SUPREME COURT OF THE STATE OF NEW YORK
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 ALLAN H. "BUD" SELIG, AS 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.

Index No.
652044/2014

MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

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Respondents-Respondents-Cross-Appellants the Office of Commissioner of Baseball, d/b/a Major League Baseball ("MLB"), and the Commissioner of Baseball oppose the Motion for Leave to Appeal to the Court of Appeals filed by TCR Sports Broadcasting Holding, LLP, the Baltimore Orioles Baseball Club, and the Baltimore Orioles Limited Partnership (collectively, "MASN").

PRELIMINARY STATEMENT

MASN asks this Court to certify well-settled questions of contract interpretation to the Court of Appeals because MASN does not like the outcome of this Court and the motion court's application of the unique facts of this case to that well-settled law. This Court should not do so.

The questions MASN hopes to pose to the Court of Appeals address routine legal questions on the enforceability of agreements to arbitrate or the standard for reformation of contract. These legal standards are well-established. Likewise, there is no pressing public need for further judicial pronouncements about this private, commercial dispute among sophisticated parties. As the plurality observed in this Court's July 13, 2017 decision[1] ("Opinion" or "Op."): "The only reason that [MASN's] position has changed [about the appropriate arbitral forum] is that they are unhappy with the RSDC's refusal to accept their interpretation of the . . .

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[1] Attached as Ex. 1 to the Affirmation of Rachel W. Thorn in Support of MASN's Motion for Leave to Appeal to the Court of Appeals.

RSDC's established methodology, which led to an award that exceeded their expectations." Op. at 29 (plurality).

Moreover, MASN's motion rests on a faulty factual premise. MASN asks this Court for leave to appeal whether a court has the power to order parties to arbitrate before a forum different from the one they chose in their contract when the forum they selected has been found evidently partial. But the answer to that question is not relevant here because, contrary to MASN's repeated contentions, *the forum* the parties selected—the Revenue Sharing Definitions Committee (RSDC)—was not found to be evidently partial. To the contrary, the motion court explicitly *rejected* MASN's arguments that MLB's supporting role rendered the RSDC an inherently partial forum, and a majority of this Court affirmed that decision. The issues MASN seeks to appeal thus are not legal issues at all (let alone novel ones), but rather involve only routine application of settled legal principles regarding contract reformation and the Federal Arbitration Act (FAA) to the particular facts of this case, which is manifestly insufficient to warrant Court of Appeals review.

The proposed appeal presents no novel legal question, has no broader impact beyond this case, and presents no conflict with previous decisions of the Court of Appeals or other departments of the Appellate Division. Accordingly, leave to appeal should be denied.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

This dispute arises from a contract entered into by MASN, the Orioles, the Nationals, and MLB dated March 28, 2005 (the "Agreement"), which created a structure under which MASN, a regional sports network (RSN), would televise Orioles and Nationals games. For the first seven years of the contract, telecast rights fees were fixed. Beginning in 2012, the Agreement obligated MASN to pay "fair market value" for both Clubs' telecast rights, which were to be re-set every five years. If, after a mandatory negotiation period and mediation process, MASN and the Nationals were still unable to agree on fair market value, their dispute was to be submitted to the RSDC, a standing committee of MLB composed of three Club owners or executives that regularly determines issues related to the fair market value of Clubs' telecast rights.

The members of the RSDC are appointed by the Commissioner, and the committee's membership changes periodically. Because the RSDC's members are Club owners or executives (and often non-attorneys) with other full-time commitments, and are exercising their own independent judgment rather than representing the interests of their Clubs, MLB staff provides the committee with administrative, legal, and organizational support. The principal role of the RSDC is to analyze transactions between Clubs and related parties that involve baseball-related revenue (including telecast agreements with RSNs) to ensure that revenue

Clubs receive under those transactions faithfully represent fair market value for revenue-sharing purposes. Over the twenty years of its existence, the RSDC has issued numerous reports addressing billions of dollars of related-party transactions, including RSN rights fees, and it has developed significant expertise in valuing telecast and other rights. Thus, choosing to arbitrate disputes over telecast rights fees before the RSDC allowed MASN, the Orioles, and the Nationals to leverage the RSDC's unique expertise in valuing telecast rights fees.

