To Be Argued By:
ROBERT S. SMITH

New York County Clerk's Index No. 652044/14

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

TCR SPORTS BROADCASTING HOLDING, LLP,

Petitioner-Appellant-Cross-Respondent-Respondent,

—against—

WN PARTNER, LLC; NINE SPORTS HOLDING, LLC;
WASHINGTON NATIONALS BASEBALL CLUB, LLC,

Respondents-Respondents-Cross-Appellants-Appellants,

THE OFFICE OF COMMISSIONER OF BASEBALL; and
THE COMMISSIONER OF MAJOR LEAGUE BASEBALL,

Respondents-Respondents-Cross-Appellants,

—and—

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

Nominal Respondents-Appellants-Cross-Respondents-Respondents.

BRIEF FOR *AMICUS CURIAE* ROBERT S. SMITH

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PRELIMINARY STATEMENT

At issue in this case are two arbitrations, one already completed, the other contemplated as a result of Supreme Court's order vacating the result of the first. During the course of the first arbitration, the arbitral forum, Major League Baseball (MLB), acquired a $25 million stake in the potential recovery of one of the parties, the Washington Nationals Baseball Club, LLC (the Nationals). After the first arbitration, the Commissioner of MLB made several statements about the case, including an affirmation agreeing with the Nationals' view, and disagreeing with that of the Baltimore Orioles Baseball Club (the Orioles) and Mid-Atlantic Sports Network (MASN), on the central issue in dispute.

Robert S. Smith, as *amicus curiae*, respectfully submits that MLB's stake in the first arbitration rendered that arbitration fundamentally unfair, and that, if the second arbitration is conducted by MLB, the Commissioner's open espousal of one party's position and MLB's financial stake will render that arbitration fundamentally unfair as well.

INTEREST OF *AMICUS CURIAE*

Amicus curiae Robert S. Smith is a practitioner and former judge with long experience in, and deep concern for, the dispute resolution process before both courts and arbitral tribunals. As a litigation lawyer at the firm of Paul, Weiss, Rifkind, Wharton & Garrison LLP from 1968 until 2003, he was involved in many

litigations and arbitrations, often large and complex. He also served as an arbitrator, and as a referee appointed by the New York State Commission on Judicial Conduct. As an Associate Judge of the Court of Appeals from 2004 to 2014, he is the author of more than 200 judicial opinions, including several involving disputes subject, or arguably subject, to arbitration. *See Matter of New York State Office of Children & Family Servs. v. Lanterman*, 14 N.Y.3d 275, 283 (2010); *Matter of Schreiber v. K-Sea Transp. Corp.*, 9 N.Y.3d 331, 334 (2007); *Patrolmen's Benevolent Ass'n of City of N.Y., Inc. v. N.Y. State Pub. Empl. Relations Bd.*, 6 N.Y.3d 563, 570 (2006); *In re Buffalo Police Benevolent Ass'n (City of Buffalo)*, 4 N.Y.3d 660, 664 (2005). Since leaving the bench and resuming private practice with the firm of Friedman Kaplan Seiler & Adelman LLP in 2015, he has continued a general trial and appellate practice, but also has a significant practice in alternative dispute resolution (ADR): he has been selected as a mediator or arbitrator in five matters, and has been retained as counsel or as an expert witness in several other matters subject to ADR.

Mr. Smith is concerned that certain of the positions urged by several parties and other *amici* in this case would tend, if accepted by this Court, to erode the overriding principle that no party's cause should be decided by a tribunal – whether arbitral or judicial – in which there cannot be a fundamentally fair

proceeding and resolution. To the extent that the principle of fundamental fairness is attenuated or abandoned, public confidence in courts and arbitrators will suffer.

The fee of the Friedman Kaplan law firm for the preparation of this brief will be paid by MASN. The brief has been prepared entirely by Mr. Smith with the help of his colleagues at Friedman Kaplan, and reflects Mr. Smith's views.

QUESTIONS ADDRESSED IN THIS BRIEF

The Court already has many briefs before it, and we assume that it already knows the facts and the main issues in dispute. In the interests of brevity, we limit our discussion to four questions, all of which relate to the issue of fundamental fairness. Those questions are:

1. Is there a requirement of fundamental fairness in arbitrations conducted pursuant to the Federal Arbitration Act (FAA)? We argue that there is.
2. Did the financial interest of MLB in the outcome of the first arbitration render that arbitration fundamentally unfair? We argue that it did.
3. If a second arbitration is conducted under MLB's auspices, will that proceeding be fundamentally unfair because (1) the Commissioner of Baseball has openly expressed agreement

with the position of one side on a critical issue; and (2) MLB has a large financial stake in the outcome? We argue that such a new arbitration would be unfair for each of these reasons.

