed below, the Trust's experts Galatioto and Bergmark opined that Erickson's "report" "contained a number of methodological errors, omissions, and discrepancies" and was "not in compliance with appraisal standards." (Exs. 37, 38.) Even Erickson and Mercer agreed that Erickson's report complied with neither USPAP nor Erickson's initial retainer letter.

Behind the scenes, on October 27, 2011, the 49ers' counsel sent an email to SRR's in house attorney containing a clear threat that "arbitrators" like Phillips are "immune from lawsuits for the

---

[12] *See* Ex. 40, p. SF000285 ("[a]t the conclusion of our analysis, ***following your review and comment***, we will submit a report containing a determination of the value of the Minority Interest, a description of the methodologies used in arriving at our conclusion of value, and supporting schedules showing details of major calculations and analyses" (emphasis added)).

decisions they render (***although they may incur liability for failing to issue a decision***)." (Ex. 103 [emphasis added].) The 49ers' threat was plain: we will sue you if Phillips does not issue an opinion. SRR responded by involving outside counsel in its discussions with the 49ers and caving to the 49ers' demands by issuing Phillips' work product to date in exchange for a partial payment to SRR. (Exs. 104, 105.) Rather than caving to the 49ers' threat, SRR could have simply stopped work. Instead, in response to Inglis' request for the "most recent draft," SRR sent *only the 49ers* exactly what Inglis requested, a "draft opinion letter" bearing the date October 21, 2011. (Ex. 106.) *On November 23, 2011*, or over a month later, the 49ers sent the "Draft Opinion Letter" to Mieuli. (Ex. 107.) No final or draft letter from SRR was ever delivered to Mieuli by SRR. (Ex. 11, p. 699:20-701:12 [Bergmark testifying as to his opinion of Phillips' draft, as well as the custom and practice in the industry to deliver a final report to the parties. No evidence SRR ever delivered a report to the Trust.].) The Draft Opinion Letter makes clear on its face that it was not a formal opinion of value, and provides that "if additional material information related to the above noted concerns becomes available and such information would impact the Fair Market value of the Minority Interest, we reserve the right to revisit our opinion." (Ex. 107, p. 4.) Indeed, the draft letter was not even signed – a fact Mr. Moyer conveniently omits from his Decision.

U. The "Reports" from Erickson and Phillips Are Incomplete and Fail to Comply with USPAP or the Parties' Agreements

1. The Erickson "Report"

As even the 49ers' expert Mercer had to concede, Erickson's "report" was not, as required by his engagement letter with the 49ers as well as modern day appraisal standards, "prepared in accordance with generally accepted valuation standards" and did not "conform to the Uniform Standards of Professional Appraisal Practice . . ." (Ex. 34, p. SF041716; Ex. 11, p. 3451:13-3452:24.) As set forth above, the Trust was an "intended user" of Erickson's "report" and, as Mercer admitted, if the Trust was an intended user, then Erickson's short "report" failed to comply with USPAP. (Ex. 11, p. 3472:8-9 [Mercer testifying "[w]ell, if he was an intended user, then this report should have been a full report."].) As he had to, Erickson also conceded his report failed to comply with USPAP. (Ex. 11, p. 2936:4-10, 3010:1-5.)

Galatioto opined that the Erickson report's valuation of $18.5 million for the rare and non-dilutive interest held by the Trust was not reasonable, credible, or consistent with industry standards or market conditions. (Ex. 37, p. 48.) Galatioto explained that the $18.5 valuation

- was 43% less than that of a minority interest in the Oakland Raiders franchise as of 2007, despite substantial qualitative and quantitative advantages of the 49ers franchise,
- was 36% less than the lowest of any of the 30 NFL minority interest transactions occurring during the three years prior to the valuation date,
- reflected 39% lower equity value than that which York indicated a "single buyer" was willing to pay during his meeting with the appraisers,
- implied a minority revenue multiple of 2.58x versus the NFL minority interest transaction average multiple of 4.66x,
- included dramatic discounts for lack of control and lack of marketability, despite evidence demonstrating that NFL minority, non-controlling transactions actually occur without any discount to NFL controlling interest transactions, and
- selectively reflected only certain post-valuation date events (the distressed-seller Morabito transaction), while excluding other similar post-Valuation Date events (Sobrato).

(Ex. 37, p. 79.) Bergmark likewise opined that the $18.5 million valuation identified in the Erickson report indicates that the conclusions reached were not in compliance with appraisal standards. (Ex. 11, p. 725:12-727:19.) In fact, Mercer, the 49ers' own expert, conceded that Erickson's report did not conform to Standard 10 of the reporting requirements of USPAP. (Ex. 11, p. 3643:11-16.)

The 49ers' expert Mercer has published about a concept called the sanity check, which needs to be utilized by appraisers to see if their conclusions are sane, rational, consistent, and reasonable.[13]

[13] This concept is consistent with the concept of the "Common Sense Reality Check" discussed by Galatioto in his expert report. As Galatioto made clear, he too believes it is incumbent upon an appraiser to perform such a sanity check. The views of these two experts are also consistent with guidance from USPAP, as discussed by Mercer in his publication *2006 USPAP Focuses on Credibility, SR-9 Holding Period Requirements and More* (Business Valuation Resources Guest Article).

If not, the appraiser must go back to the drawing board. (Ex. 108; Ex. 11, p. 3609:9-3610:25.) Had Erickson performed a sanity check, he should have seen that his result was absurd.

In fact, Erickson's own work papers included a chart that compared the valuations of other NFL clubs – extrapolated from other, recent minority ownership interest transactions – with a valuation of the 49ers – based on Erickson's lowball $18.5 million valuation of the Trust's interest:

Previous Transactions NFL Franchise	San Francisco 49ers	Pittsburgh Steelers	Miami Dolphins	San Francisco 49ers	Atlanta Falcons	Houston Texans	Oakland Raiders
Transaction Level Announcement Date	Minority June-10	Minority Nov-08	Minority Feb-08	Minority Jul-10	Minority Dec-09	Minority May-08	Minority Oct-07
Valuation - $ Millions (1)	$514	$800 Jan 2009 - Outside Minority on same terms.	$1,090 Jan 2009 - Minority on same terms	$440	$950	1,025	$900
Source		NFL Office - J.B.	NFL Office - J.B.	NFL Office - J.B.	NFL Office - J.B.	NFL Office - J.B.	NFL Office - J.B.
Revenue Multiple for Enterprise		3.7x	5.0x				
Revenue Multiple for Minority Transac	2.6x	3.7x	5.0x	2.2x	5.1x	4.3x	5.2x
Source		NFL Office - J.B.	NFL Office - J.B.	NFL Office - J.B.	NFL Office - J.B.	NFL Office - J.B.	NFL Office - J.B.
Total Conforming Net Revenues ($'millions)	$199	$216	$218	$199	$186	$237	$173
Source	2009 Q.R.	Calculated	Calculated	2009 Q.R.	Calculated	Calculated	Calculated

(*See* Ex. 109.) The discrepancy is clear.

Indeed, the only way Erickson could have reached such a low ball valuation (in addition to the improper influence and corruption by the 49ers) was to rely on the distressed Morabito transaction, which everyone agrees should have formed no part of the valuation because it post-dated the valuation date established at the AAA arbitration. (Ex. 11, p. 479:23-480:16.) Erickson's own work papers demonstrate that that is exactly what he did. They refer to the July 2010 Morabito transaction with the following note: "used to justify discounts." (*See* Ex. 37, p. 34 [SF041709].)

2. Phillips' Alleged Report

As detailed above, Galatioto opined that the $18.5 million valuation – also purportedly agreed to by Phillips – is not reasonable or credible. In addition, Bergmark's opinion concerning the SRR report is nearly identical to his conclusions concerning the Erickson report: the $18.5 million valuation identified in the SRR report indicates that the conclusions reached in the reports were not in compliance with appraisal standards, the appraisers were not provided complete data to provide a final conclusion of value, and the appraisals considered data that was not available

as of the valuation date (Morabito), or disregarded other data that was available within the same time period (Sobrato). (Ex. 11, p. 717:5-718:7.)

Bergmark also opined that the SRR report is not "final" because "it was conveyed along with an e-mail which identified the report as a draft," the work file version of the same report contained a "Draft" watermark on each page, "Inglis requested SRR send 'the most recent draft of the valuation opinion,'" SRR said a copy of the report should not be provided to the Trust, and the report "indicate[s] the existence of unresolved issues." (Ex. 38; Ex. 110; Ex. 11, p. 711:7-715:4, 715:18-717:17; 857:5-13 [Bergmark testifying that, "[a]ll those indications indicate that he had stopped his work and that he had submitted a draft report because the 49ers had asked for his file and whatever was in his file at that point in time. I see no indication that it represented, based on that correspondence, a final report."].) The SRR "report" was also not in compliance with Phillips' own retainer agreement which promised "a report" containing "a description of the methodologies used" and "supporting schedules showing details of major calculations and analyses." (Ex. 40; Ex. 11, p. 715:5:12 [Bergmark testifying the SRR report is not consistent with the retainer agreement because it "is more of a summary-type report that just basically identifies the opinion"].) The SRR retainer agreement further promised that Mieuli and the 49ers would be given a final report after the opportunity to "review and comment" on the draft report, which also never happened. (Ex. 40, p. SF000285.)

Unsurprisingly, Mr. Moyer simply chose to ignore the Trust's experts Bergmark and Galatioto and to credit the 49ers' expert Mercer and the 49ers' appraiser Ericksen instead. In doing so, he closed his eyes to the fact that neither Erickson nor Mercer had a lick of credible appraisal experience concerning an NFL club. By contrast, the Trust's expert Galatioto is deeply embedded in that world (including performing valuations and appraisals which Mr. Moyer ignored) which lends unassailable credence to Galatioto's testimony that there is no minority discount for an ownership in an NFL club. That was of no import to Mr. Moyer, however, who preferred the result Mercer created based on analyses of minority interests in generic business ventures – not an ownership in a highly coveted NFL club.

