M6033
12/1/17

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

TCR SPORTS BROADCASTING HOLDING, LLP,

Petitioner – Appellant
Cross-Respondent – Respondent,

-against-

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

Respondents – Respondents –
Cross-Appellants – Appellants,

THE OFFICE OF THE 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.

RECEIVED
NOV 29 2017
SUP COURT APP. DIV.
FIRST DEPT.

Index No.
652044/2014

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF FACTS 4

A. The Arbitration Agreement 4

B. The Arbitration 5

C. Supreme Court's Decisions 6

D. This Court's Decision 8

E. The Court of Appeals' Decision 13

ARGUMENT 13

I. THE QUESTIONS PRESENTED DO NOT MERIT FURTHER REVIEW 13

A. There Is No Need For Further Review Of The Question Whether The FAA Leaves In Place The Courts' General Power To Reform A Contract 14

B. There Is No Need For Further Review Of The Question Whether Contract Reformation Is Required On The Facts Of This Case 16

II. ANY REVIEW SHOULD AWAIT FINAL DETERMINATION OF THE DISPUTE 26

CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

Cases

AT&T Mobility LLC v. Concepcion,
563 U.S. 333 (2011) 15, 23

Aviall, Inc. v. Ryder Sys., Inc.,
110 F.3d 892 (2d Cir. 1997) 22, 26

Aviall, Inc. v. Ryder Sys., Inc.,
913 F. Supp. 826 (S.D.N.Y. 1996) 22

Chimart Assocs. v. Paul,
66 N.Y.2d 570 (1986) 15, 25

Erving v. Virginia Squires Basketball Club,
468 F.2d 1064 (2d Cir. 1972) 21, 22

First National Oil Corp. v. Arrieta,
2 A.D.2d 590 (1st Dep't 1956) 21

Hearn v. Hearn,
936 A.2d 400 (Md. Ct. Spec. App. 2007) 25

Hooters of America, Inc. v. Phillips,
173 F.3d 933 (4th Cir. 1999) 20, 21

Hyman v. Pottberg's Executors,
101 F.2d 262 (2d Cir. 1939) 21

Kindred Nursing Centers Ltd. P'ship v. Clark,
137 S. Ct. 1421 (2017) 15, 23

Md. Port Admin. v. John W. Brawner Contracting Co.,
492 A.2d 281 (Md. 1985) 25

Morris v. New York Football Giants, Inc.,
150 Misc.2d 271 (Sup. Ct., N.Y. Cnty. 1991) 21, 22

Pitta v. Hotel Association of N.Y.C.,
806 F.2d 419 (2d Cir. 1986) 20

PPF Safeguard, LLC v. BCR Safeguard Holding, LLC,
85 A.D.3d 506 (1st Dep't 2011) 15

Rabinowitz v. Olewski,
100 A.D.2d 539 (2d Dep't 1984) 22, 23

Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co.,
307 F.3d 617 (7th Cir 2002) 23, 24

U.S. Elecs., Inc. v. Sirius Satellite Radio, Inc.,
17 N.Y.3d 912 (2011) 22

Statutory Authorities

9 U.S.C. § 2 .... 12, 14

9 U.S.C. § 10(b), ... 15

N.Y. Civ. Prac. L. & R. § 5501(b) 17

N.Y. Civ. Prac. L. & R. § 5713 17

N.Y. Civ. Prac. L. & R. 5601(a) 13

Constitutional Provisions

N.Y. Const.Art. 6, § 3(a) 17

N.Y. Const.Art. VI, § 3(b) 26

Miscellaneous

11 Carmody-Wait New York Practice 2d § 71:69 14

Arthur Karger, The Powers of the New York Court of Appeals
(Rev. 3d ed. 2005) 17, 26

N.Y. Civ. Prac. L. & R. § 5602, Practice Commentary C5602:1 .... 2, 13

INTRODUCTION

The Court of Appeals dismissed MASN's appeal of this Court's non-final order, which directed the parties to conduct a new arbitration proceeding.[1] MASN now attempts an end-run around the Court of Appeals' dismissal by asking this Court to take the extraordinary step of granting discretionary leave to appeal. But such discretionary leave is plainly unwarranted here, and MASN can only suggest otherwise by reasserting and recycling stale arguments that this Court already rejected when it heard the appeal.