In 2012, MASN, the Orioles, and the Nationals arbitrated a dispute over the fair market value of the Nationals' telecast rights fees, the first such dispute to be submitted to the RSDC under the Agreement. The RSDC considered all parties' evidence and arguments and issued a reasoned decision that, although accepting neither side's position entirely, substantially favored MASN. For example, for 2012, MASN proposed rights fees of approximately $34 million and the Nationals proposed fees of approximately $109 million. The RSDC awarded fees of approximately $53 million—an amount nearly three times closer to MASN's proposal than the Nationals'. Nonetheless, MASN sought to vacate the award on numerous grounds.

The New York County Supreme Court, Commercial Division (Marks, J.), considered and rejected all of MASN's arguments save one: It concluded that the RSDC's award must be vacated on "evident partiality" grounds because the outside

law firm that represented the Nationals before the RSDC—Proskauer Rose LLP ("Proskauer")—had also represented MLB and the Clubs or other entities with which the RSDC's three arbitrators were affiliated in a few "unrelated" litigation matters. R.37 (motion court opinion). The court rejected all of MASN's remaining arguments, including MASN's claim that the proceedings were not fundamentally fair, that the RSDC arbitrators did not act independently in deciding the dispute, and that "MLB improperly controlled or influenced the arbitration process, or usurped the arbitrators' decision-making function." R.29–30. Instead, the court concluded that MLB in fact simply "provided the sort of support that the parties must necessarily have expected when they entered into the Agreement," R.30, and that "that "very little was establish[ed] by those seeking to vacate the award, who have the burden of proof," to support their claim of "denial of fundamental fairness based on MLB's support role or the informality of the procedures used." R.30–31. In addition, the court rejected MASN's request to re-write the Agreement and remand the dispute to an arbitral forum other than the RSDC. R.42. The court explained "that re-writing the parties' Agreement is outside of its authority," and noted that the parties could "return to arbitration by the RSDC, however currently constituted, pursuant to the parties' Agreement" if the Nationals retained new counsel. R.42–43. Appeals and cross-appeals to this Court followed.

While this litigation was pending, the RSDC's membership changed in the usual course, resulting in three new members of the RSDC, none of whom had heard the original dispute. Additionally, following the motion court's decision, the Nationals advised that they had retained different counsel, not Proskauer, to represent it in any new RSDC proceeding, and that their new counsel has not previously represented MLB, the new RSDC members, or their Clubs.

On July 13, 2017, in a *per curiam* decision concurred in by three members of the panel, this Court affirmed the motion court's order vacating the RSDC award because of Proskauer's participation as well as its denial of MASN's request to hold the second arbitration before a panel unaffiliated with MLB. The Court also directed that the Nationals' motion to compel the parties to re-arbitrate the issues before the RSDC be granted.

With respect to the question of whether the contract should be reformed to provide for a different arbitral forum, the plurality opinion (Andrias, J., joined by Richter, J.) held that "on the record before us there is no basis, in law or in fact, to direct that the second arbitration be heard in a forum other than the industry-insider committee that the parties selected in their agreement to resolve this particular dispute, fully aware of the role MLB would play." Op. at 6. Although the plurality noted that the FAA "does not provide for pre-award removal of an arbitrator," Op. at 24 n.3, without deciding the issue, it stated that even assuming

the Court had inherent power to require a re-arbitration in a different forum, it would not matter because "MASN and the Orioles have not established that remand to the RSDC will be fundamentally unfair under the particular circumstances before us." Op. at 25 n.3.