In addition, Mr. Moyer simply brushed aside the fact that the 49ers' appraiser Erickson worked for the 49ers' expert Mercer – which should have rendered Mercer's testimony regarding Erickson's appraisal not credible. Decision, pp. 77-78. Instead, Mr. Moyer gushed over Mercer's qualifications and declared him "credible and persuasive through the full range of issues he addressed in this proceeding." *Id.*, p. 78.

V. The 49ers Sell Interests in the Club Based on an Equity Valuation of at Least $850 Million

Unbeknownst to Mieuli, as early as 2008, the 49ers were having discussions with potential investors about becoming fractional owners of the 49ers. (Ex. 17.) In 2010, the 49ers began discussing the sale of a fractional interest in the club to John Sobrato. (Exs. 111-114.) During those negotiations, the 49ers took the position that "there is little to no discount for an interest like this with such amenities." (Ex. 115.) The negotiations with Sobrato, which continued into 2011, were based on the understanding the 49ers had an equity value of $850 million. (Exs. 117-119, 25, 52, 119, 120, 121 at SF007692 [July 2011 stadium funding presentation reflecting an $850 million valuation].)

Although the fact the 49ers engaged in discussions with potential investors was revealed to the appraisers, the substance of those discussions was never revealed under the guise of a confidentiality agreement. (Exs. 122, 123 [refusing to discuss prior valuations despite existence of confidentiality agreement with appraisers].) Specifically, the 49ers concealed the fact it placed an $850 million equity value on the team, a figure which is in stark contrast to the $370 million implied equity value based on the purported $18.5 million fair market value of the Trust's 5% interest. Barrett testified that the 49ers' valuation of the franchise at $850 million was a material fact that should have been disclosed to the appraisers. (Ex. 11, p. 452:3-453:5.)

III. PROCEDURAL BACKGROUND

A. The Trust Files Superior Court Actions to Protect Its Rights and Objects to the NFL's Jurisdiction Over This Dispute

In or about January 2012, the Trust learned that the 49ers were seeking the NFL's approval to liquidate the Trust's 5% interest in the club for $18.5 million. On February 1, 2012, the 49ers certified the parties' dispute over the appraisal to the NFL commissioner for arbitration pursuant to

the arbitration provision in the NFL Bylaws. (Ex. 128.) The 49ers sought, among other relief, a declaration that the Trust "is obligated to accept, in full liquidation of its limited partnership interest, the sum of $18.5 million... ."

On February 2, 2012, the Trust filed a complaint in San Francisco Superior Court alleging declaratory relief, breach of contract, breach of fiduciary duty, and other claims against the 49ers arising from the corrupt, incomplete appraisal and the 49ers' efforts to liquidate the Trust's interest. *See Mieuli v. San Francisco Forty Niners, Limited*, Case No. CGC-12-517917. At or about the same time on February 3, 2012, the Trust – out of an abundance of caution and given that the 49ers were taking the position that their appraiser's opinion should be deemed an "arbitration" for the purposes of judicial review – initiated a second legal action by filing a petition to vacate the "arbitration award," i.e., the appraisal. *See Mieuli v. San Francisco Forty Niners, Limited*, Case No. CPF-12-511894.

By letter dated February 8, 2012, the NFL stated that "Commissioner Goodell has received a copy of Mr. Bass's letter of February 1, 2012, certifying a dispute between the 49ers and the Franklin Mieuli Trust, Peter Mieuli, Trustee. (Ex. 127.) Pursuant to Section 8.3 of the NFL Constitution and Bylaws, the Commissioner has 'full, complete and final jurisdiction' to arbitrate such disputes." On February 15, 2012, Mieuli informed the NFL and the 49ers that he was "not submitting to the Commissioner's jurisdiction." (Ex. 129.) In response, on February 24, 2012, the NFL stated that "Commissioner Goodell is expressing no view on the jurisdictional contentions made by either party to this dispute." (Ex. 130.) On March 21, 2012, Mieuli again informed the NFL that he objected to the NFL's jurisdiction to decide the parties' dispute.

The NFL nevertheless proceeded with the arbitration process, over the Trust's objections. On May 31, 2012, the NFL notified the parties that Commissioner Goodell had appointed former NFL Executive Vice President and League Counsel Jay Moyer to serve as arbitrator. (Ex. 5.) Mr. Moyer was previously employed by the NFL for twenty-four years from 1972 to 1996, first as league counsel to the NFL commissioner and then, beginning in 1984, as the Executive Vice President, the NFL's number two executive position. (*See id.*)

The Trust continued to contest jurisdiction, and on August 8, 2012, Mr. Moyer issued an order finding that "no transfer of the Trust's interest can be effected without recommendation by the Commissioner and approval of the NFL's member clubs. [Citations.] Neither party contends that these conditions have been met." (Ex. 132.) Mr. Moyer then clarified the purported basis for his appointment: "Pursuant to the NFL Commissioner's discretion under the NFL Dispute Resolution Procedural Guidelines ('NFL Guidelines'), the Commissioner appointed the undersigned [Mr. Moyer] as arbitrator for this case." (Ex. 132, p. 1.) On August 14, 2012, Jeffrey Pash, on behalf of NFL Commissioner Goodell, confirmed that the commissioner believed Article 8.3(A) of the NFL Bylaws governed the present dispute. (Ex. 133.)

B. This Court Grants the 49ers' Motion to Compel Arbitration

In the meantime, the 49ers moved to compel both legal actions filed by the Trust in this Court to NFL arbitration. The 49ers contended that, pursuant to the First Amendment, "Franklin Mieuli agreed that his limited partnership interest in the Forty Niners would be 'subject to the Constitution and By-laws of the National Football League'" (quoting First Amendment). The 49ers further contended that the dispute fell within the scope of Article 8.3(A) of the Bylaws providing for the arbitration of disputes involving "two or more holders of an ownership interest in a member club of the League...."

The Trust opposed the motion to compel arbitration. The Trust argued, *inter alia*, that the NFL lacked jurisdiction over the parties' dispute and that the parties' dispute was not arbitrable.

On December 19, 2012, the Court granted the 49ers' motion, holding that the disputes implicated in the Trust's two legal actions were "fully arbitrable before the National Football League Commissioner."

C. The Trust Learns that the 49ers Extinguished Its Ownership Interest in 2012, and the Trust Objects Once Again to the NFL's Arbitral Jurisdiction

On May 30, 2014, the Trust again challenged the NFL's jurisdiction when Mieuli learned that the 49ers had eliminated the Trust's limited partnership interest as part of its corporate restructuring in 2012. More specifically, the Trust learned that, on March 22, 2012, the 49ers converted the Partnership into the Forty Niners Football Company LLC, a Delaware corporation.

(Ex. 124.) As part of the conversion, the 49ers represented to the State of California that 100% of the limited partners voted to convert the partnership. (Ex. 124, p. 7.) The Trust, however, was never asked to consent nor did it consent to conversion. In fact, the 49ers did not even tell the Trust at the time that its ownership interest had been extinguished.

The 49ers then changed its corporate structure to a holding company arrangement, such that the franchise was now held in Forty Niners Holdings, LP ("Holdings"), a Delaware limited partnership. According to the Holdings partnership agreement, the Trust had ***no ownership interest*** anymore. (Ex. 125 at Exhibit A.) Instead, the Trust's "interest" was limited to the right to receive payment of the appraisal valuation – which is to say that the Trust was no longer a partner but rather only a creditor:

> The Partnership believes that Mieuli shall have no rights under this Agreement or with respect to Teamco, Converted Teamco, the Partnership, Partners or Holders, other than: (i) the determination of the purchase price for the Former Mieuli Interest in accordance with the provisions of Paragraphs 13.4.2 and 18 of the Teamco Partnership Agreement, and (ii) the right to receive payment of the purchase price for the Former Mieuli Interest in accordance with the provision of Paragraph 18 of the Teamco Partnership Agreement.

(Ex. 125, § 2.8; *see also* Ex. 126 [January 31, 2002 letter from Bass stating "Mieuli's only existing right is to receive the $18.5 million purchase price for his limited partnership interest. Beyond that, he owns nothing capable of being conveyed or assigned."].)

Despite the unambiguous terms of the Holdings partnership agreement that made clear the Trust was no longer an "ownership interest" holder in the 49ers, Mr. Moyer once again overruled the Trust's objection to the NFL's jurisdiction. In Procedural Order No. 6, the Arbitrator found: "It is clear that the Trust -- as it has consistently maintained herein -- has had, and retains today, an ownership interest in the Club. This Tribunal's jurisdiction is thus unaffected."

D. The Arbitration and Decision

On October 12, 2015, the arbitration commenced in San Francisco. Decision, p. 18. The arbitration spanned 19 days over several months and concluded in March 2016. After the hearing was complete, the parties submitted voluminous post-hearing opening and reply briefs collectively

spanning several hundreds of pages. In both of its briefs, the Trust reiterated its objection to the NFL's jurisdiction over this dispute.

On May 30, 2018, ***nearly two full years*** after the parties' final post-hearing briefs were submitted, Mr. Moyer issued his award. Mr. Moyer awarded the Trust $22.57 million for its partnership interest by averaging the three "appraisals." Decision, p. 111. Characterizing the Decision as a comprehensive victory for the 49ers is an understatement. Mr. Moyer not only denied all of the Trust's claims but also declined to award the Trust any interest on the award – even though this dispute dates back eight years. Moreover, the 49ers simply got away with liquidating the Trust's interest over six years ago, not paying the Trust even one cent during that time, and collecting the interest for themselves on the Trust's money.

But what is most striking about Mr. Moyer's ruling is that he managed to avoid lending any credence at all to any position or action taken by the Trust, Peter Mieuli, their counsel, or their experts at any point in the Arbitration. Indeed, for the entire 111 pages of the Decision, Mr. Moyer somehow managed to reject the Trust's position on essentially every single material issue in the arbitration.