Supreme Court (Marks, J.), affirmed by this Court, concluded that the Nationals' representation by the Proskauer firm in the prior arbitration warranted vacatur of the arbitration award for evident partiality. But those defects have now been remedied. The Nationals are no longer represented by Proskauer, and the Nationals' new counsel (Quinn Emanuel) does not represent MLB, the RSDC members or their baseball clubs. In addition, all the present RSDC members are different from those who participated in the original arbitration. Thus, as this Court's plurality found, any claim now put forward by MASN that it will not face an impartial group of RSDC arbitrators is "*pure conjecture*," and is not a basis on which to alter the parties' chosen forum for resolution of the dispute. Thorn Aff., Ex. 1 (the "Affirmance Order") at 30 (opinion of Andrias, J.) (emphasis added). In

---

[1] Defined terms have the same meanings as in the Nationals' merits briefs.

short, there is no non-speculative basis to find that the now reconstituted RSDC, or the arbitration proceeding itself, will be biased.

Leave to appeal also is unwarranted here because the main question on which MASN seeks review—whether a court *ever* has power to reform an arbitration contract to send the dispute to an arbitral forum different from the one selected in the contract—is not actually in dispute. All five Justices on the panel agreed that generally applicable rules of contract law govern the question of whether an arbitration agreement should be enforced according to its terms, and those generally applicable rules permit a court to reform a contract in an appropriate case. The disagreement among the Justices of this Court instead concerned whether Supreme Court should have exercised its general contract-law reformation power to grant relief to MASN under the specific facts here.[2] This question, which is limited to this case, and has no far-reaching legal or policy consequences, is not a "question of law important enough to warrant the immediate attention of the Court of Appeals," CPLR § 5602, Practice Commentary C5602:1.

[2] As Justice Andrias observed in his plurality opinion joined by Justice Richter, "even if this Court has the inherent power to disqualify an arbitration forum in an exceptional case, 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 in the arbitration process." Affirmance Order at 6-7.

Indeed, in this case's present posture, MASN would be asking the Court of Appeals to equitably reform a presumptively-valid arbitration agreement in order to solve a problem that has been remedied. A "do-over" of this sort runs counter to the settled law of arbitration in New York. As retired Justice Leo Milonas observed in his *amicus* brief (at 13-14), MASN's position that arbitration agreements should be freely rewritten in such circumstances would threaten New York's credibility as a preferred arbitration venue.

At this juncture, this case presents a garden-variety, industry-centric arbitration agreement and proceeding, of the type that is frequently brought before our appellate courts for confirmation. Under these circumstances, this is not—certainly at this point—a matter that ought to concern the Court of Appeals, given its already busy roster of pressing and cutting-edge matters.

It is most respectfully submitted that the Appellate Division, First Department, should not be jumping the gun and promoting for Court of Appeals review a matter that presents no real issue of novelty or importance. If, at the end of the second arbitration, there are concerns, those issues can *then* be raised on appeal. But again, as this Court's plurality held, the suggestion that such issues should be addressed now, before a second arbitration is convened, is improper.

MASN's real quarrel with the outcome in this Court turns on factual disputes that Supreme Court's decision, and this Court's affirmance, resolved in

the Nationals' favor. The Court of Appeals is not empowered to decide such factual questions, and should not be asked to do so. The parties contractually agreed to an expeditious resolution of their dispute by the RSDC. Further court proceedings, such as this motion, are unnecessary and will only frustrate the prompt resolution of the dispute.

MASN's motion should be denied.

STATEMENT OF FACTS

A. The Arbitration Agreement

The parties to this case executed the Agreement here at issue in 2005. R.196-215. The Agreement obligates MASN to pay annual fees to the Nationals for the rights to broadcast their baseball games. R.202. The Agreement provides that, beginning with the 2012 season, the Nationals are entitled to "the fair market value of the Rights," assessed at five-year intervals. R.202-03. While the Agreement provides that some disputes thereunder are subject to arbitration before a panel of the AAA, R.209, these sophisticated parties and their experienced counsel were clear in providing that disagreements about the "fair market value" of the telecast rights are to be governed by a separate and detailed dispute-resolution scheme culminating in mandatory and binding arbitration before the RSDC. R.203. The RSDC is a rotating panel of MLB Club representatives that regularly hears disputes concerning revenue-sharing and related issues. It does not follow a

formalized arbitration model like that used by bodies such as the AAA, *see* R.1924, and openly receives administrative support from MLB, R.1762. As MASN acknowledged in Supreme Court, it "agreed to" and therefore "ha[s] to live with" "whatever the structure [of the arbitration] [i]s, whatever Major League Baseball's role [i]s." R.3286.

