

**IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY**

**COMMODORE TRUST and
DAVID FREEMAN,**)
)
)
Plaintiffs,)
)
VS.)
)
PREDATORS HOLDINGS, LLC, and)
THOMAS CIGARRAN,)
)
Defendants.)

NO. 16-674-BC

2016 JUL 29 PM 3:00
LEONARD H. HENDERSON
DAVIDSON CO. CHANCERY CT
D.C.&M.

FILED

**MEMORANDUM AND ORDER DISMISSING PLAINTIFFS' PETITION
FOR STAY OF ARBITRATION, AND GRANTING MOTIONS OF
DEFENDANTS AND INTERVENOR NHL TO COMPEL ARBITRATION**

The Plaintiffs' claims filed in this lawsuit to recover \$250 million from the owner of the Nashville Hockey Club must be sent to the National Hockey League ("NHL") Commissioner for arbitration. This is required even though the Plaintiffs' holdings in the Nashville Hockey Club are indirectly through other entities, and the Plaintiffs are one and two steps down the ownership chain of the Member Club. The scope of the NHL Consent agreement the Plaintiffs signed when they acquired their interest in the Nashville Hockey Club and the NHL Constitution is unambiguous. The wording of those documents compels arbitration of disputes concerning even indirect holdings. The wording is required by federal law to be enforced by this Court.

It is therefore ORDERED that the Plaintiff's Petition to Stay Arbitration and for a Temporary Injunction is denied, and the motions of the Defendants and Intervenor NHL to compel arbitration and stay this litigation are granted.

The provisions which determine this outcome are Sections 3(a)(i) and 12(b) of the December 7, 2007 Consent Agreement signed by the Plaintiffs, and Articles 3.5, 6.3(b)(1) and (5) of the NHL Constitution.

Consent Agreement

The NHL is an exclusive professional sports league. Entry into the League is selective. The Club Member teams are limited in number, presently, to 30. The League is highly regulated and restricted by the NHL Commissioner who derives his authority from the NHL Constitution. A Member Club holds an NHL franchise which, in this case, is known as the Nashville Predators.

To acquire an interest in an NHL Member Club franchise, the NHL requires holders in the ownership chain to sign a "Consent Agreement." Assenting to the terms of the Consent Agreement is a condition to acquire an exclusive NHL franchise.

In this case it is undisputed that the Plaintiffs, on December 7, 2007, signed the NHL Consent Agreement. The Court has been provided the undisputed facts of this chain of ownership:

- Listed in Article 3.1 of the NHL Constitution as Member #18, is “Nashville Hockey Club Limited Partnership.” 100% of that partnership is held by Defendant Predators Holdings, LLC.
- The next link is that one of the Defendant LLC’s members is Plaintiff Commodore Trust.
- The next link is that a beneficial interest in Commodore Trust is held by Plaintiff Freeman.

Above the Plaintiffs’ signatures on the December 7, 2007 Consent Agreement is the statement, “IN WITNESS WHEREOF, the parties have executed and delivered this Consent Agreement as of the date first written above [emphasis added].” Preceding the signatures are text. Pertinent to this case is the text contained within Section 3(a)(i) and Section 12(b).

Section 3(a)(i) states that the parties agree to be bound by the NHL Constitution.

Section 12(b) provides that

[REDACTED] Article 6.3 of the NHL Constitution, analyzed in detail below, provides for the exclusive arbitration jurisdiction of the NHL Commissioner. Accordingly, by their signatures to the Consent Agreement, the Plaintiffs agreed to these provisions.

With respect to the reference in Section 12(b) of the Consent Agreement to the “subject matter hereof,” the Plaintiffs have argued that “submit matter hereof” limits the requirement to arbitrate to the “hereof,” i.e. the specific transaction which prompted signing of the Consent Agreement: the December 7, 2007 acquisition by the Plaintiffs and Defendants of the Nashville Hockey Club. A broader scope is placed on the term “subject matter hereof” by the Defendants and the NHL from textual analysis of other passages of the Consent Agreement. It is their position that the rights, obligations and duties in the Consent Agreement, including submission to NHL arbitration, are not limited to the 2007 acquisition but constitute ongoing terms of Member Club ownership.