4. Must a court order arbitration before the forum chosen in the parties' agreement even where, because of the circumstances of the case, that forum cannot conduct a fundamentally fair proceeding? We argue that, in such a case, a court not only may, but must, reject the selected forum.

ARGUMENT

I. THERE IS A REQUIREMENT OF FUNDAMENTAL FAIRNESS IN FAA ARBITRATIONS

Astonishingly, the main brief of the Nationals asserts: "'Fundamental fairness' is *not* a necessity in arbitration." (Nationals' Br. at 36) Still more astonishingly, this assertion is echoed in the brief of a distinguished *amicus*, the Honorable E. Leo Milonas. (Milonas *Amicus* Br. at 7) We ask this Court to reject this proposition, which if adopted will surely undermine confidence in the arbitration process.

While it is true that the words "fundamental fairness" do not appear in the FAA, courts have repeatedly held that "fundamental fairness" is a prerequisite to a valid award. *See, e.g., Bowles Fin. Grp., Inc. v. Stifel, Nicolaus & Co.*, 22 F.3d 1010, 1012 (10th Cir 1994) ("Courts have created a basic requirement that an

arbitrator must grant the parties a fundamentally fair hearing"); *Bell Aerospace Co. Div. of Textron, Inc. v. Local 516, UAW*, 500 F.2d 921, 923 (2d Cir. 1974) ("[A]n arbitrator need not follow all the niceties observed by the federal courts. He need only grant the parties a fundamentally fair hearing."). Courts have vacated awards where fundamental fairness was lacking (*see, e.g.*, *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1997) (awards will not be overturned "except where fundamental fairness is violated"); *Home Indem. Co. v. Affiliated Food Distribs., Inc.*, No. 96 Civ. 9707 (RO), 1997 WL 773712 at *3 (S.D.N.Y. Dec. 12, 1997) ("the 'touchstone' for a finding of arbitral misconduct under the [FAA] is the concept of 'fundamental fairness'") (quoting *Compania Chilena de Navegacion Interoceanica, S.A. v. Norton, Lilly & Co.*, 652 F. Supp. 1512, 1515 (S.D.N.Y. 1987)); *see also Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n ex rel. Brady*, 820 F.3d 527, 545 (2d Cir. 2016) (award may be vacated for refusal to hear evidence "only if 'fundamental fairness is violated,'" quoting *Tempo*). In short, the principle that arbitration must be fundamentally fair is not only seemingly self-evident; it is generally accepted.

The Nationals and Mr. Milonas do not cite any case that would support a contrary view. The only authority they do cite on this issue is a dictum in an Eighth Circuit decision, *Nat'l Football League Players Ass'n ex rel. Peterson v. Nat'l Football League*, 831 F.3d 985, 998-99 (8th Cir. 2016). But neither the

Peterson dictum, fairly read, nor the case on which that dictum relies, *Hoffman v. Cargill Inc.*, 236 F.3d 458 (8th Cir. 2001), supports the broad proposition that in arbitrations under the FAA, no fundamental fairness requirement exists. The point of those cases is a narrower one: that where parties have chosen a forum, courts will generally not be open to an argument either that the inherent imperfections of that forum make it "fundamentally unfair" or that the tribunal reached a "fundamentally unfair" result. Even to that proposition, *Hoffman* adds the caveat that there might be a "'fundamental fairness' standard" that applies "to arbitration schemes so deeply flawed as to preclude the possibility of a fair outcome." *Id*. at 463. And the holding of *Peterson* is even more remote from the issues we are now addressing, because in that case the losing party identified no "structural unfairness," but merely attacked "the merits of the arbitrator's decision." *Peterson*, 831 F.3d at 999.

We do not question the principle that parties cannot complain, except on very rare occasions, that procedures they have agreed to are "fundamentally unfair." But it is a totally unacceptable leap from that principle to the idea that fundamental procedural fairness is not a necessity in arbitration. It is not claimed in this case that the parties challenging the arbitration award agreed to a procedure in which the features we discuss here are inherent. There is nothing inherent in the procedures of MLB's Revenue Sharing Definitions Committee (RSDC) that

permits or requires MLB to have a financial interest in a party's potential recovery, or that permits or requires the Commissioner of MLB to announce before an arbitration hearing is held that one party is right on a key issue and the other wrong.