An integration clause provides that the "Agreement, and the terms contained [t]herein, constitute the entire agreement between the parties with respect to the subject matters [t]herein and supersede all other oral and written understandings or agreements relating to the subject matters contained [t]herein." R.210. The Agreement is "governed by ... the laws of the State of Maryland." *Id.*

B. The Arbitration

In 2012, the parties commenced arbitration before the RSDC over the rights fees due to the Nationals for the 2012-2016 period, the first five-year period covered by the Agreement's fair-market-value provision. The Nationals claimed entitlement to the fair market value of their rights, which they calculated to be worth an average of $118 million annually. R.2055-56. MASN advocated for a different approach that assumed a 20% annual profit to MASN, which yielded an average annual rights fee to the Nationals of just $39.5 million. *See* R.2056; R.1185; R.1193.

Neither side completely persuaded the RSDC of its position. The RSDC reached its decision in mid-2012, and MLB informed the parties of the approximate amount of the award (which averaged around $59.6 million annually). R.1931; R.234. But the RSDC's award was withheld as MASN and the Orioles encouraged negotiation of an overall settlement of the parties' relationship with MASN. R.1929-32. To encourage the Nationals to participate in these negotiations, MLB extended to the Nationals a $25 million advance to cover part of the shortfall between the rights fees that MASN was then paying and the rights fees that the RSDC had determined to award. R.1933-34.

C. Supreme Court's Decisions

The RSDC issued its final award in 2014. Although the award fell distantly short of the Nationals' valuation of their broadcast rights, and was far closer to MASN's proposal, MASN petitioned Supreme Court to vacate the award. The Nationals cross-petitioned to confirm.

Supreme Court (Marks, J.) granted MASN's petition in part, R.14-43 (the "Vacatur Order"), finding that MASN had failed to carry its burden to justify vacatur with respect to all proffered arguments, other than evident partiality stemming from the Nationals' representation by Proskauer, R.25-42.

Supreme Court's reasoning with regard to the ground of partiality was very narrow: indeed, it rejected the argument that the $25 million advance to the

Nationals "raise[d] any serious questions about the fairness of the arbitration process." R.34. Supreme Court also rejected arguments that the arbitration process involved misconduct, and specifically found that MASN "ha[s] not shown any denial of fundamental fairness based on MLB's support role" in the arbitration. R.26, R.29-31. Supreme Court also found that "[t]he arbitrators['] ... extensive explanation of their determination of the appropriate methodology to apply" under the Agreement was "reasonable on its face" and "more than sufficient" to require upholding the award over MASN's "manifest disregard" challenge. R.28-29.

Supreme Court nevertheless granted the petition on grounds of evident partiality, but solely because the Nationals' arbitration counsel at Proskauer had concurrently represented interests associated with MLB and the RSDC arbitrators, R.35-36, and MLB and the RSDC had taken insufficient steps in response to MASN's stated concerns about Proskauer's involvement, R.38-39, R.41.

Supreme Court also denied MASN's request for an order directing that the parties conduct a new arbitration in a forum other than the RSDC. R.42 & n.21.[3]

---

[3] The court "emphasize[d] that ... it is ultimately the Nationals' choice of counsel that created the conflict [requiring vacatur]," and stated that if "the Nationals are willing and able to retain counsel who do not concurrently represent MLB or the individual arbitrators and their clubs," the parties could "thereby" return to "arbitration by the RSDC, however currently constituted, pursuant to the parties' Agreement." R.42-43 n.21.

The Nationals subsequently replaced Proskauer with new counsel to represent the Nationals in a future arbitration. MASN, however, refused to return to the RSDC. The Nationals accordingly moved to compel MASN to participate in a new arbitration. Supreme Court denied that motion, and instead stayed any further arbitration pending final determination of the parties' appeals to this Court. R.121.12-.20 (the "Stay Order").

D. This Court's Decision

MASN appealed to this Court from Supreme Court's denial of their request to send the parties to a forum other than the RSDC. The Nationals and MLB cross-appealed the vacatur. The Nationals also appealed the Stay Order.