The plurality then considered and rejected each argument advanced by MASN for reformation of the Agreement. First, the plurality found that "the decision to carve out telecast fee disputes for arbitration before the RSDC was a conscious choice. In making that choice, . . . the sophisticated parties, represented by experienced counsel, knew full well how the RSDC operated, including that MLB would have significant influence over the arbitration process" by providing "administrative, organizational and legal support, including analyzing financial information and preparing draft decisions in accordance with the instructions of the RSDC members who would make the final determinations." Op. at 28.

Second, the plurality noted that the RSDC was now composed of three new arbitrators affiliated with different Clubs and rejected as "pure conjecture" MASN's argument that the new panel would not "exercise its independent judgment." Op. at 30. Instead, the plurality noted that "the new arbitrators on the reconstituted RSDC have not demonstrated any bias in the matter and there has been no showing of an impermissible conflict between them and MASN or the Orioles." Op. at 35.

Third, the plurality rejected MASN's contention that the $25 million advance MLB paid to the Nationals in 2013 gave MLB a financial stake in a new arbitration proceeding, concluding that the argument "ignores the circumstances that led to the advance and its purpose, turning the parties' intent behind the advance on its head." Op. at 31. The plurality also recognized the fact that the Nationals had offered to post a bond to guarantee repayment of the advance, thereby taking the issue off the table for a new arbitration proceeding. *Id.* at 30.

Finally, the plurality found that the Commissioner's public statements in defense of the litigation that MASN instigated against MLB, and expressing his view that the parties should comply with their contractual obligations, did not warrant reformation of the Agreement because "it is the RSDC, not MLB or its Commissioner that will render a final decision in this matter." Op. at 32.

After consideration of all of the facts and arguments, the plurality concluded that "it cannot be said that MASN's and the Orioles' expectation of a reasonably fair and impartial arbitration forum in the RSDC has been frustrated, and there is no basis to sever the clause in the parties' agreement selecting the RSDC as the arbitral forum for this dispute or to reform the clause to require a rehearing before a new forum unconnected to MLB. The motion court's decision vacating the award was based solely on Proskauer's conflicts, a defect that has been remedied in that the Nationals have retained new counsel." Op. at 35.

Justice Kahn concurred. Her opinion observed that under the FAA, "the terms of negotiated arbitration agreements must be judicially enforced according to their terms in the absence of an established ground for setting such agreement aside, such as fraud, duress, coercion or unconscionability." Op. at 37 (citations omitted). Noting that "[n]ew arbitrators have been designated to hear the matter for the RSDC," she concluded that "[t]his Court may not order that the arbitration take place in a forum other than the one selected by the parties, notwithstanding the possibility of a more impartial proceeding in another forum." *Id.* at 38.

Two justices dissented from this portion of the decision. The dissent recognized the controlling legal principle cited by the plurality and Justice Kahn, but disagreed with those three justices on the application of the facts to that legal standard. Instead, the dissent would have held that reformation was proper under its reading of the "rare circumstances presented here." Op. at 41. Despite acknowledging that MASN and the Orioles were aware of MLB's role in assisting the RSDC at the time they entered into the Agreement and that Proskauer's absence in a new arbitration resolved any "conflicts arising from the firm's participation," the dissent concluded Proskauer's removal did not "guarantee that MLB will prioritize fundamental fairness in a subsequent arbitration." Op. at 62. The dissent also discounted the fact that the RSDC's membership had rotated and was now comprised of three new arbitrators affiliated with different Clubs, though

it acknowledged that "the three new RSDC arbitrators have not shown any bias." Op. at 66.

On July 14, 2017, MASN noticed an appeal to the Court of Appeals. After inviting letters from the parties concerning its jurisdiction, on November 16, 2017, the Court of Appeals dismissed the appeal *sua sponte* on the ground that the finality requirement was lacking. This motion for leave to appeal followed.

LEGAL STANDARD

The jurisdiction of the Court of Appeals to review non-final orders in civil cases is limited by the New York Constitution to "questions of law." N.Y. Const. Art. VI § 3(b)(4). In determining whether to grant leave to appeal to the Court of Appeals, this Court considers whether the questions of law are "novel or of public importance, or involve a conflict with prior decisions of [the Court of Appeals], or involve a conflict among the departments of the Appellate Division." 22 N.Y.C.R.R. § 500.22(b)(4).