As identified in the brief of the NHL, provisions regarding:

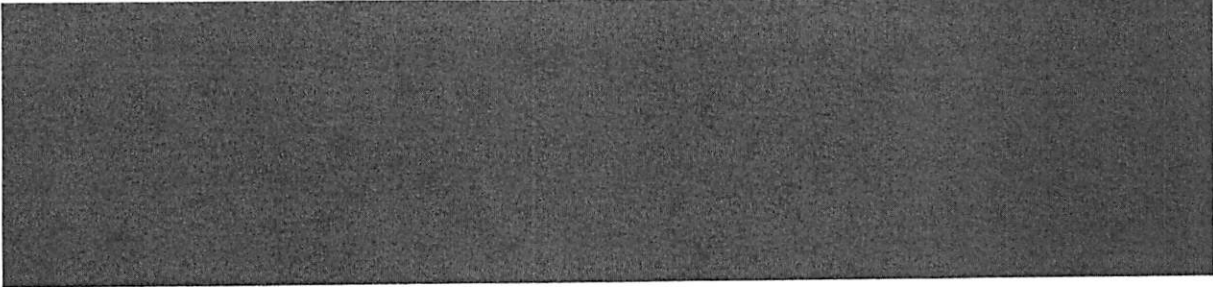
[REDACTED]

[REDACTED] pertain to and express the intent to apply to future events and aspects of the Club’s operation well beyond the transfer transaction of ownership in 2007.

Additionally indicative of the ongoing application of the Consent Agreement to the parties in this case is that under Section 3(a)(i), as well as agreeing to be bound by the NHL Constitution, the Plaintiffs agreed to be bound by

[REDACTED]

(emphasis added). There is also section 4(c) of the Consent Agreement 



From these passages, the Court adopts the textual analysis of the Defendants and the NHL that the Consent Agreement covers ongoing operations of the Club in numerous respects and, in turn, Plaintiffs' present claims in this lawsuit fall within the "subject matter hereof" of the Consent Agreement. The Plaintiffs, then, agreed in the Consent Agreement to be bound by the NHL Constitution's arbitration provision, not only with respect to the December 2007 acquisition of the Club, but as to matters arising in the future, such as the claims in this lawsuit.

The significance, as a matter of law, of the Plaintiffs' signatures on a Consent Agreement wherein they agree to be bound by the NHL Constitution and its arbitration provisions, is that these consents establish the essential element of agreement to arbitration. Quoting from Plaintiffs' brief, the law is that parties cannot be forced to arbitrate claims they did not agree to arbitrate. *Frizzell Constr. Co., Inc. v. Gatlinburg, LLC*, 9 S.W.3d 79, 83 (1999). "Arbitration is a consensual proceeding in which the parties select decision-makers of their own choice and then voluntarily submit their disagreement to those decision-makers

for resolution in lieu of adjudicating the dispute in court.” *Merrimack Mut. Fire Ins. Co. v. Batts*, 59 S.W.3d 142, 149 (Tenn. Ct. App. 2001).

The Plaintiffs’ signing of the Consent Agreement, the Court finds, establishes the essential element of an agreement to be bound by the NHL Constitution and its arbitration provisions.

NHL Constitution

Article 6.3(b)(1)

Having concluded the Plaintiffs agreed to submit to the arbitration provisions of the NHL Constitution, the Court’s next step of analysis is to determine if the claims made in this lawsuit fit within the arbitration criteria found in the NHL Constitution.

The specific Article on arbitration in the NHL Constitution is Article 6.3(b). It has 5 subparts. Two of those—6.3(b)(1) and (b)(5)—are pertinent to this case.