II. MLB'S STAKE IN THE OUTCOME RENDERED THE FIRST ARBITRATION FUNDAMENTALLY UNFAIR

In his opinion at Supreme Court, Justice Marks accepted MLB's argument that the "procedural support" role of MLB's Commissioner and staff in the first arbitration (which included drafting the panel's opinion) was "generally akin to the support that a law clerk provides to a judge." (R. 107) The Orioles and MASN argue that this characterization understates MLB's role, but we accept it for purposes of this *amicus* brief. This case may thus be viewed as presenting the question: When is it acceptable for the arbitral counterpart of a judge's law clerk to have a significant financial stake in the outcome of an arbitration? We respectfully submit that the answer should be "Never." A proceeding in which a participant in the decision-making process has money riding on the outcome is, always and everywhere, fundamentally unfair.

During the course of the first arbitration, the arbitrators (the members of the RSDC) reached what Justice Marks describes as an "internal decision," and informed the parties about it. (R. 97) Before the internal decision was issued, however, there was a lengthy delay, during which the Nationals complained of

financial hardship, and MLB responded by loaning the Nationals $25 million, "repayable" (in Justice Marks's summary) "from the proceeds of the RSDC Award." (R. 109) Justice Marks found that this loan did not "raise any serious questions about the fairness of the arbitration process" (R. 111) because, in Justice Marks's view, it was a foregone conclusion when the loan was made that the award would be sufficient to repay it. Although revision of the internal award was possible, Justice Marks concluded that "[e]ven if the RSDC had suddenly decided to reduce the final amount of the award between the time of its internal decision and the date it issued the award, there is no reason to suppose that the award would be reduced to the point that the Nationals would be unable to repay MLB $25 million from the total amounts due to it over a five-year period." (R. 110-11)

The Orioles and MASN contend that this statement by the Court was mistaken, because the loan was repayable not from the "total amounts due" from MASN to the Nationals, but only from amounts due in addition to the amounts MASN was already paying voluntarily. Those additional amounts would be zero if the Orioles and MASN prevailed in the arbitration. We return to this question below (p. 15-16), but we put it aside for now; we assume that Justice Marks was correct about the *likelihood* that the final award would be adequate to protect MLB. We nevertheless submit that an analysis based on the mere likelihood that

the money the arbitrators' "law clerk" had invested would be safe is inconsistent with the parties' right to a fundamentally fair proceeding.

Motions for reargument may provide an analogy. Such motions are very rarely granted – probably less than 1% of the time. Suppose an ordinary case is decided, in which there is no reason to think reargument is at all likely. And suppose, before the time to move for reargument has expired, one of the Court's law secretaries loans a large sum to one of the parties, repayable if the judgment in that party's favor stands. It is absolutely unthinkable, we respectfully submit, that such behavior by a law clerk would be tolerated – much less that the law clerk could continue to work on the case, and assist in the issuance of an order denying reargument.

It is true that there is a difference between courts and arbitrators, and that the latter are subject to less stringent standards of impartiality. But a financial interest in the outcome, whether or not that interest is likely to be jeopardized, goes too far. There is no case cited by the parties, and we are aware of none, that condones the acquisition of such an interest by an arbitrator, arbitral tribunal or arbitrator's "law clerk." By contrast, many authorities hold, or take for granted, that such a financial interest is impermissible. *See Pitta v. Hotel Ass'n of N.Y.C., Inc.*, 806 F.2d 419, 423–24 (2d Cir. 1986) ("It is axiomatic that a neutral decision-maker may not decide disputes in which he or she has a personal stake."); *accord*

Scandinavian Reinsurance Co. v. St. Paul Fire & Marine Ins. Co., 668 F.3d 60, 74–76 (2d Cir. 2012) (quoting *Three S Del., Inc. v. DataQuick Info. Sys., Inc.*, 492 F.3d 520, 530 (4th Cir. 2007)) (finding no evident partiality because there was no indication that the arbitrators "had any special financial or professional interest in ruling in St. Paul's favor," but noting that one of the factors to consider when determining whether evident partiality exists is "the extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceedings"); *Trustmark Ins. Co. v. John Hancock Life Ins. Co. (U.S.A.)*, 631 F.3d 869, 872 (7th Cir. 2011) ("disinterested" means "lacking a financial or other personal stake in the outcome"); *see also Gibson v. Berryhill*, 411 U.S. 564, 578–79 (1973) (holding that inherent institutional bias prevents Board of Optometrists comprised of competing professionals from presiding over licensing hearing for others, because "[i]t is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes").