IV. ARGUMENT

A. The Arbitrator Acted in Excess of His Powers in Six Separate and Independent Ways, Any One of Which Provides Sufficient Grounds for Vacating the Decision

Pursuant to Code of Civil Procedure section 1286.2, subdivision (a)(4), the court "shall vacate" an arbitration award if the "arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted." Courts have construed the term "exceeded their powers" to encompass a variety of scenarios, several of which apply here and provide grounds for vacating the Decision.[14]

[14] All six of the ways in which Mr. Moyer "exceeded [his] powers" undermine the entirety of the Decision by striking at the subject matter jurisdiction of the NFL, the arbitrability of the claims, and the contractual authority of the Arbitrator. These are not issues that can be rectified by simply "correcting" the award. Accordingly, the latter prong of the statute is satisfied, i.e., the Decision cannot be "corrected without affecting the merits of the decision upon the controversy submitted."

1. The Arbitrator Lacked Subject Matter Jurisdiction Over This Dispute Because The Trust Did Not Sign or Agree to the Contractual Amendment Containing the Purported Arbitration Provision

An arbitrator "exceeds his powers when he acts without subject matter jurisdiction." *O'Flaherty v. Belgum*, 115 Cal.App.4th 1044, 1055 (2004). In the arbitration context, "subject matter jurisdiction" refers to "the arbitrators' authority or power to adjudicate" a particular dispute. *Nat'l Union Fire Ins. Co. v. Stites Prof. Law Corp.*, 235 Cal.App.3d 1718, 1723-24 (1991). For three reasons, the NFL's arbitrator lacked subject matter jurisdiction over this dispute.

First and most fundamentally, there was ***no arbitration agreement at all*** because the Trust did not sign or agree to the First Amendment, which contained the purported arbitration provision. (Ex. 2, p. PM0409.) Instead, the general partner purported to sign on the Trust's behalf, but the general partner had no authority to do so. In the absence of a valid arbitration agreement, the arbitrator had no jurisdiction to resolve this dispute, and the Decision is a legal nullity that cannot be enforced.

"Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Retail Clerks Union v. Thriftimart, Inc.*, 59 Cal.2d 421, 426 (1963) (citation and quotation marks omitted); *Chan v. Drexel Burnham Lambert, Inc.*, 178 Cal.App.3d 632, 640 (1986) ("[a]rbitration is recognized as a matter of contract, and a party cannot be forced to arbitrate something in the absence of an agreement to do so" (citation and quotation marks omitted)); *Arista Films, Inc. v. Gilford Securities, Inc.*, 43 Cal.App.4th 495, 502 (1996) (same). California courts recognize that the right to select a judicial forum is a "substantial right," and it will "not lightly...be deemed waived." *Chan* at 643; *Wolschlager v. Fidelity National Title Ins. Co.*, 111 Cal.App.4th 784, 789 (2003) ("Absent a clear agreement to submit disputes to arbitration, courts will not infer that the right to a jury trial has been waived."). These rules are rooted in "the basic premise that arbitration is consensual in nature." *Lawrence v. Walzer & Gabrielson*, 207 Cal.App.3d 1501, 1505 (1989). Without the parties' mutual consent, there *is no* arbitration agreement. *Herman Feil, Inc. v. Design Center of Los Angeles*, 204 Cal.App.3d 1406, 1414 (1988) ("the asserted absence of contractual consent renders arbitration, by its very definition, inapplicable to resolve the issue").

In particular, a party is not bound by an arbitration agreement if the agreement was signed by someone without the legal authority to so bind that party. In *Blanton v. Womancare, Inc.*, 38 Cal.3d 396, 407-08 (1985), for instance, the California Supreme Court refused to enforce an arbitration agreement against a litigant where the agreement was signed by the litigant's attorney on the client's purported behalf. The attorney had no legal authority to do so. *Id.* As a result, the court set aside both the arbitration agreement and the arbitration award and ordered a trial *de novo*. *Id.* at 399; *see also Goldman v. Sunbridge Healthcare, LLC*, 220 Cal.App.4th 1160, 1173-74 (2013) (husband was not bound by arbitration agreement in the absence of evidence the wife was authorized to sign arbitration agreement on his behalf).

The NFL arbitration in this case was conducted pursuant to the ostensible authority provided by the Partnership Agreement's First Amendment. (Ex. 2, ¶ 6 [adding paragraph 18.8 to original Partnership Agreement].) The original agreement did not contain any arbitration clause involving the NFL's arbitration procedure. (Ex. 3.) The First Amendment purported to change that by adding the following new provision: "Notwithstanding any agreement to the contrary, this Agreement and any and all other arrangements between or among the parties hereto…which relates to the ownership of [sic] operation of the Franchise as a member club of the National Football League are subject to the Constitution and By-laws of the National Football League…." (Ex. 2, ¶ 6.)

However, the Trust did not agree to the First Amendment. The amendment was ***not signed*** by the Trust's trustee Franklin Mieuli or its attorney-in-fact Luther J. Avery, Esq. (Ex. 2, p. PM0409.) In fact, the amendment was not signed by ***either*** of the two limited partners, i.e., the Trust and Richard Carl Morabito. (*Id.*)

Instead, Carmen A. Policy, the President of The San Francisco Forty Niners, Inc. – which was the general partner of the Partnership at the time – purported to "sign[] on behalf of each of the limited partners pursuant to authority granted to the general partner in the partnership agreement." (Ex. 2, p. PM0409.) Indeed, both Mieuli and Morabito's "signatures" are followed by "/s" to reflect that they are not original, authentic signatures. (*Id.*)

However, the Partnership Agreement did ***not*** provide the general partner with any authority to execute this amendment on the Trust's behalf and bind the Trust to the arbitration provision in the NFL's Bylaws. As a result, the amendment was invalid and ineffective.

Paragraph 7 of the amendment provides some guidance regarding the purported authority the general partner believed it had at the time. (Ex. 2, ¶ 7.) It states, in relevant part, that "the General Partner has signed on [the limited partners'] behalf pursuant to Paragraphs 7, 14, 16 and 21 of the Agreement [i.e., the original Partnership Agreement]...." (*Id.*) However, none of those paragraphs provides any authority to bind the Trust to NFL arbitration. Paragraphs 7 and 14 have nothing to do with either the amendment of the agreement or attorney-in-fact signing authority. (Ex. 3, ¶¶ 7, 14.) Paragraph 7 pertains only to the admission of new partners to the Partnership. (*Id.*, ¶ 7.) Paragraph 14 is nothing more than an expression of the limited partners' passive role with respect to the operation of the 49ers, providing that the limited partners have no right to take part "in the conduct or control the Partnership business...." (*Id.*, ¶ 14.)

Paragraph 16 provides the general partner with a *limited* attorney-in-fact signing authority, but it does not include any authority to amend the Partnership Agreement, let alone bind the limited partners to an arbitration agreement. (Ex. 3, ¶ 16.) Specifically, paragraph 16.1 allows the general partner to execute, on the limited partners' behalf, certain Secretary of State documents that are purely administrative in nature – such as a "Certificate of Limited Partnership" or "Fictitious Business Name Statement." (*Id.*) And paragraph 16.3 provides the general partner with the ability to execute documents effectuating the purchase of a partner's interest, in the event the partner fails or refuses to do so. (*Id.*) Neither paragraph provided the general partner with the authority it believed it had.

Paragraph 21 relates to the amendment of the Partnership Agreement. (Ex. 3, ¶ 21.) It provides that the agreement "may be amended by agreement of Partners holding ninety-five percent (95%) in interest of the Partnership...." (*Id.*) However, the general partner had only a 90% interest in the 49ers, so it did not have the power to ***unilaterally*** amend the agreement. (*Id.*, ¶ 4.1(a).) It needed the consent of ***at least one*** of the limited partners, each of which owned a 5% interest. (*Id.*, ¶ 4.1(b).) As the First Amendment indicates, however, the General Partner acted unilaterally and

failed to obtain either limited partner's consent because neither limited partner actually signed the amendment.

In short, the Trust did not sign or consent to the First Amendment and therefore did not agree to be bound by the NFL's arbitration provision. Indeed, the First Amendment did not constitute a valid amendment to the Partnership Agreement at all because it is missing the signature – and therefore the consent – of at least one of the two limited partners.

There is no agreement binding the Trust to the NFL's arbitration provision. As a result, the arbitration that took place is of no force and effect, and the Decision must be vacated.

2. The Arbitrator Also Lacked Jurisdiction Because The First Amendment to the Partnership Agreement Did Not Effectuate a Valid Incorporation by Reference of the NFL's Bylaws Under California Law

Even assuming *arguendo* it constituted a valid amendment of the Partnership Agreement, the First Amendment did not effectuate a valid incorporation by reference of the extrinsic NFL Bylaws containing the arbitration provision. For this reason too, there is no arbitration agreement that binds the Trust to the NFL's arbitration provision, rendering the NFL without subject matter jurisdiction.

California law permits an extrinsic document to be incorporated by reference into a contract "so long as (1) the reference is clear and unequivocal, (2) the reference is called to the attention of the other party and he consents thereto, and (3) the terms of the incorporated document are known or easily available to the contracting parties." *DVD Copy Control Assn., Inc. v. Kaleidescape, Inc.*, 176 Cal.App.4th 697, 713 (2009). The first and second elements are absent here.

(a) The Trust Did Not Consent to the Incorporation by Reference of the NFL's Bylaws

Beginning with the second element, the Trust did not consent to the incorporation by reference. As detailed above, the Trust did not sign the First Amendment that – at least according to the 49ers – incorporated the NFL's Bylaws by reference. Rather, the general partner signed the amendment for the Trust based on purported authority in the Partnership Agreement that the general partner ***did not have***. Since the Trust did not provide its consent, the purported incorporation by reference was invalid as a matter of California law.