ARGUMENT

I. Leave to Appeal Should Be Denied

A. MASN's Motion Presents No Novel Legal Question

A novel question of law is one that constitutes an issue of first impression, and "[w]hen courts speak of issues of first impression, they speak only of these relatively few cases, which require consideration of adjustments of substantive rules of law." *McGrath v. Toys "R" Us, Inc.*, 3 N.Y.3d 421, 437 (2004) (Read, J.,

dissenting in part). MASN identifies two "questions for review": (1) whether a court has the power to order rehearing in an arbitral forum different than the one specified in the parties' contract; and (2) whether the motion court and the First Department abused their discretion in declining to do so under the facts presented in this particular case. MASN Mem. of Law in Supp. of Mot. for Leave to Appeal to the Court of Appeals ("MASN Br.") at 5. Neither of these questions is novel. Moreover, the first question is not even squarely presented, as every member of this Court accepted the premise that the court had the power to order arbitration in a different forum. *See* Op. at 24–25 n.3. A majority of the Court concluded that MASN failed to meet the demanding standard necessary to warrant that extraordinary remedy. Accordingly, both of MASN's questions involve nothing more than fact-bound application of settled law.

With respect to the first question, the law is already clear. The Federal Arbitration Act (FAA) requires courts to "rigorously enforce" arbitration agreements according to their terms. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013). That extends to terms specifying the "rules under which any arbitration will proceed" and "who will resolve specific disputes." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010). Accordingly, "an agreement to arbitrate before a particular arbitrator may not be disturbed, unless the agreement is subject to attack under general contract principles." *Aviall,*

Inc. v. Ryder Sys., Inc., 110 F.3d 892, 895 (2d Cir. 1997). As the Court of Appeals explained in *Matter of Salvano*, 85 N.Y.2d 173 (1995):

> The goal of the [FAA] is not to promote arbitration as an end in itself, or even to promote the expeditious resolution of claims but to rigorously enforce arbitration agreements according to their terms. Accordingly, courts have refused . . . to direct that the parties arbitrate in a forum other than that specified in their agreement, even though permitting the choice of a different forum might seem fairer or more suited to the needs of a particular party. . . . [I]n the absence of an established ground for setting aside a contractual provision, such as fraud, duress, coercion or unconscionability, a court must enforce the parties' arbitration agreement according to its terms.

Id. at 182 (internal citations and quotation marks omitted)).

Here, MASN seeks to re-write the parties' Agreement to replace the RSDC (the parties' contractually chosen arbitral forum) with a new arbitral forum, such as the AAA, for the telecast rights fees dispute. This would be no small change. Notably, the plurality observed that the parties' Agreement "specified that other disputes would be arbitrated before the Commissioner or the AAA, evidencing that the decision to carve out telecast fee disputes for arbitration before the RSDC was a conscious choice." Op. at 27–28 (plurality). Substituting the AAA means that the dispute will not be resolved by industry insiders and the panel will not consist of Club owners and executives who have expertise in valuing baseball telecast rights and the RSDC's methodology. It also means that the substituted arbitrators will not be assisted and supported by MLB staff, which has access to highly proprietary and confidential information about other Clubs' telecast fees and

contracts with other RSNs. It likewise presumably means that AAA rules will apply instead of the RSDC's approach, which is an expedited procedure whereby the parties make written and oral presentations and address questions posed by the RSDC members, without "written rules of evidence, discovery rights or obligations, sworn testimony, or direct or cross-examination of witnesses." Op. at 28 (plurality). To effect such a radical change, MASN must establish the right to contract reformation.