We ask the Court to adopt a simple rule: No participant in the decision-making process, including an institution providing an arbitral panel or functioning as a law clerk, may bet money on the outcome of an arbitration, even if the bet looks like a sure thing.

III. THE SECOND ARBITRATION WILL BE FUNDAMENTALLY UNFAIR IF CONDUCTED UNDER MLB'S AUSPICES

Justice Marks found that the first arbitration was fatally flawed by the participation of the Proskauer law firm as attorneys for the Nationals, at a time when Proskauer also represented MLB and the interests of the individual arbitrators. MLB argues that if that flaw is corrected, there can be no problem with holding a second arbitration under MLB's auspices: "given that the only even arguable problem was Proskauer's role, arbitration before the newly constituted RSDC without any involvement from Proskauer is the only remedy that could make any sense." (MLB Br. at 51) Of course, the premise that Proskauer's involvement was the only flaw is disputed. But even if the premise is correct, the logic is unsound. There will be two problems in the second arbitration that did not exist, or did not exist to the same degree, in the first arbitration. One problem is the Commissioner's espousal of a position on the merits; and the other is the severity of MLB's financial conflict.

A. The Commissioner Has Endorsed the Nationals' Position on the Merits of the Case

The parties' briefs discuss, and debate the significance of, various statements made by the Commissioner that are claimed to show that he has prejudged the outcome of a second arbitration. We find it necessary to discuss only one.

As the Court knows, at the heart of this case is language from a 2005 agreement, saying that the RSDC shall use its "established methodology for evaluating all other related party telecast agreements in the industry" in determining the payments made for the Nationals' television rights. The Orioles and MASN say that this language refers to what is known as the "Bortz Methodology" (Appellants' Br. at 25-27); the Nationals say it does not (Nationals' Br. at 11-12). After the conclusion of the first arbitration, the Commissioner submitted an affirmation in the present litigation in which he described a conversation between himself and an attorney representing the Orioles as follows:

> I also explained to Mr. Rifkin during the settlement negotiations, both orally and in writing, that his purported understanding of the March 28, 2005 Agreement, which Mr. Rifkin helped to draft, did not conform to the text. The relevant provision in the contract refers to "using the RSDC's established methodology for evaluating all other related party telecast agreements in the industry." The relevant contract provision makes no reference to any "Bortz Methodology," and certainly includes no reference to MASN maintaining a 20 percent operating margin, which is what MASN and the Orioles now claim the Bortz Methodology requires. As I have explained to Mr. Rifkin, if MASN maintaining a mandatory 20 percent operating margin had been intended by the parties, it would have been very easy to write those words into the contract.

(R.3181 at ¶ 40)

The above is nothing more nor less than an argument on the merits of the case. It is plain, we submit, that such an argument by the head of an arbitral forum – or the head of the organization that functions as the arbitrators' "law clerk" – must taint any future arbitration of the issue before that body. *See, e.g.*, *Matter of Excelsior 57th Corp. (Kern)*, 218 A.D.2d 528, 530 (1st Dep't 1995) ("the record contains three . . . affidavits [by the arbitrator] which evidence his bias and display facts which have the potential to impugn the integrity of the second arbitration"); *Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters*, 969 F.2d 1436, 1446 (3d Cir. 1992) (holding that "arbitrator was unacceptably predisposed towards" one party over the other based on conduct and statements made by the arbitrator during the arbitration proceedings); *see also Dealer Computer Servs., Inc. v. Michael Motor Co.*, 761 F. Supp. 2d 459, 465 (S.D. Tex. 2010), *vacated and remanded on other grounds*, 485 F. App'x 724 (5th Cir. 2012) (arbitrators' undisclosed participation in another arbitration involving the same contract and one of the parties "strongly suggest[s] that [the arbitrator] may have prejudged the liability and damages issues," because, *inter alia*, "[i]t would be unreasonable to expect an arbitrator who had already signed an eight-page opinion ruling for a party as to how a contractual provision should be interpreted to change her mind in a subsequent arbitration and rule against that party on the exact same contractual provision.").