In a per curiam order, this Court affirmed Supreme Court's Vacatur Order, including Supreme Court's determination not to order the parties to arbitrate in a forum other than the RSDC. Affirmance Order at 5 (per curiam). Furthermore, the Court "modified" the Stay Order "on the law, to grant the Nationals' motion [for an order compelling arbitration before the RSDC]." *Id.* Three Justices concurred in these results. *Id.* at 6-36 (plurality opinion of Andrias, J., joined by Richter, J.); *id.* at 37-38 (Kahn, J., concurring). Two Justices dissented from the decision not to remand the parties to a different arbitral forum. *Id.* at 39-74 (Acosta, J., joined by Gesmer, J.).

1. The plurality concluded that Supreme Court had properly vacated the RSDC's award on "evident partiality" grounds related to Proskauer's role in the arbitration. *Id.* at 6 (opinion of Andrias, J.). But the plurality rejected MASN's arguments for sending the matter to a different arbitral forum, finding that "even if this Court has the inherent power to disqualify an arbitration forum in an exceptional case, 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 in the arbitration process." *Id.* at 6-7. The plurality explained that "there has been no showing of bias or corruption on the part of the members of the reconstituted RSDC, and the Nationals will use new counsel at the second arbitration." *Id.* at 7.

The plurality concluded that "[s]peculation that MLB will dictate the outcome of the second arbitration by exerting pressure on the new members of the RSDC does not suffice to establish that they will not exercise their independent judgment or carry out their duties impartially, or that the proceedings will be fundamentally unfair." *Id.* The plurality observed that "MASN and the Orioles have not made the extraordinary showing of grounds needed to reform the agreement or disqualify the RSDC, without which [the Court] lack[s] the authority to reform the contract." *Id.* at 35.

The plurality also stated that whatever power the courts may have to direct parties to arbitrate in a forum other than the one chosen by the parties, the facts here do not warrant its exercise: "even if the dissent is correct that it must be within the inherent equitable power of the court to protect fundamental fairness by sending the arbitration to a new forum, we conclude, on the record before us, that the court correctly rejected MASN's and the Oriole's argument that the parties' agreement should be disregarded and the matter remanded to an arbitral forum unaffiliated with MLB." *Id.* at 24.[4]

The plurality rejected as "pure conjecture" the dissent's assertion that the new RSDC panel would fail to exercise independent judgment. *Id.* at 30. In response to the dissent's reliance on MLB's $25 million advance to the Nationals, the plurality found that the Nationals had resolved that issue by "offer[ing] to post a bond to guarantee repayment of the advance to MLB regardless of the outcome of the arbitration"—leaving MLB with no possible financial stake in the outcome. *Id.* And the plurality refuted the dissent's reliance on certain public statements made by the MLB Commissioner regarding the first RSDC award, observing that "MLB was merely attempting to protect the binding arbitration process" and that in

---

4 *See also id.* at 25 n.3 ("[E]ven if such inherent power exists, MASN and the Orioles have not established that remand to the RSDC will be fundamentally unfair under the particular circumstances before us.")

any event "it is the RSDC, not MLB or its Commissioner that will render a final decision in this matter." *Id.* at 32.

The plurality observed that MASN and the Nationals "expressly chose to carve out disputes over telecast fees for arbitration before the RSDC, an industry-insider committee with specialized knowledge," even while they "specified that other disputes would be arbitrated before the Commissioner or the AAA"—thus "evidencing that the decision to carve out telecast fee disputes for arbitration before the RSDC was a conscious choice." *Id.* at 27-28. MASN was a "sophisticated part[y], represented by experienced counsel," and made its choice knowing "full well how the RSDC operated." *Id.* at 28. "Most significantly, [MASN] knew that MLB staff would provide 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." *Id.*

2. Justice Kahn's concurrence reasoned that "in the absence of an established ground for setting [an arbitration] agreement aside, such as fraud, duress, coercion or unconscionability," the FAA dictates that an arbitration agreement must be enforced. *Id.* at 37 (opinion of Kahn, J.). Justice Kahn then observed that "the parties chose" the RSDC to govern the dispute here at issue, and noted that "[n]ew arbitrators have been designated to hear the matter for the

RSDC." *Id.* at 37-38. On these facts, Justice Kahn found, "[t]his Court may not order that the arbitration take place in a forum other than the one selected by the parties." *Id.* at 38