New York law on contract reformation is similarly well-established. Contract reformation is an "extraordinary remedy," 16 N.Y. Jur. 2d Cancellation of Instruments § 56, whose purpose is "to restate the intended terms of an agreement when the writing that memorializes that agreement is at variance with the intent of both parties," *Warberg Opportunistic Trading Fund, L.P. v. GeoResources, Inc.*, 112 A.D.3d 78, 86 (1st Dep't 2013) (quoting *George Backer Mgmt. Corp. v. Acme Quilting Co.*, 46 N.Y.2d 211, 219 (1978)) (internal quotation marks and alterations omitted). A party must establish its right to reformation by "clear, positive and convincing evidence," *id.* at 85, including by showing "in no uncertain terms . . . exactly what was really agreed upon between the parties," *Chimart Assocs. v. Paul*, 66 N.Y.2d 570, 574 (1986).

This case presents no novel issue of contract reformation law, nor is there a need for the Court of Appeals to clarify the legal requirements governing contract

reformation. The requirements for reformation are already the subject of multiple decisions in the Court of Appeals and have been routinely applied by the Appellate Division and trial courts in the state, including by the motion court and this Court in this case. Accordingly, MASN's first "question for review" is not a novel question of law.

Although MASN submits that Court of Appeals review is necessary because of a purported 2-1-2 split in this Court, MASN ignores the fact that all five justices agreed upon the governing legal standard under the FAA—that arbitration agreements must be rigorously enforced according to their terms absent an established ground for revocation of a contract. Thus, there is no legal issue for the Court of Appeals to decide; rather, the dispute is solely factual. And in any event, the Court of Appeals has already elucidated these legal standards. *Salvano*, 85 N.Y.2d at 182.

MASN's argument also ignores that three justices—the plurality and Justice Kahn's concurrence—all agreed that the requirements for reformation had not been met and joined the *per curiam* decision which granted the Nationals motion to compel a new arbitration before the RSDC. Those three justices rejected MASN's request for contract reformation not because they concluded that the Court lacked the power to grant such a request, but because they rejected MASN's argument that it satisfied the demanding standard that contract reformation requires. The

only difference between the plurality and concurring opinions is the level of specificity at which they decided the question.

The concurrence, relying on the substantial body of case law interpreting the FAA that requires courts to enforce arbitration agreements in the absence of an established ground for setting aside the agreement, concluded the fact that MASN had selected the RSDC as its arbitral forum far outweighed the possibility that another forum might be fairer. Implicit in this ruling is that no established ground for setting aside the parties' Agreement—*i.e.*, contract reformation—was present. By contrast, the plurality decided to engage each of MASN's arguments as to why the parties' Agreement should be reformed, and rejected each one on its merits. At bottom, neither opinion believed that reformation of the parties' Agreement was warranted. That the plurality and concurrence differed slightly over their reasons for rejecting MASN's contract reformation argument does not transform that factual dispute over whether a particular contract should be reformed into a novel legal issue warranting review in the Court of Appeals.

MASN's second "question for review"—whether the motion court and this Court abused their discretion by rejecting MASN's request to reform the parties' Agreement—does not even purport to present a novel legal issue, but rather is by its terms a quintessential fact-based inquiry. MASN's inability to meet the settled legal requirements for contract reformation is a fact-dependent inquiry already

resolved by the motion court and affirmed by this Court. *See* Op. at 35 (plurality) ("MASN and the Orioles have not made the extraordinary showing of grounds needed to reform the agreement or disqualify the RSDC, without which we lack the authority to reform the contract."); R.42 (motion court opinion). It is not a legal question properly brought to the Court of Appeals. Thus, both of the questions MASN seeks to appeal involve nothing more than fact-bound application of settled law.