Indeed, the discussion of the Commissioner's statement in the Nationals' brief is itself enough to make the impropriety clear. The brief says (at 47):

> While the Commissioner recounted that he had previously advised MASN that its proffered construction of the Agreement "did not conform to the text," R.3181, that observation was simply accurate as a matter of fact: the Agreement's language "makes no reference to any 'Bortz Methodology,'" nor does it make "reference to MASN maintaining a 20 percent operating margin." *Id*. In any event, the RSDC's award discussed at length why MASN's proposed "Bortz" methodology was not consistent with the RSDC's "established methodology" (the contractually agreed standard to be applied). *See* R.219-23; R.227.

The Nationals' argument may be paraphrased thus: "It does not matter that the Commissioner has announced, before the second arbitration begins, that we are right, because we *are* right." Perhaps they are, and perhaps they are not. But that is what the arbitration is supposed to decide. An arbitration cannot be fundamentally fair when the head of the arbitral forum has chosen sides before it begins.

B. MLB's Financial Conflict in the Second Arbitration Is an Insuperable Obstacle to a Fair Proceeding

As we explained above, Justice Marks decided that MLB's $25 million loan to the Nationals, repayable out of the proceeds of an arbitration award, did not taint the first arbitration because an award large enough to repay the loan

was a foregone conclusion when the loan was made. We have criticized this reasoning, but in any event it does not apply to the second arbitration. The arbitrators in the second proceeding will be, and should be, writing on a clean slate. The position of the Orioles, as we understand it, will be that the appropriate award, to the extent that the award can be a source of repayment to MLB, is zero. If the Orioles prevail in this view, MLB will be out $25 million. How then can MLB provide a fair forum for the second arbitration?

We have looked in the parties' briefs for an answer to this question. We have found none, except for the following two sentences from MLB's reply brief (at 28):

> Regardless, as the trial court found, the advance will be repaid irrespective of whether the RSDC awards the amount of telecast fees proposed by MASN or the Nationals. R.33–34. This is simple math—not even MASN and the Orioles are advocating for rights fees that would pay the Nationals less than $33 million per year for five years, more than enough to pay back a $25 million advance.

The position of the Orioles and MASN (Reply Br. at 55) is that these sentences are factually inaccurate. The $33 million figure referred to by MLB is taken from the rights fees calculated by the Orioles' and MASN's expert for the first arbitration (R. 1190), but, as we mentioned above (p. 8), those amounts were being paid voluntarily during the arbitration, and they have now been wholly paid. Acceptance of these figures would yield no additional payments, and MLB's loan

would not be paid back. The Orioles' and MASN's position on this factual issue seems to be supported by the record. (R. 2498 (email from MLB saying that payments would be from "additional MASN payments due to the issuance of an RSDC opinion"); R. 3651-52 (MLB's counsel acknowledges that "[i]f the award changed . . . Major League Baseball would have been out the money."))

We submit that it will be impossible for MLB to conduct a fundamentally fair proceeding while it has $25 million to lose from the result that the Orioles and MASN seek.

IV. A COURT NEED NOT, AND MAY NOT, ORDER ARBITRATION BEFORE A FORUM THAT CANNOT PROVIDE FUNDAMENTAL FAIRNESS

Justice Marks declined to direct that the second arbitration be referred to "a panel of neutral arbitrators" not under MLB's auspices, saying that "re-writing the parties' agreement is outside of [the Court's] authority" (R.42 n.21) (Justice Marks did not, however, as he pointed out in a later opinion, "require the parties to return to arbitration before the RSDC" (R. 121.28)). The Nationals also stress what they claim are the boundaries of the Court's authority. They appear to argue – though they do not say in so many words – that the Court has no choice but to order arbitration before the forum selected by the parties, even if that forum cannot provide a fair hearing. (Nationals' Br. at 49-51) Similarly, Mr. Milonas, as *amicus*, says that "section 10(b) of the FAA permits parties to seek disqualification of arbitrators but not the arbitral forum." (Milonas Amicus Br. at 10) Thus, the

Nationals and Mr. Milonas seem to imply, where the parties have contractually selected a forum, a court may not refuse to send a case to that forum, no matter how clear it is that the forum cannot be fair. Presumably, in their view, the only remedy for the unfairness is to challenge the award after it is rendered.