(b) The Purported Incorporation of the Bylaws Was Anything But "Clear and Unequivocal"

In addition, the reference to the NFL's Bylaws in the First Amendment is not "clear and unequivocal" and does not indicate any intent to incorporate all of those bylaws into the Partnership Agreement as contractual terms binding on each partner. For this reason too, the incorporation-by-reference doctrine is not met.

The relevant language states as follows: "Notwithstanding any agreement to the *contrary*, this Agreement...[is] *subject to* the Constitution and Bylaws of the National Football League...." (Ex. 2, ¶ 6 [adding ¶ 18.8 to original agreement] [emphasis added].) This language did not clearly and unequivocally effectuate a sweeping incorporation by reference of the entirety of the Bylaws. Rather, Paragraph 18.8 is nothing more than a "precedence provision." *See, e.g., Hughes Aircraft Co. v. North American Van Lines, Inc.*, 970 F.2d 609, 613 (9th Cir. 1992); *In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 725 F.Supp. 712, 730 (S.D.N.Y. 1989) ("'Notwithstanding' means 'take[s] precedence over' and thus negates any contrary provision of the Offer to Purchase."). In other words, paragraph 18.8 was intended only to ensure the precedence/priority of the NFL's Bylaws over anything "contrary" in the agreement. The paragraph's title, i.e., "*Precedence* of League Policies," makes this clear. (Ex. 2, ¶ 6 [emphasis added].)

Further, the very next sentence describes Paragraph 18.8 as a provision "affecting the rights of *the National Football League*" and provides the NFL with the "sole discretion" to approve or reject proposed amendments to this paragraph. (Ex. 2, ¶ 6 [citation omitted].) The paragraph also states that the NFL "is a third party beneficiary hereof." *Id.* As such, the clear purpose of Paragraph 18.8 is not to define the *contracting parties'* rights but rather to protect *the NFL's* rights and interests by ensuring the superiority of the NFL's Bylaws over any conflicting contractual terms in the Partnership Agreement.

Moreover, while the specific terms "incorporated by reference" are not required for a valid incorporation, there must nevertheless be *some* language indicating an intent that the parties are bound by the extrinsic document. *See, e.g., Chan* at 643 (describing cases in which contracting parties agreed "to be governed by" or "to abide by" extrinsic rules); *Slaught v. Bencomo Roofing*

Co., 25 Cal.App.4th 744, 749 (1994) (party "shall be bound by all of the terms and conditions" of extrinsic documents). By contrast, a "mere reference" does not "clearly and unequivocally evidence the parties' intent to incorporate. . . ." *Versaci v. Superior Court*, 127 Cal.App.4th 805, 817 (2005); *Amtower v. Photon Dynamics, Inc.*, 158 Cal.App.4th 1582, 1606-07 (2008) (specific references to extrinsic document in various contract provisions not sufficient to constitute an express incorporation by reference of the entire extrinsic agreement).

The language here does not indicate any intent to bind the limited partners to all the provisions of the NFL Bylaws. Paragraph 18.8 states merely that the Partnership Agreement is "subject to" the Bylaws. "The phrase 'subject to' ... means conditioned upon, limited by, or subordinate to." *Swan Magnetics v. Superior Court*, 56 Cal.App.4th 1504, 1510 (1997) ; *Gapusan v. Jay*, 66 Cal.App.4th 734, 741 (1998)("'subject to' means 'subordinate to,' which means 'inferior in order, nature, dignity, power, importance, or the like . . . .'" (quoting Black's Law Dictionary)). The use of "subject to" indicates only an intent that the Bylaws control *to the extent the Partnership Agreement contradicts them.* It does not evidence an intent to incorporate the entirety of those Bylaws as binding on the limited partners. *See Sniezek v. Kan. City Chiefs Football Club*, 402 S.W.3d 580, 584 (Mo. Ct. App. 2013) ("The mere mention of the NFL's constitution and bylaws in the Agreement, however, did not incorporate the terms of those documents into the Agreement.").

Further, Paragraph 18.8 does not mention the topic of arbitration or the arbitration provision in the NFL Bylaws. Nor does it mention the arbitration provision in Paragraph 19 of the *original* Partnership Agreement, which is a narrowly-drawn arbitration clause that subjects disputes involving only "football" matters – i.e., matters relating to the sport itself – to arbitration before the American Arbitration Association.[15]

These omissions are telling with respect to the parties' intent. If Paragraph 18.8 really did incorporate by reference the NFL's Bylaws – including its arbitration provision – then its amendment effectively superseded Paragraph 19 and waived the Trust's right to a jury trial for all non-"football" matters. Yet there is nothing in the First Amendment that even remotely suggests the Trust might

[15] Paragraph 19 is not applicable to this dispute, which does not involve a "football" matter.

be waiving a right so substantial as the right to a judicial forum for all intra-partnership disputes. *Commercial Factors Corp. v. Kurtzman Bros.*, 131 Cal.App.2d 133, 136 (1955) ("If a party wishes to bind in writing another to an agreement to arbitrate future disputes, such purpose should be accomplished in a way that each party to the arrangement will fully and clearly comprehend that the agreement to arbitrate exists and binds the parties thereto." (internal quotation marks omitted)).

That makes perfect practical sense under the circumstances. The Bylaws is ***292 pages*** long and is filled with innumerable, arcane rules, articles, and resolutions. (Ex. 1.) Nothing about the single, generic reference to those Bylaws in Paragraph 18.8 constitutes "clear and unequivocal" notice that the limited partners are committing themselves to be bound by everything recited therein. *Windsor Mills, Inc. v. Collins & Aikman Corp.*, 25 Cal.App.3d 987, 993 (1972) ("[A]n offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he was unaware, contained in a document whose contractual nature is not obvious....This principle of knowing consent applies with particular force to provisions for arbitration." (citations and quotation marks omitted)).

3. The Arbitrator Exceeded His Powers by Acting Pursuant to an Unconscionable and Unenforceable Arbitration Provision

The NFL lacked subject matter jurisdiction over this dispute for the additional reason that the arbitration provision in the First Amendment was unconscionable and therefore unenforceable. *Jones v. Humanscale Corp.*, 130 Cal.App.4th 401, 414 (2005) (unconscionability of arbitration clause provides grounds for vacating arbitration award); *see also Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc.*, Case No. S232946, 2018 WL 4137013, 2018 Cal. LEXIS 6399, at *24 (Cal. Supr. Ct. Aug. 30, 2018) ("California cases have made clear that the legislative policy favoring contractual arbitration, and the finality of arbitral awards, applies only when there is, in fact, a *valid* contract to arbitrate." (emphasis added)).

Arbitration agreements are subject to generally applicable contract defenses, including fraud, duress, and unconscionability. *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal.4th 1109, 1171 (2013); *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC*, 55 Cal.4th 223, 246 (2012) ("[G]enerally applicable contract defenses, such as ... unconscionability, may be applied to

invalidate arbitration agreements without contravening the FAA." (quotation marks omitted)). "If a court finds as a matter of law that a contract or any clause of a contract is unconscionable, the court may refuse to enforce the contract or clause, or it may limit the application of any unconscionable clause so as to avoid any unconscionable result." *Carmona v. Lincoln Millennium Car Wash, Inc.*, 226 Cal.App.4th 74, 83 (2014) (citing Civ. Code § 1670.5(a)).

Unconscionability "refers to an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Baltazar v. Forever 21, Inc.*, 62 Cal.4th 1237, 1243 (2016) (quotation marks omitted). The doctrine "has both a procedural and a substantive element." *Id.* (quotation marks omitted). Both procedural and substantive unconscionability must be present, but they exist on a sliding scale such that "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Id.* at 1244 (quotation marks omitted). "The ultimate issue in every case is whether the terms of the contract are sufficiently unfair, in view of all relevant circumstances, that a court should withhold enforcement." *Farrar v. Direct Commerce, Inc.*, 9 Cal.App.5th 1257, 1265 (2017).

California courts routinely refuse to enforce arbitration agreements on unconscionability grounds. In fact, just a few years ago, the Missouri Supreme Court affirmed the unconscionability of ***the NFL's*** arbitration procedure. The outcome here should be the same.

(a) The NFL's Arbitration Provision Was Procedurally Unconscionable

Whether an arbitration agreement is procedurally unconscionable depends on "the manner in which the contract was negotiated and the circumstances of the parties at that time." *Kinney v. United Healthcare Servs., Inc.*, 70 Cal.App.4th 1322, 1329 (1999). Procedural unconscionability focuses on the elements of oppression and surprise. *Pinnacle Museum Tower Assn.* at 247. "Oppression arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice. Surprise involves the extent to which the supposedly agreed-upon terms are hidden in a prolix printed form drafted by the party seeking to enforce them." *Baxter v. Genworth North America Corp.*, 16 Cal.App.5th 713, 722 (2017).

(i) There Was a High Degree of "Oppression"

This case involved a high degree of "oppression." As detailed above, there was ***no*** negotiation and ***no*** meaningful choice on the Trust's part because the Trust neither signed nor consented to the First Amendment. Rather, the 49ers purported to execute the First Amendment on the Trust's behalf. (Ex. 2, p. PM0409.) As such, there was no choice by the Trust, let alone "meaningful" choice. In this respect, the First Amendment was even more oppressive than a classic contract of adhesion presented on a "take it or leave it" basis that is deemed to exemplify a high degree of oppression. *See, e.g., Magno v. The College Network, Inc.*, 1 Cal.App.5th 277, 286 (2016); *Flores v. Transamerica HomeFirst, Inc.*, 93 Cal.App.4th 846, 853 (2001) ("A finding of a contract of adhesion is essentially a finding of procedural unconscionability."). The Trust did not have the option to "leave it" or at least negotiate the First Amendment's terms because the 49ers made the Trust's decision for it. *Stirlen v. Supercuts, Inc.*, 51 Cal.App.4th 1519, 1534 (1997) (arbitration clause was procedurally unconscionable because party "had no realistic ability to modify the terms").