B. MASN's Motion Rests on an Unfounded Factual Predicate

In addition to not presenting novel legal questions, MASN's motion rests on the faulty premise that the arbitral award was vacated "because of the evident partiality of the forum." MASN Br. at 5. But this premise is demonstrably untrue; the arbitration award in this case was *not* vacated because of evident partiality *of the forum*. Rather, as the plurality explained, "[t]he motion court's decision vacating the award was based solely on Proskauer's conflicts," Op. at 35 (plurality), which was an issue specific to the particular participants in the proceeding that produced the award, not an issue inherent in the forum the parties selected. Justice Marks made clear that the sole ground for his finding of evident partiality concerned Proskauer's relationships, and that an RSDC arbitration without Proskauer's participation would cure any problem. *See* R.42–43 ("The Court emphasizes that because it is ultimately the Nationals choice of counsel that

created the conflict," the parties could "return to arbitration by the RSDC, however currently constituted, pursuant to the parties' Agreement" if the National retained new counsel.); *see also* R.3377–78 (The Court: "Because if you take Proskauer out of the mix, there is nothing wrong with the panel."). And the *per curiam* decision in this Court affirmed that fact-based conclusion.

Accordingly, both the motion court and this Court rejected MASN's claims that the RSDC itself was evidently partial and its suggestion that the newly constituted RSDC would be evidently partial in any re-arbitration. Indeed, MASN previously conceded that it would have lost the vacatur motion without Proskauer's involvement. *See* R.2870 (MASN counsel arguing to the motion court that if MLB had "told Proskauer, no, it's unseemly for you to be here representing the Nationals. Then none of us would have been here today.").

MASN's motion nonetheless repeatedly claims that the RSDC's award "was unanimously vacated due to MLB's evident partiality," MASN Br. at 24, but that is demonstrably incorrect. Both the motion court and the plurality expressly rejected any claim that MLB's support role compromised the RSDC's independence. For example, the plurality ruled that MASN "knew full well how the RSDC operated, including that MLB would have significant influence over the arbitration process," by providing "administrative, organizational and legal support, including analyzing financial information and preparing draft decisions in accordance with the

instructions of the RSDC members who would make the final determinations." Op. at 28 (plurality); *see also* R.31 ("[V]ery little was establish[ed] by those seeking to vacate the award, who have the burden of proof," to support their claim of "denial of fundamental fairness based on MLB's support role or the informality of the procedures used."). Indeed, MASN conceded this point below: "Sure, we bought into whatever the structure [of the RSDC] was, whatever Major League Baseball's role was; we agreed to that, we had to live with that." R.3286 (MASN's counsel); *see also* R.2787 (Orioles' counsel acknowledging that the Club "bargained for the RSDC process").

MASN has not even sought review of whether it was error to reject its claims that the RSDC itself was evidently partial or whether the newly constituted RSDC would be evidently partial in any re-arbitration. There are several good reasons why it has not done so. In addition to lacking any support in the record, these issues would be highly factual and would not constitute "questions of law," much less ones that are novel or of public importance. Without any viable or preserved claim that the reconstituted RSDC is evidently partial, MASN's petition fails at the threshold.

C. The Issues Presented Are Fact-Specific, and Have No Broader Impact Beyond this Particular Case

MASN also has not shown that its proposed appeal is of public importance. This appeal concerns the administration of an intra-industry arbitration proceeding

established by an agreement between private parties within the context of a voluntary association. The issues relevant to the appeal—the content of the parties' Agreement, their intent at the time of contracting, the conduct of the first arbitration, and the characteristics of the future arbitration—are all unique to this case and have little, if any, bearing on the public or on other cases. Indeed, the fact that that no party in this case has found a single case from any jurisdiction involving similar circumstances as those presented here underscores this case's *sui generis* nature. *See* R.39 (motion court opinion) ("Neither the parties, nor this Court's own research, have uncovered any precedent involving a substantially similar factual scenario decided under the FAA."). And the dissent noted multiple times that this case presented "unique" and "rare" circumstances, indicating that they are highly unlikely to recur. *See, e.g.*, Op. at 40 & 41 (dissent).

MASN's only argument as to the public importance of its proposed appeal is that a third review of this arbitration is necessary to ensure a fundamentally fair arbitral process. But there is nothing fundamentally unfair about holding the parties to their bargain, and MASN's argument is based on the faulty premise that the RSDC (the arbitral forum) or MLB (which supports the RSDC) were partial or biased against MASN. Contrary to MASN's characterizations, there has never been such a finding in this case. *See supra* Part I.B. In fact, "[t]here has been no showing that the RSDC was either corrupt or biased." Op. at 33 (plurality).