This theory, we respectfully submit, lacks merit. The idea that a court must – or even that it may – relegate the parties to a forum known to be unfair, leaving them to seek relief after the fact, is contrary to common sense, especially where, as here, one unfair hearing in that forum has already taken place. Taken literally, this theory could produce an endless loop – one unfair proceeding would result in an award that a court would vacate, and the court would then be forced to remand for another unfair proceeding, and so on until the parties tired of the exercise. We know of no authority supporting such an absurd result. "[I]n an appropriate case, the courts have inherent power to disqualify an arbitrator before an award has been rendered." *Matter of Astoria Med. Grp. (Health Ins. Plan of Greater N.Y.)*, 11 N.Y.2d 128, 132 (1962); *see also Metro. Prop. & Cas. Ins. Co. v. J.C. Penney Cas. Ins. Co.*, 780 F. Supp. 885, 894 (D. Conn. 1991) ("it simply does not follow that the policy objective of an expeditious and just arbitration with minimal judicial interference is furthered by categorically prohibiting a court from disqualifying an arbitrator prior to arbitration"). The same should be true of an arbitral forum. Cases in which an entire forum, and not just an arbitrator, is

irreparably tainted by unfairness are of course rare, but when such cases occur courts do not compel arbitration before that forum. *See Rabinowitz v. Olewski*, 100 A.D.2d 539, 540 (2d Dep't 1984) (disqualifying entire arbitration panel specified by parties' contract due to taint by the appearance of bias).

Most of Mr. Milonas's brief is consistent with a narrower, and more debatable, theory: that a court, having determined that the selected arbitral forum is incapable of providing a fair hearing, cannot direct the parties to an alternative forum, but must simply invalidate the arbitration clause. *See* Milonas Br. at 3, 9 (arguing that the FAA permits a court, in a proper case, to decline to enforce an arbitration agreement, or to strike an arbitration clause, but not to pick a different arbitral body). On that view, the Court here, if it agrees that a second arbitration under MLB auspices would be fundamentally unfair, must leave the parties without an arbitral remedy. We know of no controlling authority on this question, though the Second Department in *Rabinowitz* (not an FAA case) did do what Mr. Milonas says a court may not do: it replaced a tainted arbitral body with a substitute arbitrator. None of the cases relied on by Mr. Milonas are ones in which an arbitral body was found incapable of conducting a fair proceeding.

While Mr. Smith's position is that the Court may not order a second arbitration before the MLB, he takes no position on the issue of whether the Court may or should choose an alternative arbitral forum. We do, however, suggest that

the question may be analyzed as one of severability. Where the arbitral body chosen in the agreement is disqualified because it cannot provide a fair proceeding, the clause in the agreement selecting that forum is unenforceable. The question then becomes whether that part of the agreement is severable from the arbitration clause itself. Under the law of Maryland (the law chosen in the 2005 agreement (R.210)), contract provisions are severable if they are "not so interwoven with other provisions as to be logically inseparable." *Etokie v. Carmax Auto Superstores, Inc.*, 133 F. Supp. 2d 390, 394 (D. Md. 2000). Under New York law, severability here would depend on how the intent of the parties can be best effectuated – by ordering no arbitration at all, or by ordering arbitration before a different forum. *See, e.g., Brady v. Williams Capital Grp., L.P.*, 64 A.D.3d 127, 137 (1st Dep't 2009), *aff'd as modified,* 14 N.Y.3d 459 (2010) ("the appropriate remedy is to sever the improper provision of the arbitration agreement, rather than void the entire agreement and force Brady to pursue her claims in state or federal court"); *Matter of Wilson*, 50 N.Y.2d 59, 65 (1980) (under New York law, "whether the provisions of a contract are severable depends largely upon the intent of the parties as reflected in the language they employ and the particular circumstantial milieu in which the agreement came into being"). The 2005 agreement between the parties contains a severability clause. (R. 212)

The more critical point here, however, is the simpler one we made above: for a court to order arbitration before a tribunal known to be unfair is neither required nor permissible. If the Court concludes that it cannot choose an alternative arbitral forum, it should nullify the arbitration clause altogether.

CONCLUSION

Amicus respectfully requests the Court to decide the issues discussed in this brief in accordance with the views expressed above.

Dated: February 21, 2017

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