Further, this scenario was *doubly* oppressive in that the arbitration provision was contained in an extrinsic document, i.e., the Bylaws, over which the Trust had absolutely no control. The Bylaws were adopted by the NFL's member clubs, including the 49ers, and they were subject to amendment or modification only by vote of the NFL's members clubs. (*See* Ex. 1, Art. XXV.)

This form of oppression is especially relevant here given that the First Amendment does not limit the applicability of the Bylaws to the version then-in-effect in 1992. The NFL's member clubs could thereafter amend the Bylaws in any way they chose and thereby purport to bind the Trust to Bylaws it had no control over and could not possibly have contemplated in 1992. *Harper v. Ultimo*, 113 Cal.App.4th 1402, 1407 (2003) ("But the oppression is even more onerous than that: As written, the clause pegs both the scope and procedure of the arbitration to rules which might change. And it is unclear whether an arbitration would be conducted under the Better Business Bureau rules as of the time of contracting, or at the time of arbitration.").

(ii) There Was a High Degree of "Surprise"

This case also involved a high degree of "surprise." On its face, Paragraph 18.8 does not provide any indication whatsoever that it purports to limit the Trust's fundamental rights to a judicial forum. (Ex. 2, ¶ 6.) Paragraph 18.8 does not mention arbitration at all. (*Id.*) It does not refer to the arbitration provision in the NFL's Bylaws. It does not refer to the narrow arbitration provision in the original Partnership Agreement, much less provide that the NFL Bylaws supersede it. It does not provide that the limited partners, including the Trust, agree to abide by the NFL's Bylaws or similar language indicating that Paragraph 18.8 purports to substantially affect the Trust's legal rights. Instead, Paragraph 18.8 merely states the contract is "subject to" the Bylaws, which, as subsequent language clarifies, means only that the NFL's "rights" as a "third party beneficiary" of Paragraph 18.8 supersede "any agreement to the contrary" in the Partnership Agreement. An "inconspicuous", arbitration clause printed in small typeface on the opposite side of a signature page evidences procedural unconscionability. *Gutierrez v. Autowest, Inc.*, 114 Cal.App.4th 77, 83 (2003). Here, the arbitration provision was not merely inconspicuous; it was *invisible*.

The fact that a copy of the NFL Bylaws was not attached to the First Amendment only increases the level of procedural unconscionability. *Harper* at 1406 ("The inability to receive full relief is artfully hidden by merely referencing the Better Business Bureau arbitration rules, and not attaching those rules to the contract for the customer to review. The customer is forced to go to another source to find out the full import of what he or she is about to sign—and must go to that effort *prior* to signing."); *Samaniego v. Empire Today, LLC*, 205 Cal.App.4th 1138, 1146 (2012) ("Empire failed to provide plaintiffs with a copy of the relevant arbitration rules. This is significant.").

In sum, the level of procedural unconscionability present here is very high – which means that, on the unconscionability "sliding scale," only a low degree of substantive unconscionability is necessary to render the purported arbitration provision unenforceable. *Sanchez v. Western Pizza Enterprises, Inc.*, 172 Cal.App.4th 154, 171 (2009) ("The more procedural unconscionability is present, the less substantive unconscionability is required to justify a determination that a contract or clause is unenforceable.").

(b) The NFL's Arbitration Provision Was Substantively Unconscionable

"[S]ubstantive unconscionability focuses on overly harsh or one-sided terms." *Sanchez* at 171. "[C]ourts will more closely scrutinize the substantive unconscionability of terms that were 'artfully hidden' by the simple expedient of incorporating them by reference rather than including them in or attaching them to the arbitration agreement." *Baltazar* at 1246. This case involves a high degree of substantive unconscionability.

(i) Adhesive Contracts Involving a Party-Affiliated Arbitrator Are Unconscionable and Unenforceable

A contract of adhesion that gives one party the right to choose a biased arbitrator "is unconscionable." *Sonic-Calabasas A, Inc.* at 1152 (*citing Graham v. Scissor-Tail, Inc.*, 28 Cal.3d 807 (1981)); *Sanchez* at 177 ("[A]n arbitration agreement must provide for a neutral arbitrator."). Even more specifically, "[a]n agreement to submit a dispute to ADR for a binding decision will not be enforced if the designated decisional body is so associated with a party that it is presumptively biased in favor of that party." *Sehulster Tunnels/Pre-Con v. Traylor Brothers, Inc./Obayashi Corp.*, 111 Cal.App.4th 1328, 1340 (2003).

Graham v. Scissor-Tail, Inc. is a seminal case in California arbitration law, and it is directly on point both factually and procedurally. In *Graham*, the California Supreme Court affirmed the unconscionability of an arbitration agreement in an adhesive contract between a music promoter and a musician who was a member of the American Federation of Musicians ("AFM") labor union. The arbitration provision mandated final and binding arbitration before the AFM itself pursuant to the AFM's Constitution, By-laws, Rules, and Regulations. *Id.* at 813. After a dispute arose between the parties, the AFM member successfully compelled arbitration. *Id.* at 814.

The AFM's president appointed an arbitrator who was "a former executive officer and a long-time member" of the AFM and who had presided over several AFM matters before. *Id.* at 815. After a hearing, the arbitrator ruled decisively in favor of the AFM member defendant, who then petitioned the Superior Court to confirm the award, while the music promoter plaintiff petitioned the court to vacate it. *Id.* at 816. The trial court confirmed the award. *Id.*

The Supreme Court vacated that order. The court held that the arbitration clause was unconscionable and unenforceable because it "designates an arbitrator who, by reason of its status and identity, is presumptively biased in favor of one party." *Id.* at 821. It was fundamentally unfair to allow an entity "to sit in judgment of a dispute arising between one of its members and a contracting nonmember." *Id.* The entity's interests were so allied with the interests of the AFM member defendant that the likelihood of a "fair and reasoned decision, based on the evidence" was "a virtual impossibility." *Id.* at 827. The court pointed out that the AFM's very "reason for being" was to act in the interests of its members. *Id.*

Several, more recent Court of Appeal decisions have refused to enforce arbitration provisions under similar circumstances. In *Sehulster Tunnels/Pre-Con v. Traylor Brothers, Inc./Obayashi Corp.*, 111 Cal.App.4th 1328 (2003), the court refused to enforce an ADR provision in a construction contract between a city and the general contractor in a dispute between the general contractor and a subcontractor. The agreement provided for the selection of a three-member panel, with one member selected by the city, one selected by the general contractor, and the third member selected by the other two members. *Id.* at 1338. The agreement was incorporated by reference into the agreement between the general contractor and subcontractor. *Id.* at 1336.

The court held that, while that "selection process may be appropriate and fair for resolving disputes between the owner and general contractor who are the appointing parties, it does not have the appearance of fairness in the context of a subcontractor's claim against the owner and general contractor." *Id.* at 1341-42. Two members of the panel were appointed by parties with interests adverse to those of the subcontractor, and therefore the panel was "presumptively aligned with" and "presumptively biased" in favor of the city and general contractor, thereby rendering the agreement unconscionable. *Id.* at 1342.

Similarly, in *Pinela v. Neiman Marcus Group, Inc.*, 238 Cal.App.4th 227 (2015), the court refused to enforce an unconscionable arbitration agreement that required the arbitrator to be selected from a pool of individuals who resided in Texas and were licensed to practice law in Texas. This arbitrator-selection procedure had "no apparent justification other than to tilt the scale of arbitral justice to one side's advantage," i.e., to the advantage of the Texas-based employer as against the

California-based employee. *Id.* at 253; *see also Magno* at 290 (arbitration provision allowing one party to select the arbitrator was substantively unconscionable); *Sanchez* at 177 (same).

What is more, in *State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798 (Mo. 2015) ("*Hewitt*"), the Missouri Supreme Court held that an arbitration provision in a contract between the St. Louis Rams NFL club and the club's former equipment manager was substantively unconscionable because the provision designated the NFL's commissioner as the arbitrator. *Id.* at 813. The court explained that, in a dispute between an NFL club and one of its employees, the commissioner was "in a position of bias as the arbitrator" because he was employed by the league, which simply consisted of the various NFL clubs: "In effect, then, the commissioner is required to arbitrate claims against his employers." *Id.* The *Hewitt* court's holding on the core substantive unconscionability issue is entirely consistent with California law, including *Graham*.[16]

(ii) The NFL's Arbitration Provision Cannot Be Enforced in a Dispute Between One of the NFL's Members and a Non-Member

As in *Graham*, *Sehulster Tunnels/Pre-Con*, *Hewitt*, and similar cases, the NFL's arbitration provision is substantively unconscionable as applied to this dispute between a member of the NFL (the 49ers) and a non-member (the Trust). Mr. Moyer was/is presumptively biased in favor of the 49ers. As in *Graham*, the arbitrator here was a former officer of the organization (the NFL) in which one of the parties (the 49ers) was a member. (Ex. 5.) In fact, Mr. Moyer was employed by the NFL for some ***twenty-four years***, first as league counsel to the NFL commissioner and then as the Executive Vice President, the NFL's number two executive position. (*See id.*) He was – quite

[16] Remarkably, despite the *Hewitt* court's ruling some three-and-a-half years ago, the NFL has not changed its arbitration provision so as to bring it into compliance with the law of unconscionability, which is substantially similar in many states in which NFL clubs operate. Indeed, the NFL is an outlier amongst major American sports leagues in maintaining an arbitration system tainted by bias. *See* The Latest NFL Fumble: Using Its Commissioner as the Sole Arbitrator, Journal of Dispute Resolution (Vol. 2016, Issue 1), p. 241 ("Major League Baseball (MLB), the National Basketball Association (NBA), and the National Hockey League (NHL) all use an independent arbitration process."); *id.*, p. 244 ("The Missouri Supreme Court took the correct first step by finding that the NFL Commissioner was indeed biased and therefore it was unconscionable to have him as an arbitrator. Other states should follow this precedent, and the NFL Player's Association and the NFL should completely remove these arbitration provisions in the next collective bargaining agreement.").

literally – the commissioner's "right-hand man" and the NFL's top in-house counsel for years. In addition, Mr. Moyer ***still works for the NFL*** as "Special Counsel." (*Id.*)

Further, just as in *Graham* where the arbitrator was a former employee of a labor union whose very "reason for being" was to act in the interests of its members, Mr. Moyer is a former employee of the NFL, the principal purpose of which is "[t]o promote and foster the primary business of League members," including, of course, the 49ers. (Ex. 1, Art. 2.1.) Accordingly, Mr. Moyer *of course* owed, and still owes, fealty to the NFL and its members. Serving the best interests of the league and its members, including the 49ers, was his primary job responsibility for decades and remains his responsibility to this day as counsel to the NFL. (Ex. 5.)