For context, Article 6.3(b) on arbitration is found in that part of the NHL Constitution entitled “Article VI Commissioner” because arbitration is one of the powers and duties of the NHL Commissioner. This is seen from an overview of Article VI which begins at 6.1 with “Office of Commissioner, Election and Term of Office.” Part of the text there is that the Commissioner serves as the Chief Executive Officer of the League and is charged with “protecting the integrity of the game of professional hockey and preserving public confidence in the League.” It is, then, within this context that the Commissioner, at 6.3(b), “Power and

Duties,” is granted full, exclusive jurisdiction and authority to arbitrate and resolve certain disputes including at (b)(1):

any dispute that involves two or more Member Clubs of the League or two of more holders of an ownership interest in a Member Club of the League [emphasis added].

Breaking down 6.3(b)(1) and applying this text to facts in this lawsuit, there is no dispute that the first group 6.3(b)(1) refers to: “two or more Member Clubs of the League,” is not involved in the lawsuit. That is because, of the “Members Clubs” listed in Article 3.1 of the Constitution, including Member #18 listed there as the “Nashville Hockey Club Limited Partnership,” there is no other Member Club involved in this lawsuit. Thus, the group referred to in the first clause of Article 3.1 is not pertinent.

It is the next group: “two or more holders of an ownership interest in a Member Club of the League,” found in the second clause of 6.3(b)(1), that the Court concludes applies to this case.

The key to this second clause is the meaning of “holders of an ownership interest.” The NHL Constitution does not begin, as some documents do, with a listing of definitions used in the text. Article I of the Constitution is the “Name”; Article II is “Purposes and Objects”; and Article III is “Membership.” Yet, as just noted, within Article III, 3.1 provides the meaning of “Member” used in the first clause of the 6.3(b)(1) arbitration powers of the Commissioner. Thus, as Article III provided the meaning for “Member” in the first clause of 6.3(b)(1) so, the Court concludes, Article III also provides the meaning for the NHL

Commissioner's arbitration jurisdiction with respect to the second clause of section 6.3(b)(1):
"of two or more holders of an ownership interest in a Member Club of the League."

In addition to 3.1, Article III "Membership," has 11 other parts. These parts cover all aspects of membership such as eligibility, admission of new members, transfers of membership, ownerships interests, voluntary withdrawal, capital contributions, involuntary termination, and dissolution.

At 3.5 of Article III this text appears:

3.5 *Transfer of Membership or Ownership Interest in a Member Club.* No membership or ownership interest in a Member Club may be sold, assigned or otherwise transferred except (a) with the consent of three-fourths of the members of the League, and (b) upon the condition that the transferee will at all times be bound by and comply with the terms, provisions and conditions of this Constitution, and (c) upon the further condition that the transferee shall assume or guarantee all debts, liabilities and obligations of the transferor member existing at the date of transfer. Application for the sale, transfer or assignment of a membership or ownership interest must be made in writing to the Commissioner.

* * *

"Ownership interest" in a Member Club as used above shall include any stock, partnership (general or limited) or other proprietary holding in any corporation, company, association, partnership, or other organization which holds, directly or indirectly, the franchise of Member Club.

Taking this definition of “ownership interest” and applying it to the claims in this lawsuit, the Court has been provided, as noted above, the undisputed facts of this chain of ownership:

- Listed in Article 3.1 of the NHL Constitution as Member #18, is “Nashville Hockey Club Limited Partnership.” 100% of that partnership is held by Defendant Predators Holdings, LLC.
- The next link is that one of the Defendant LLC’s members is Plaintiff Commodore Trust.
- The next link is that a beneficial interest in Commodore Trust is held by Plaintiff Freeman.