Nor is there any reason to believe that a new RSDC arbitration will be anything but fundamentally fair and consistent with the parties' expectations when they entered into the Agreement. There are three new RSDC arbitrators, and "the new arbitrators on the reconstituted RSDC have not demonstrated any bias in the matter and there has been no showing of an impermissible conflict between them and MASN or the Orioles." Op. at 35 (plurality); *see also id.* at 38 (Kahn, J., concurring) ("New arbitrators have been designated to hear the matter for the RSDC."). Proskauer has been replaced as the Nationals counsel, and MASN has already acknowledged that if MLB had "told Proskauer, no, it's unseemly for you to be here representing the Nationals. Then none of us would have been here today." *See* R.2870. Finally, MLB has no financial interest in the outcome of the new arbitration, as there is no serious argument that MLB is in danger of not being repaid and, in any case, the Nationals have represented to this Court that they will post a bond "to guarantee repayment of the advance to MLB regardless of the outcome of the arbitration." Op. at 30 (plurality).

A new arbitration before the parties' contractually chosen forum—the RSDC—is consistent with the Agreement and the expectations of the parties at the time of contracting. Ironically, it is MASN's position that would do the greatest "disserv[ice to] New York's global reputation as one of the leading centers for business arbitration." MASN Br. at 24. "The goal of the [FAA] is not to promote

arbitration as an end in itself, or even to promote the expeditious resolution of claims but to rigorously enforce arbitration agreements according to their terms." *Salvano*, 85 N.Y.2d at 182. Rather than agreeing to abide by the terms of the parties' Agreement, MASN seeks to shred the Agreement for no better reason than it is dissatisfied with the result of one—indeed, the only—arbitration conducted under the Agreement to date, and it now would prefer to have these disputes resolved by someone other than the internal, expert body to which the parties contractually agreed. Accepting that argument would call into question the certainty of contracts in New York, and cause contracting parties to think twice about situating future arbitrations in New York.

D. This Court's Decision Does Not Conflict with Prior Decisions of the Court of Appeals or with Decisions of Other Departments of the Appellate Division

MASN concedes that this Court's Opinion does not conflict with any prior decision of the Court of Appeals or with any other decision of other departments of the Appellate Division. *See* MASN Br. at 18 ("[T]here do not appear to be any authorities that directly address the removal of an arbitral forum following an evident partiality finding."). Indeed, the Court's Opinion is consistent with both *Matter of Salvano*, 85 N.Y.2d 173, 182 (1995), and *Matter of Cullman Ventures*, 252 A.D. 222, 228 (1st Dep't 1998). In those cases, the Court of Appeals and this Court held that "[u]nder the Federal Arbitration Act, privately negotiated

arbitration agreements are to be enforced according to their terms, absent an established ground for setting aside a contractual provision, such as fraud, duress, coercion or unconscionability, factors not present here. Hence, courts may not . . . direct that the arbitration take place in a forum other than that specified in the agreement, notwithstanding a possibly fairer or more convenient proceeding in a forum not designated in the agreement." *Cullman Ventures*, 252 A.D.2d at 228 (citing *Salvano*, 85 N.Y.2d at 181–82).

Thus, far from creating any conflict with prior decisions of the Court of Appeals or other departments, this Court's Opinion is in unanimous accord with those decisions. *Salvano*, *Cullman Ventures*, and this Court's Opinion are consistent with federal cases interpreting the FAA. *See, e.g.*, *Aviall*, 110 F.3d at 895 ("[A]n agreement to arbitrate before a particular arbitrator may not be disturbed, unless the agreement is subject to attack under general contract principles."); *cf. Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527, 548 (2d Cir. 2016) ("Had the parties wished" to select another arbitral forum, "they could have fashioned a different agreement.").