In addition, as this action demonstrates, Mr. Moyer continues to act on behalf of the NFL and its members in the capacity of an NFL arbitrator. He has an inherent "repeat player" incentive to tilt the scales of "justice" in favor of the NFL and its members. Otherwise, the NFL will surely look elsewhere for the purpose of outsourcing the commissioner's arbitration obligations.

Significantly, this was not a dispute between two co-equal members of the league, e.g., the 49ers and the Raiders. Rather, it was a dispute between one member of the league and a limited partnership interest owner who was trying to sell that interest. In this context, Mr. Moyer was naturally and inevitably aligned with and biased in favor of the member of the organization that supported and shaped the bulk of his professional legal career. *See* The Latest NFL Fumble: Using Its Commissioner as the Sole Arbitrator, Journal of Dispute Resolution (Vol. 2016, Issue 1), p. 240 ("The principal flaw in allowing the NFL Commissioner to decide employee and player disputes with management is that the Commissioner is naturally partial toward management. The NFL Commissioner is not a neutral third party. His employers, the NFL team owners, appoint him; and therefore the Commissioner is implicitly subject to control by them.").[17] Mr. Moyer's presumptive bias in favor of the 49ers cannot reasonably be disputed.

[17] To be clear, the Trust's contention is only that the NFL's arbitration provision is unconscionable on the specific facts presented here, i.e., in a dispute between an NFL member and a non-member. At least in principle, the commissioner, Mr. Moyer, or someone else affiliated with the NFL could fairly serve as an unbiased arbitrator in, for instance, a dispute between two NFL member clubs.

Moreover, the fact that Mr. Moyer – rather than the NFL's commissioner – served as the arbitrator does not in any way mitigate the bias or diminish the precedential force of *Hewitt*. Mr. Moyer was employed by the NFL for twenty-four years – twelve years of which he spent as the league's number two executive officer. (*See* Ex. 5.) As such, Mr. Moyer was "in a position of bias as the arbitrator" for exactly the same reasons the commissioner himself was in *Hewitt*. *Hewitt* at 813. Indeed, that is, in all likelihood, exactly why the commissioner hand-picked Mr. Moyer to serve in his place as the arbitrator in this dispute. The commissioner undoubtedly knew he could rely on Mr. Moyer to give the 49ers' the benefit of every single doubt and, eventually, to issue a ruling with which the 49ers would be pleased.

(iii) The Decision Is Replete With Evidence of the Arbitrator's Bias and Perfectly Exemplifies Why *Graham v. Scissor-Tail* Is the Law

It surprised absolutely no one that, in *Graham*, the presumptively biased, "in house" arbitrator – a former union executive who was appointed by the president of the union – ruled comprehensively in favor of the party who was a member of that union. *Graham* at 815-16. It is likewise unsurprising that the arbitrator in this case – a former NFL officer who was appointed by Roger Goodell, the commissioner of the league of which the 49ers are a member – ruled comprehensively in favor of the party that, along with the other NFL clubs, has employed him and paid his salary for decades. Indeed, the Decision reads like a 49ers' brief. The Decision repeatedly impugns Mieuli's character and motives, while praising the 49ers. The Decision also consistently sides with the 49ers on essentially every material issue involving the credibility of witnesses, the interpretation of the evidence, and the application of law.

In particular, Mr. Moyer's bias is epitomized in his decision not to award the Trust interest on its award. Decision, pp. 109-110. That decision represents – in and of itself and without reference to the underlying valuation dispute – a multi-million dollar windfall for the 49ers.

The Partnership Agreement mandated that the "unpaid balance of the purchase price" of the Trust's interest "shall bear interest from the date of withdrawal at the rate of six percent (6% per annum...." (Ex. 3, ¶ 18.4.) The Trust was also entitled to prejudgment interest pursuant to California law. Civ. Code § 3287; *North Oakland Medical Clinic v. Rogers*, 65 Cal.App.4th 824,

828 (1998). Significantly, the 49ers have never contended that the Trust is entitled to $0 but rather took the position the Trust was entitled to only $18.5 million. As such, the Trust should have been awarded – at a minimum – 6% interest per year on $18.5 million, which is $1,110,000 per year.[18]

Mr. Moyer's refusal to award the Trust any interest is especially inexcusable in light of how long this dispute has been pending before him – which is, in large part, his own fault. Here, the Trust invoked its right to have its interest appraised and withdraw from the Partnership in July 2010 – ***over eight years ago***. (Ex. 19.) The parties have been litigating this dispute for ***nearly seven years*** since February 1, 2012 when the 49ers "certified" this dispute for NFL arbitration. *See supra* III.A. And, of those six years and seven months of litigation, nearly two full years passed as Mr. Moyer took his leisurely time penning his 111-page arbitral version of "War and Peace."

By refusing to enforce the Partnership Agreement and award the Trust interest, Mr. Moyer effectively shifted some $6-8 million from the Trust to the 49ers. Throughout all of those years, the 49ers have had all of that money to use for their own purposes.

As Mr. Moyer's refusal to award interest and other instances make clear, the outcome of this arbitration was effectively pre-determined and foreordained by virtue of the inherent structural bias governing the proceeding. That is precisely the outcome that California law exemplified in cases like *Graham* was designed to prevent.

4. This Dispute Was Not Subject to Arbitration Because the Trust Was Not an "Ownership Interest" Holder

An arbitrator exceeds his powers "by deciding a dispute which was not arbitrable." *Citibank v. Crowell, Weedon & Co.*, 4 Cal.App.4th 844, 848 (1992). This dispute was not arbitrable because it did not fall within the scope of the NFL's arbitration provision.

---

[18] In fact, in the event it denies vacatur, the Court should correct the Decision so as to award the Trust 6% interest per annum on $18.5 million dating back to the July 19, 2010. (Ex. 19.) A court may "correct," rather than vacate, an award if the "arbitrators exceeded their powers but the award may be corrected without affecting the merits of the decision...." Code Civ. Proc. § 1286.6(b). The Court may correct the Arbitrator's ruling on the interest issue without otherwise affecting the merits of the award. Mr. Moyer's refusal to award the Trust 6% interest violated the Partnership Agreement, and therefore Mr. Moyer exceeded his powers in doing so. (Ex. 3, ¶ 18.4.)

The NFL Bylaws specify five categories of disputes falling within the commissioner's jurisdiction as arbitrator. (Ex. 1, Art. 8.3.) Only one of those categories is even potentially implicated here, i.e., "[a]ny dispute involving two or more members of the League or involving two or more holders of an ownership interest in a member club of the League, certified to [the commissioner] by any of the disputants...." (*Id.*, Art. 8.3(A).) Article 8.3(A) is phrased disjunctively and applies to ***either*** any dispute "involving two or more members of the League" ***or*** any dispute "involving two or more holders of an ownership interest in a member club of the League."

As an initial matter, the first disjunct plainly does not apply. The Bylaws define "members" to mean the thirty-two NFL *clubs*. (Ex. 1, Art. 3.1(A).) This dispute, however, involves only *one* such "member," i.e., the 49ers or, more specifically, San Francisco Forty Niners, Limited, the former California limited partnership that held the 49ers' franchise. *See* Decision, caption page; *see also* Ex. 128 (49ers' counsel certifying dispute to NFL for arbitration on behalf of Claimant San Francisco Forty Niners, Limited). Accordingly, the only arguably applicable provision is the second disjunct, which requires a dispute "involving two or more holders of an ownership interest in a member club of the League." This provision does not apply either, for two independent reasons.

First, as of March 2012 – years before the arbitration hearing was held or the Decision issued – the Trust ceased being a "holder[] of an ownership interest" in the 49ers because the 49ers ***extinguished*** the Trust's 5% interest in the club. On March 22, 2012, the 49ers converted the entity holding the franchise – i.e., San Francisco Forty Niners, Limited, a California limited partnership – into the Forty Niners Football Company LLC, a Delaware corporation. (Ex. 124.) The 49ers then converted their corporate structure into a holding company arrangement, and the franchise was transferred into Forty Niners Holdings, LP ("Holdings"), a Delaware limited partnership. Decision, pp. 17, 31. Accordingly, as of March 22, 2012, the only "holders of an ownership interest" in the 49ers were the partners in Holdings.