Comparing this ownership chain to use of the words “any,” “other proprietary holding” and “indirectly” in Article 3.5, the Court concludes that “ownership interest” includes the Plaintiffs and Defendants within its scope because the above ownership chain shows that the Plaintiffs indirectly hold a proprietary interest in the Member Club. In so concluding, the Court adopts the theory and legal authorities cited by NHL’s Counsel that even though Plaintiff Commodore Trust is merely a member of Defendant Predators Holdings, LLC and, therefore, under Del. Code Ann. tit 6, § 18-701 (West 2011), “a member has no interest in specific limited liability company property,” nevertheless as the equivalent of a shareholder, an LLC member owns an indirect interest in the assets of the LLC. *See In re Opus E., L.L.C.*, 480 B.R. 561, 570 n.4 (Bankr. D. Del. 2012). Similarly, in situations in which a shareholder owns the stock of a parent of a subsidiary, courts commonly refer to the shareholder as being an indirect owner of the subsidiary. *See, e.g. United States v. Rigas, F.*

Supp. 2d 299, 302 (S.D. N.Y. 2003) (holding company was indirect owner of the assets of its subsidiaries). The Court also adopts the NHL's reasoning and authorities at page 22 of its July 8, 2016 *Memorandum* that Plaintiff Freeman's equitable title, as a beneficial interest holder in Commodore Trust, is the equivalent of equitable ownership.

The Court, therefore, concludes that the Plaintiffs' indirect holdings in the Member Club fit the definition of "ownership interest" in Section 3.5 which is subsequently the term used in the second clause of 6.3(b)(1) to identify the persons and entities subject to arbitration by the NHL Commissioner.

In opposition, the Plaintiffs argue that such a broad construction of 6.3(b)(1), to include indirect holders and "any" dispute, could lead to absurd results of the Commissioner deciding matters tangential to the Hockey League. That, however, is not a concern in this case. The Plaintiffs' claims in this lawsuit are not tangential to the NHL. The Plaintiffs seek to recover \$250 million for the Defendants' alleged withholding and repudiation of fees allegedly promised by the Defendants to the Plaintiffs for funding they provided to keep the Predators in Nashville. These claims relate to the NHL. There is no absurd exercise of arbitration jurisdiction by the NHL Commissioner.

Plaintiffs' additional objection relates to the text above of the term "as used above"—a modifier linked with the definition of "Ownership interest" in Article 3.5:

"Ownership interest" in a Member Club as used above shall include any stock, partnership (general or limited) or other proprietary holding in any corporation, company, association, partnership, or other organization which holds, directly or indirectly, the franchise of Member Club [emphasis added].

Plaintiffs' construction is that "as used above" has the effect of limiting Article 3.5's definition of "ownership interest" to Article 3.5. If that construction prevails, Article 6.3(b)(1), on claims referred to NHL arbitration, does not include the broad definition of "ownership interest" that extends to Plaintiffs' indirect ownership claims in this lawsuit.

After reviewing the entire NHL Constitution to understand the mechanics of Article 3.5 and the term "ownership interest" throughout the document, the Court concludes the definition of "ownership interest" is not limited to Article 3.5 and does apply to Article 6.3(b)(1). This conclusion is based upon these findings.

- "As used above" is not a phrase whose sole or customary meaning is limiting. The phrase can also be used to clarify and explain, as in the usage, the Court finds, in the NHL Constitution. In this document in Article 3.5, the phrase is merely clarifying and explanatory.
- In another instance when the drafters sought to be limiting, the drafters were and knew how to be explicit: "13.2. Definitions. For purpose of this Article 13 the following capitalized terms shall have the following meanings."
- As already noted above in connection with Article 3.1, Article III is designated as containing provisions on "Membership." It is, then, logical and consistent that terms defined in that section would be imported into and used in Article 6.3(b)(1) when there are references in 6.3(b)(1) to "membership."

Based upon the foregoing analysis, the Court concludes that Article 6.3(b)(1) covers the claims in this lawsuit, and the NHL Constitution requires arbitration of those claims.

Article 6.3(b)(5)

In addition to Article 6.3(b)(1) of the NHL Constitution, in that same Article, 6.3(b)(5) compels arbitration. This provision vests the NHL Commissioner with the exclusive jurisdiction to arbitrate "any dispute involving a Member Club . . . that in the opinion of the Commissioner is detrimental to the best interests of the League."