Lacking conflicting authority, MASN offers a list of so-called "analogous" cases that it asserts are in "tension" with this Court's Opinion. MASN Br. at 17–19. But all of the cases MASN cites are either consistent with this Court's Opinion or inapposite. Most of the cases address a different question—the replacement of a

particular individual arbitrator, not the revision of a contract to substitute a different arbitral forum—and the lone case that involves selection of a different arbitral *forum* involved a pre-arbitration decision not decided under the FAA, *Rabinowitz v. Olewski*, 100 A.D.2d 539 (2d Dep't 1984).

Moreover, even in the few cases where a court has ordered the extraordinary remedy of replacing a particular arbitrator or refused to enforce an arbitration agreement, it has done so by applying general contract principles. *See Pitta v. Hotel Ass'n*, 806 F.2d 419, 424–25 (2d Cir. 1986) (applying the contract's own procedure for selection of a new arbitrator); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1068 (2d Cir. 1972) (rescission); *Morris v. New York Football Giants, Inc.*, 150 Misc. 2d 271, 278 (Sup. Ct. N.Y. Cnty. 1991) (same); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999) (same); *see also Aviall, Inc. v. Ryder Sys., Inc.*, 913 F. Supp. 826, 834 (S.D.N.Y. 1996) (describing *Erving* and *Morris* as cases "which closely resemble 'mutual mistake,' when the written agreement no longer reflects the intent of the parties, the court agreed to reform the contract and appoint a neutral arbitrator").

A case is not in "tension" with this Court's Opinion simply because another court determined that the legal requirements for contract reformation were or were not met under that case's particular set of facts. Those different outcomes on different facts underscores that MASN's proposed appeal is a factual dispute that is

not suitable for certification to the Court of Appeals. In sum, there is no conflict between this Court's Opinion and prior decisions of the Court of Appeals or other departments.

E. Granting Leave to Appeal Will Only Cause Further Delay and Waste Judicial and Party Resources

The Court of Appeals already dismissed *sua sponte* MASN's first attempt to appeal this Court's Opinion, finding that the appeal lacked the requisite finality. Granting MASN's motion for leave to appeal now, despite the Court of Appeals's finding of non-finality, will only cause further fragmentation of appeals in these actions, resulting in further delay and waste of judicial and party resources, contrary to New York policy. *See* Arthur Karger, The Powers of the New York Court of Appeals § 3.1 (Rev. 3d ed. 2005) (New York recognizes "the need to conserve judicial resources by generally applying a strict policy against piecemeal appeals in a single litigation.").

The Court of Appeals will only ever need to consider the issues that MASN now seeks to appeal if MASN (1) loses the new arbitration; (2) moves to vacate the award; (3) meets the high burden of setting aside an award; and (4) meets the high standard for proving reformation of contract is appropriate. This chain of events is highly unlikely and speculative. Moreover, the record will not be as complete if the appeal takes place in the Court of Appeals now as it would be after the new arbitration takes place. Accordingly, it would be a waste of judicial and party

resources to go through an appeal now when the issues to be decided are likely to be mooted by a new arbitration and the record is not complete.

CONCLUSION

For the foregoing reasons, the motion for leave to appeal to the Court of Appeals should be denied.

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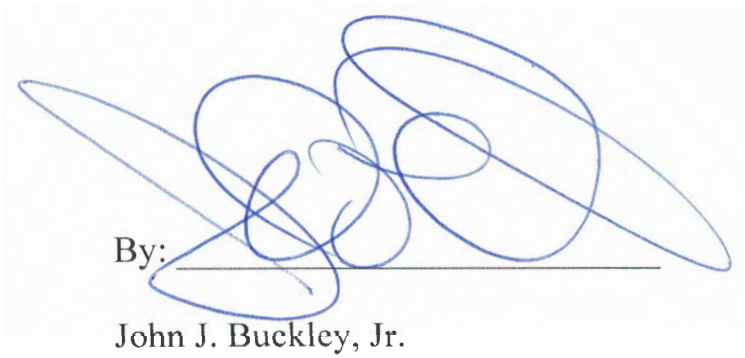

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