According to the Holdings ***partnership agreement itself***, however, the Trust was no longer a partner. The general partner was San Francisco Forty-Niners, LLC, and the limited partners

included only San Francisco Forty Niners, II, LLC, San Francisco Forty-Niners, LLC, Mark Wan, and Gideon Yu. (Ex. 125 at Exhibit A.) Their partnership interests added up to 100%. (*Id.*)

The Holdings agreement did *refer* to the Trust's interest. But it characterized that interest, consistent with its own Exhibit A, as "the *Former* Mieuli Interest." (Ex. 125, § 2.8 [emphasis added].) The agreement further stated that the Trust had "no rights under this Agreement" except to have its interest appraised and to receive the appraised value. (*Id.*)

In sum, the 49ers' decision to extinguish the Trust's ownership interest in March 2012 stripped the NFL of any jurisdiction that it even arguably might have had.[19] If the Trust was no longer a "holder[] of an ownership interest" in the 49ers, the Trust was no longer subject to the NFL's arbitration provision. As a result, Mr. Moyer had no power to hear or adjudicate this dispute.[20]

5. This Dispute Was Not Subject to Arbitration Because The 49ers Are Not an "Ownership Interest" Holder

Second, this dispute does not fall within the scope of the arbitration provision because it does not involve "two or more holders of an ownership interest in a member club of the League...." Assuming *arguendo* that the Trust qualified as an ownership interest holder – which it did not

---

[19] The 49ers presumably extinguished the Trust's interest in full confidence that the NFL and its hand-picked arbitrator would continue to uphold the NFL's jurisdiction over this dispute. And that is exactly what happened. In the Decision, Mr. Moyer of course sided with the 49ers on this issue. Decision, pp. 31-34. Mr. Moyer deferred to the prior decision of his employer, the NFL, which had previously stated that it was "'satisfied that the 2012 reorganization did not operate to eliminate any ownership interest that the Mieuli Trust may have had in the San Francisco Forty Niners.'" Decision, p. 33. He then asserted that "the Trust has offered nothing probative to counter that conclusion" – while completely ignoring the actual list of partners in the Holdings agreement. *Id.* The agreement is not just probative; it is *dispositive* of this issue. The agreement controls over any representation by the NFL in determining whether the Trust was an "ownership interest" holder.

[20] By extinguishing the Trust's ownership interest in the club, the 49ers also violated the Trust's statutory rights under California law – which provides an additional legal ground for vacating the Decision. *Sargon Enterprises, Inc. v. Browne George Ross LLP*, 15 Cal.App.5th 749, 764 (2017) (arbitrator exceeds his powers by issuing an award that violates a party's statutory rights). California law provided the Trust with the right to "receive[] a percentage interest in the profits and capital of the converted entity equal to that partner's percentage interest in profits and capital of the converting limited partnership as of the effective time of the conversion." Corp. Code § 15911.02(a)(1). As detailed above, no such thing took place here, as the Trust's 5% interest in the converting entity was reduced to 0% in the converted entity.

effective March 2012 – the Trust was the only such ownership interest holder involved in this dispute.

There were only two parties to the arbitration, i.e., San Francisco Forty Niners, Limited and the Trust. (Ex. 128.) When the 49ers "certified" this dispute for NFL arbitration and asked Commissioner Goodell to assume jurisdiction, the only "claimant" was San Francisco Forty Niners, Limited, and the only "respondent" was the Trust. (*Id.*) As such, the Trust's adversary in this proceeding is *the member club itself*, i.e., San Francisco Forty Niners, Limited. The club is not a "holder[] of an ownership interest." It is instead the *object itself in which other people and entities hold an ownership interest.*

Other than the Trust, no other "holders of an ownership interest in a member club" are involved. San Francisco Forty Niners, Inc., the former general partner and 90% ownership interest holder in San Francisco Forty Niners, Limited, is not a party to this action. Jane and Richard Morabito, who formerly held a 5% interest in San Francisco Forty Niners, Limited, is also not a party to this action. Further, none of the ownership interest holders in Forty Niners Holdings, LP – i.e., the Delaware entity into which the former California limited partnership holding the 49ers' franchise was converted – is a party to this action.

Simply stated, Article 8.3(A) of the NFL Bylaws encompasses only disputes involving two (or more) member clubs or two or more ownership interest holders in those member clubs. This dispute is between *one* member club and *one* ownership interest holder. As such, Article 8.3(A) does not apply.

Of course, the 49ers previously contended – and the NFL agreed – that this dispute is indeed subject to arbitration under Article 8.3. To the extent the 49ers continue to dispute the Trust's interpretation here, the Court should construe the provision *against* the interpretation shared by the 49ers and the NFL. *Sandquist v. Lebo Automotive, Inc.*, 1 Cal.5th 233, 248 (2016) (affirming that the general principle of contract interpretation that "ambiguities in written agreements are to be construed against their drafters" applies equally to arbitration provision written by employer in dispute with non-drafting employee).

The NFL Bylaws is simply a contract drafted by the league's members and to which those members are parties. *Oakland Raiders v. National Football League*, 131 Cal.App.4th 621, 639 (2005) (Bylaws "constitute a contract to which all member clubs agreed"); *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 791 F.2d 1356, 1360 (9th Cir. 1986) (Bylaws are a contract "to which all NFL clubs are parties"). The Bylaws can be amended *only* by a vote of the members. (Ex. 1, Art. XXV.) As such, the league's member clubs control its terms. As between the Trust and the 49ers, the 49ers are the only party to this dispute with any authorship authority over the Bylaws' content. Accordingly, while the Trust maintains that Article 8.3(A) is *not* ambiguous and clearly does *not* encompass this dispute, to the extent the Court deems that provision ambiguous, it should construe it against the 49ers/NFL's interpretation and in favor of the Trust's interpretation.

6. The Arbitrator Did Not Have the Authority to Preside Over this Arbitration

Mr. Moyer exceeded his powers for the additional reason that he had *no power*. Even assuming *arguendo* that an arbitration agreement existed that bound the Trust – which is not the case – any such agreement authorized only the NFL commissioner, i.e., Roger Goodell, to serve as arbitrator. Mr. Goodell had no authority to appoint Mr. Moyer (or anyone else) to replace him.

"The powers of an arbitrator derive from, and are limited by, the agreement to arbitrate." *Advanced Micro Devices, Inc. v. Intel Corp.,* 9 Cal.4th 362, 375 (1994). As such, an arbitrator exceeds his powers when he acts in a manner not authorized by the arbitration agreement. *Greenspan v. LADT, LLC*, 185 Cal.App.4th 1413, 1437-38 (2010); *O'Flaherty v. Belgum*, 115 Cal.App.4th 1044, 1061 (2004) (award ordering forfeiture of partnership accounts was in excess of the agreement, which did not provide for forfeiture of capital accounts even upon wrongdoing).

Assuming *arguendo* that the Trust was even bound by the NFL Bylaws, Article 8.3 of those Bylaws bestows authority *only on the NFL commissioner* to arbitrate disputes. (Ex. 1, Art. 8.3.) The Bylaws do not authorize any other person to serve as arbitrator. And the Bylaws do not provide the commissioner with the power to appoint anyone else to serve as arbitrator.

Remarkably, in its own correspondence notifying the parties that Mr. Moyer would serve as arbitrator, the NFL *quoted* Article 8.3's directive that only the commissioner "shall have full,

complete, and final jurisdiction and authority to arbitrate...." (Ex. 5.) The NFL then promptly ignored that provision, stating just a few sentences later that the commissioner has "appointed" Mr. Moyer "to serve as [the commissioner's] designee in this matter." (*Id.*) Like some all-powerful feudal overlord, the NFL and its commissioner apparently believed that they were not bound by their own Bylaws.

In his Procedural Order Number 1, Mr. Moyer attempted to shore up the gaping hole in the NFL's logic, stating that, "[p]ursuant to the NFL Commissioner's discretion under the NFL Dispute Resolution Procedural Guidelines ('NFL Guidelines'), the Commissioner appointed the undersigned [Mr. Moyer] as arbitrator for this case." (Ex. 132, p. 1.) But the NFL Guidelines provide no authority for Mr. Moyer's "designation" as arbitrator, for two reasons.

First, even if the First Amendment effectuated a valid incorporation-by-reference of the NFL *Bylaws* into the agreement, the NFL Dispute Resolution Procedural Guidelines ("NFL Guidelines") – which is a *separate* document and *not* a part of the Bylaws – were certainly not so incorporated. (Ex. 6.) The First Amendment does not even refer to the NFL Guidelines, let alone meet any of the three required elements under California law for a valid incorporation-by-reference. (Ex. 2, ¶ 6; *see also supra* Section IV.A.2.)

What is more, the incorporation-by-reference doctrine cannot not met, as a matter of law, if the extrinsic document post-dates the incorporating contract. *Gilbert Street Developers, LLC v. La Quinta Homes, LLC*, 174 Cal.App.4th 1185, 1194 (2009) ("Incorporating the *possibility* of a *future* rule by reference simply doesn't even meet the basic requirements for a valid incorporation by reference under simple state contract law. Most basically, what is being incorporated must *actually exist at the time of the incorporation*, so the parties can know exactly what they are incorporating."). Here, the NFL Guidelines provided to the parties by the NFL when it assumed jurisdiction over this dispute are dated "February 2001." (Ex. 127, attachment at p. 1, footer.) The only other version of the Guidelines in the Trust's possession are also dated February 2001. (Ex. 6.) That was roughly nine years ***after*** the First Amendment was executed in 1992. Accordingly, the First Amendment could not possibly have incorporated by reference these Guidelines; indeed, there is no evidence

that the guidelines existed at all in any form in 1992. As a result, the Trust was not bound by those guidelines.

That is what the Missouri Supreme Court held in *Hewitt*. In that case, Hewitt, an equipment manager with the St. Louis Rams, was fired after 40 years of employment with the team. Unlike in this case, the contract at issue (which Hewitt actually signed) contained a provision whereby Hewitt explicitly agreed "to be legally bound by the Constitution and By-Laws and Rules and Regulations of the National Football League and by the decisions of the Commissioner of the National Football League, which shall be final, binding, conclusive and unappealable . . ." *Id.* at 810. Hewitt filed suit and the trial court compelled the matter to arbitration, finding that the NFL Guidelines governed the arbitration procedure and that Hewitt was bound by the guidelines because his contract provided that he will be bound by "the Constitution and By-Laws and Rules and Regulations" *Id.*

The Missouri Supreme Court reversed. While the NFL Bylaws were incorporated into Hewitt's contract, the NFL Guidelines were not, and therefore Hewitt was not bound by them. *Id.* at 811. The Missouri Supreme Court was unpersuaded that the reference to "Rules and Regulations" of the NFL in Hewitt's contract was specific enough to bind Hewitt to the guidelines. *Id.* at 811-12. There is no reason the outcome here should be any different.