The dispute the Plaintiffs plead in their Complaint fits the criterion of Article 6.3(b)(5) of: (1) any dispute involving a Member Club (2) that . . . is detrimental to the best interest of the League. Having sued the LLC owner of an NHL Member Club and the Chairman of the LLC to recover \$250 million, Plaintiffs' claims in this lawsuit constitute "any dispute involving a Member Club." Further, that the dispute seeks a large recovery fits the second aspect of the criterion that: the dispute "in the opinion of the Commissioner is detrimental to the best interests of the League." This second aspect is also presented by the nature of the dispute. The Plaintiffs' claims, that the Defendant LLC owner of the Member Club and its Chairman have breached duties and contracts and have committed torts against holders in the Club ownership chain, who negotiated and helped to finance the Club staying in Nashville, is detrimental to the League. Lastly, the significance of Plaintiffs' claims in this lawsuit, both in terms of alleged wrongful conduct by the owner of a Club Member and the dollar amount of the recovery sought, link back to the Commissioner's duty in Article 6.1 to preserve public confidence in the League.

Thus, based upon the plain text of Article 6.3(5), as applied to the allegations of the Complaint, the Court concludes that the claims in this lawsuit come within the exclusive arbitration jurisdiction of the Commissioner.

Court's Authority to Construe NHL Consent Agreement and NHL Constitution

Ordinarily under the NHL Constitution, it is the Commissioner who interprets NHL rules. In this case, however, it was necessary for the Court to construe the NHL Consent Agreement and NHL Constitution to decide if those documents required "arbitrability," i.e. that the claims made in this lawsuit had to be sent to NHL arbitration because the parties agreed to that.

The position of the Defendants and the Intervenor NHL is that even the threshold issue of arbitrability is reserved for the NHL Commissioner.

The Defendants and Intervenor NHL cite to text, taken as a whole, found in Articles 6.3(b) and (d) of the NHL Constitution and Sections 3(a)(i) and 12(b) of the Consent Agreement. The Court's reading of these provisions differs from the Defendants and Intervenor in that the Court finds that while the sections do provide the Commissioner with a broad scope and range of powers, the authority to decide arbitrability is not specifically stated.

The standard the Court was provided by Plaintiffs' Counsel, is that "[u]nless the parties clearly and unmistakably provide otherwise, the question of whether the parties

agreed to arbitrate is to be decided by the court, not the arbitrator." *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986).

The Court is not able to conclude from the totality of the text cited by Counsel for the Defendants and Intervenor NHL that it is "clear and unmistakable" that the parties ceded to the Commissioner the decision of arbitrability. For this reason the Court has concluded that it has the authority to proceed, as it did above, to construe the Consent Agreement and NHL Constitution to decide the threshold question of arbitrability.

Waiver

[REDACTED]

[REDACTED]

[REDACTED] These facts, the Court finds, constitute waiver. The Plaintiffs have waived challenging the enforceability of the arbitration agreement with respect to the claims made in this lawsuit.

In so finding, the Court concludes as a matter of law, from the authorities cited by the Defendants and the NHL, that they do not have to demonstrate they are actually prejudiced

or that they detrimentally relied upon Plaintiffs' initial submission to arbitration to establish a waiver by the Plaintiffs. The bar is not that high according to the authorities cited by the Defendants and Intervenor. *See, e.g. AFG Indus., Inc. v. United Steelworkers of Am.*, No. 2:05-CV-221, 2007 WL 1138460, at *5 (E.D. Tenn. Apr. 16, 2007); *Opals on Ice Lingerie, Designs by Bernadette, Inc. v. Body Lines, Inc.*, 320 F.3d 362, 368 (2d Cir. 2003); *ConnTech Dev. Co. v. Univ. of Conn. Educ. Props. Inc.*, 102 F.3d 677, 685 (2d Cir. 1996); *United Indus. Workers v. Gov't of Virgin Islands*, 987 F.2d 162, 168 (3d Cir. 1993).