Second, the NFL Guidelines do not provide the commissioner with any authority to appoint a replacement arbitrator. (Ex. 6.) It is no wonder that Mr. Moyer did not cite any particular provision of the NFL Guidelines in his Procedural Order Number 1. There is *no applicable provision.*[21]

The only arguably pertinent provision is section 3.2, which states as follows: "The Commissioner may be assisted by persons from his staff in conducting arbitration proceedings, including serving as hearing officer." (Ex. 6, § 3.2.) However, this provision does not apply. As an initial matter, Mr. Goodell was not "assisted" by Mr. Moyer in conducting the arbitration. Mr.

[21] Mr. Moyer's reliance on the NFL Guidelines to justify his own authority perfectly exemplifies his bias in favor of the 49ers and the double standard that he repeatedly applied to the parties. Since there was no guideline authorizing his appointment, he quite literally invented one for the purpose of keeping this dispute in an NFL forum – which is exactly what the 49ers wanted.

Goodell played no role whatsoever in adjudicating this dispute. He was *replaced* entirely by Mr. Moyer – not "assisted" by Mr. Moyer.

Further, Mr. Moyer was not a member of the commissioner's "staff." As of 2012, Mr. Moyer had long since retired as Executive Vice President and League Counsel. (Ex. 5.) Accordingly, Mr. Moyer was, at the very most, a *former* staff member, not a current one.

In sum, Mr. Moyer had ***zero*** contractual authority to adjudicate this dispute. As a result, he necessarily acted in excess of his non-existent powers, and, for that reason, the Decision must be vacated.

B. The Decision Should Be Vacated Because the Arbitrator Refused to Hear Material Evidence

An arbitration award must be vacated where the arbitrator has refused to hear material evidence, and the moving party has been substantially prejudiced. Code Civ. Proc. § 1286.2(a)(5); *Burlage v. Superior Court*, 178 Cal.App.4th 524, 529 (2009). In *Burlage*, the Court of Appeal noted there are limits on courts' "tolerance for [an arbitrator's] fallibility." *Id.* The court aptly noted, "One cannot 'consider' what one has refused to 'hear.' Legally speaking the admission of evidence is to hear it, and the weighing of it is to give it consideration." *Id.* (internal quotation marks and citation omitted). The court concluded by observing, "The parties to an arbitration have bargained for a final and binding decision. But without the opportunity to present material evidence, Spencer did not receive the benefit of that bargain." *Id.* (citation omitted). The party seeking to vacate an arbitration decision on this basis need not prove that the arbitrator would have reached a different result had he heard the evidence. *Hall v. Superior Court*, 18 Cal.App.4th 427, 438-39 (1993). Rather, it is sufficient "that the arbitrator might well have made a different award had the evidence been allowed." *Id.*

In this case, the Arbitrator precluded the Trust from obtaining the testimony of Jeffrey Philips, the third "independent" appraiser, by denying the Trust's request to subpoena Phillips. (Ex. 7, p. 4.) Without citation to any authority, the Arbitrator tried to justify his decision with a generic "expense and delay" rationale: "Depositions are not routine in arbitration because they entail additional time and expense. Further pursuing involuntary depositions of appraisers may generate

even more expense and delay, because the appraisers, as non-parties to this proceeding, may be able to obtain full judicial review of an order purporting to compel such discovery." (*Id.*)

That is a preposterous excuse for denying the deposition of an essential witness in a wide-ranging and expensive case like this one. Tens of millions of dollars were at stake in this action. Decision, p. 111. Both parties have spent millions of dollars in attorney's fees and eight years of their time litigating this action. The time and expense of one day of deposition pales in comparison to the import of the testimony of arguably the most important witness to the entire arbitration. Mr. Moyer's resort to "delay" as an excuse for denying the Trust's request to subpoena Mr. Phillips is especially astonishing considering that, from the time the parties submitted their final post-hearing reply briefs in August 2016, Mr. Moyer took a leisurely ***one year, nine months, and eleven days*** to issue his Decision. He clearly had no concern with ***that*** delay.

In addition, the materiality of Phillips' testimony is beyond dispute. Mr. Moyer's $22.57 million award represented the average of Erickson's $18.5 million valuation, Phillips' alleged $18.5 million valuation, and Barrett's preliminary $30.7 million valuation. Decision, p. 111. In light of the massive gulf between the valuations of the 49ers' appraiser (Erickson) and the Trust's appraiser (Barrett), the Trust had every right to take the testimony of the third "neutral" appraiser regarding how he reached the same figure as Erickson and whether that figure was the result of some corruption in the appraisal process.

That is especially so given that there was compelling evidence indicating that Phillips' $18.5 million valuation and draft "report" were the products of impropriety. Phillips' figure was apparently the result of a ***two-minute*** conversation he had with only Erickson, during which – at least according to Erickson – he and Phillips "negotiated an agreed upon 18.5" million dollar valuation for the Trust's interest. (Ex. 11, p. 3041:14-15.) In Erickson's words: "We first started out by saying what we thought was the most reasonable answer, because valuation is always in a range. I suggested 18. And a very small change, he suggested he could live with 18.5, but that's certainly within my range." (Ex. 11, p. 3160:17-3161:8.) According to Erickson's recounting of the conversation, Phillips never told Erickson "what his independent opinion was." (Ex. 11, p. 3163:11.)

Of course, the only evidence of what took place during that conversation was the testimony of Erickson – a convicted insider-trader and the 49ers' appraiser. To this day, it remains unknown whether Phillips would have supported the 49ers, as Mr. Moyer blindly assumed. Mr. Moyer prevented the Trust from subpoenaing Phillips, thereby depriving the Trust of the ability to prove an essential component of its case, as well as rebut Erickson's testimony regarding what happened during that critical conversation.

What is more, based on the scant evidence provided it appears that the only reason why Phillips released any "report" referencing his purported valuation – which report Mr. Moyer relied on in averaging the three valuation figures – was because *the 49ers threatened to sue Phillips' appraisal firm if he did not.* (Ex. 103.) Phillips' firm caved to the 49ers' threat and issued a cursory four-page letter containing his $18.5 million valuation. (Exs. 104, 105.) The letter was in no way final and made clear that it was subject to revision "if additional material information related to the above noted concerns [regarding various aspects affecting the Trust's interest] becomes available and such information would impact the Fair Market value of the Minority Interest, we reserve the right to revisit our opinion." (Ex. 107, p. 4.)

Again, the Trust had no opportunity to question Phillips regarding the content of his "letter report" or the circumstances of its issuance because Mr. Moyer denied the Trust's request to subpoena him. As a result, the 49ers were able to present Phillips' letter as evidence of his valuation opinion *without* any rebuttal testimony from the Trust.

In addition, the Decision itself demonstrates that a neutral arbitrator not affiliated with the NFL "might well have made a different award had the evidence been allowed." *Hall* at 438-39. Phillips' purported $18.5 million valuation – as well as the phone conversation between Phillips and Erickson from which that figure came – were essential building blocks of Mr. Moyer's Decision.

More specifically, Mr. Moyer relied on Erickson's unrebutted testimony that Erickson and Phillips' valuations "virtually mirror[ed] each other" as the basis for his conclusion that the $18.5 million figure "passed a 'sanity test' with flying colors." Decision, p. 103. He relied on that same evidence in rejecting the Trust's expert Galatioto's opinion that the $18.5 million figure did not pass the "sanity test." *Id.*, p. 102. Mr. Moyer further affirmed that "Erickson's and Phillips's subsequent

agreement on an $18.5 million value for the Trust interest" fully complied with the appraisal provision in the Partnership Agreement. *Id.*, p. 105. By depriving the Trust of the opportunity to discover Phillips' testimony, Mr. Moyer refused to hear material evidence that "might well have made" a difference with respect to these (and other) vitally important credibility determinations and legal conclusions.

In fact, Mr. Moyer's commentary on the state of the Trust's evidence further demonstrates the materiality of Phillips' testimony and the prejudice suffered by the Trust in its absence. Mr. Moyer repeatedly criticized the Trust's evidentiary showing on issues as to which Phillips was a vital witness. Mr. Moyer asserted there was "no evidence that [Erickson and Phillips' valuations] were not derived independently." Decision, p. 103. He declared that "[t]here has been no showing that [Erickson and Phillips' valuations] were tainted by impropriety on anyone's part...." *Id.* He commented that, "[b]eyond the occasional suggestion or innuendo to the contrary, the record is devoid of any evidence of impropriety on the part of Jeffrey Phillips, the third appraiser." *Id.*, p. 76. And Mr. Moyer ultimately concluded that "[t]he Trust has not established the illegitimacy of the discounts Phillips and Erickson imposed, nor of the value figure on which they ultimately agreed." *Id.*, p. 103.

Yet Mr. Moyer made no mention of the fact that he had prevented the Trust from obtaining evidence from Phillips relevant to these issues – the very same evidence that he complained was not in the record. In the four years and two months that elapsed between his order denying the Trust's request to subpoena Phillips and the issuance of the Decision, Mr. Moyer apparently forgot that *he himself* was largely responsible for the purported deficiencies in the Trust's evidentiary showing. The failure of his memory in that respect was undoubtedly aided by Mr. Moyer's zeal to hammer the final nails into the Trust's coffin.

For this reason too, the Decision must be vacated.

V. CONCLUSION

For all the foregoing reasons, the Trust respectfully requests that the Court vacate the Decision.

Dated: September 11, 2018

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP
ROBERT R. MOORE
MICHAEL J. BETZ
ALEXANDER J. DOHERTY
TREY MARSHALL

By: Robt R. Moore
ROBERT R. MOORE
Attorneys for Petitioner The Franklin Mieuli Trust