Thus, in addition to the grounds above for sending this case to arbitration, waiver is also a ground.

NHL Institutional Bias

The Plaintiffs assert that NHL arbitration lacks the neutrality of a court and a trial by jury requested in the Plaintiffs' Complaint in this case. In paragraph 24 of the *Petitioners' Verified Petition To Stay Arbitration Proceeding And Application For Temporary Restraining Order And Temporary Injunction*, the Plaintiffs argue that arbitration should be stayed because of the NHL Commissioner's inherent conflict of interest and institutional partiality:

24. Furthermore, Article 6.3(b) of the NHL Constitution and Section 12(b) of the Consent Agreement are ambiguous, and strong public policy weighs against resolving that ambiguity to require Petitioners to submit their claims to arbitration by the NHL Commissioner because the Commissioner has an inherent conflict of interest that prevents him from adjudicating Petitioners' claims in an impartial manner. Resolving a dispute between the owner of an

NHL club and that owner's own owners necessarily raises the possibility of a ruling adverse to the owner and, if the financial impact of that ruling is large, devastating to the club. Yet the Commissioner works for and is paid by NHL club owners and is required to act in the best interest of and protect those club owners. Thus, the Commissioner's obligation to protect NHL club owners creates an inherent conflict of interest that prevents him from acting impartially or even with the appearance of impartiality in any dispute between a club owner and its own owners. For the same reason, even if Article 6.3(b) of the NHL Constitution and Section 12(b) of the Consent Agreement were ambiguous, they would be unconscionable and therefore unenforceable on that ground.

The Plaintiffs further argue that this institutional bias is a conflict that preempts the case being sent to NHL arbitration:

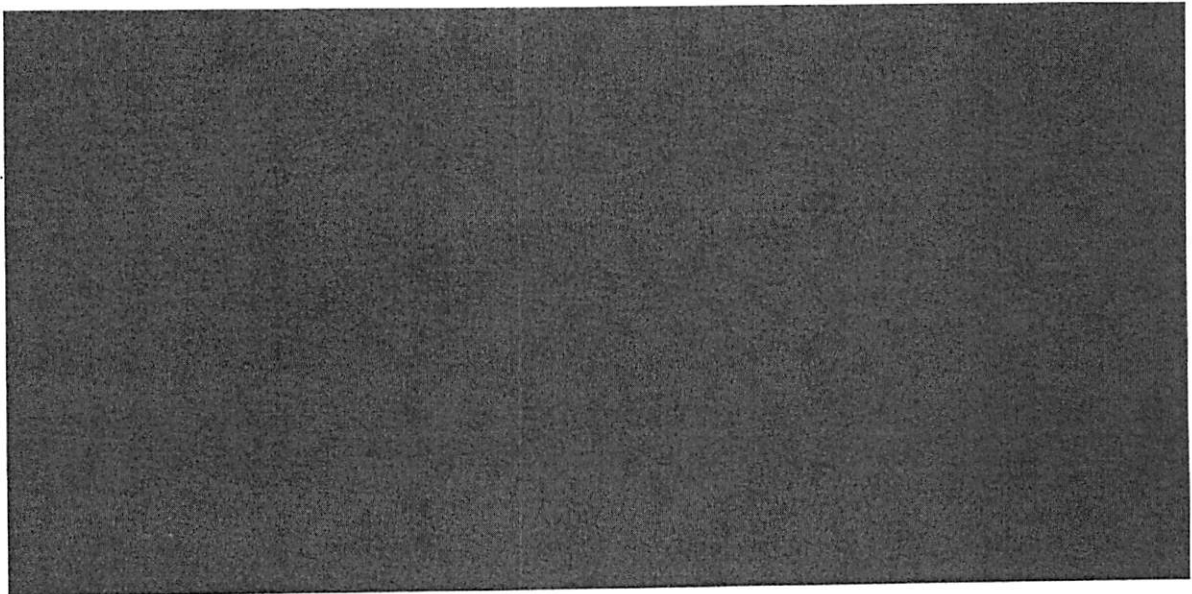
[T]he NHL Commissioner's institutional bias is ripe for consideration because it is relevant to determining the drafters' intent with respect to the arbitration provision in Section 6.3(b) of the NHL Constitution and the parties' intent with respect to Section 12(b) of the Consent Agreement. In either case, because the NHL Commissioner would be inherently conflicted and incapable of remaining neutral in a dispute of this sort, it is not reasonable to conclude from those texts that the NHL Constitution's drafters and the Consent Agreement's parties intended to submit to arbitration claims of this sort to his exclusive review.

* * *

Given this inherent bias of his position, and absent any clear contractual agreement to the contrary, it would be unreasonable to conclude that, by signing the Consent Agreement and agreeing to uphold the NHL Constitution, Commodore and Freeman understood and intended to be forced into exclusive arbitration with the NHL Commissioner in these circumstances.

Petitioners' Opposition To Respondents' Motion To Compel Arbitration, p. 10 (July 11, 2016).

The NHL Intervenor disputes Plaintiffs' claims of bias with facts of past arbitrations between the parties where the Commissioner ruled in favor of the Plaintiffs:



Under federal law a remedy is provided to the Plaintiffs for their claim of institutional bias. That remedy, though, is not deciding the bias claim as a preliminary matter on facts pertinent to conflict of interest, as is done by courts on issues of recusal. The remedy the federal law provides is upon the completion of the arbitration.

After the arbitration is concluded a party may file an application with a United States District Court Judge to vacate an arbitration award upon these grounds:

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence

pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(1)(a)(1)-(4) (West 2016).

Waiting until conclusion of the arbitration to process claims of bias is consistent with the consensual nature of arbitration. In this case the parties had notice from the text of the Consent Agreement and the NHL Constitution that in exercising his arbitration power the Commissioner is also charged with considering what is best for the League and that the Commissioner is paid by the NHL Club Owners. With that informed and knowledgeable consent to arbitration, Plaintiffs' remedy for bias under the federal law is not processed until the conclusion of the arbitration. Accordingly, institutional bias of the NHL Commissioner is not a basis by law to keep this case in court.

This completes the reasoning and analysis for ordering this case to arbitration by the NHL Commissioner.

There remain two additional matters for the Court to address.

Seal


The Court concludes that the documents filed to date under seal satisfy the criteria of Tennessee law to remain under seal: (1) the litigation involves private litigants; (2) the disclosure would reveal private, proprietary information; and (3) the disclosure is not

necessary to communicating on the public record the outcome and the reason for that outcome. *See Ballard v. Herzke*, 924 S.W.2d 652, 658-59 (Tenn. 1996). It is ORDERED that these documents shall remain under seal.

It is further ORDERED that no later than 2:00 p.m. today, all Counsel shall file under seal a Notice with the Court identifying portions of this *Memorandum and Order* which Counsel assert contain information that is under seal and should be redacted. After making the redactions identified in the Notices, the Court will unseal this *Memorandum and Order* for public view.

Temporary Restraining Order

The Temporary Restraining Order entered June 27, 2016, is no longer in effect. Within 15 days of its issuance, the Temporary Restraining Order dissolved pursuant to Tennessee Civil Procedure Rule 65. However, by agreement of Counsel for the NHL, the arbitration proceedings have been voluntarily held in abeyance during the pendency of the motions decided herein, and that agreement to hold arbitration in abeyance shall remain in place until a notice to the contrary is filed in this Court by the NHL.



ELLEN HOBBS LYLE
CHANCELLOR
TENNESSEE BUSINESS COURT
PILOT PROJECT

cc: Edward Yarbrough
J. Alex Little
Paul G. Jennings
Steven Riley
George H. Cate, III
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MAILED *faxed*
7-29-16