3. The dissenting opinion would have directed the parties to a different arbitral forum, based on the residual clause of FAA § 2—under which a court may set aside an arbitration agreement (which is ordinarily "valid, irrevocable and enforceable") only "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *see* Affirmance Order at 54, 58-59, 67 (Acosta, J., dissenting) (citing same). The dissent would have reversed Supreme Court's findings of fact with respect to MLB's degree of influence over the RSDC proceedings, and would have found ongoing bias based on MLB's supposed monetary stake in the outcome of the new arbitration. Affirmance Order at 61-66 (Acosta, J., dissenting). Based on its own new findings, the dissent would have determined that the parties' "choice of the RSDC as a fundamentally fair forum comprised of industry-insider arbitrators has been frustrated," *id.* at 62, and would therefore have invoked the court's "inherent equitable power to reform the contract" in order to rewrite the arbitration clause and direct the parties to a different arbitral forum, *id.* at 41. The dissenters thus summed up their disagreement with the plurality: "the plurality ... agrees that the [A]greement could be reformed if only MASN and the Orioles had 'made the extraordinary

showing of grounds needed to reform the agreement or disqualify the RSDC'"; and in the dissenters' view (contrary to the plurality's) "they have made such a showing here." *Id.* at 67-68; *see id.* at 61-66.

E. The Court of Appeals' Decision

MASN filed a notice of appeal to the Court of Appeals, purportedly as of right. *See* CPLR 5601(a). After requesting letter briefs, the Court of Appeals dismissed MASN's appeal *sua sponte* on November 16, 2017, explaining that the Affirmance Order "does not finally determine the proceeding within the meaning of the Constitution." Thorn Aff., Ex. 3. The Court's order noted that Judges DiFiore and Garcia took no part in the decision. The instant motion followed.[5]

ARGUMENT

I. THE QUESTIONS PRESENTED DO NOT MERIT FURTHER REVIEW

The motion should be denied because MASN has not identified any "question of law important enough to warrant the immediate attention of the Court of Appeals." CPLR § 5602, Practice Commentary C5602:1. Instead, as explained below, MASN seeks review of questions that are "lacking general significance," which "concern only these parties," and which "can be expected to arise only rarely or only in exceptional cases." *Id.* There is no "conflict of decision between

[5] While the proceedings on appeal were pending, the parties commenced negotiations and held a mediation regarding the rights fees to be paid for the 2017-2021 period. The dispute concerning that period is now also ripe for arbitration.

different appellate divisions," and the proposed questions are neither "likely to arise frequently" nor "important to others than the parties litigant." 11 Carmody-Wait New York Practice 2d § 71:69 (collecting examples of cases where further review may be warranted).

A. There Is No Need For Further Review Of The Question Whether The FAA Leaves In Place The Courts' General Power To Reform A Contract

MASN's first proposed question—whether a court has "power to order rehearing in a different ... forum not named in the arbitration clause," MASN Mem. 5—is not in need of further review because there is no genuine dispute about the answer.

All five Justices of this Court agreed that under FAA § 2, the courts retain their preexisting authority to reform or to set aside an arbitration clause "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Specifically, the plurality found no basis to send this dispute to a new tribunal, because "MASN and the Orioles have not made the extraordinary showing of grounds needed to reform the agreement." Affirmance Order at 35 (opinion of Andrias, J.).[6] The concurrence agreed that an arbitration clause may be set aside where there is an "established ground" for doing so "such as fraud, duress,

[6] *See also* Affirmance Order at 35 (opinion of Andrias, J.) ("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").

coercion or unconscionability"—a category covering reformation—but ruled that such relief is unavailable here. *See id.* at 37-38 (Kahn, J., concurring). And the dissenters also cited FAA § 2 and the applicability of "general contract principles" such as reformation. *Id.* at 60 (Acosta, J., dissenting); *see id.* at 41, 58, 67, 74.[7]

The Court's unanimous view that general contract principles provide a basis to reform an arbitration agreement is correct. The FAA precludes adoption of any arbitration-specific reformation rule and instead preserves the courts' authority to invoke "generally applicable contract defenses." *Kindred Nursing Centers Ltd. P'ship v. Clark,* 137 S. Ct. 1421, 1426 (2017) (quoting *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 339 (2011)). The doctrines of reformation and complete frustration of purpose fall within this category of generally applicable contract defenses. *See Chimart Assocs. v. Paul,* 66 N.Y.2d 570, 573 (1986) (reformation); *PPF Safeguard, LLC v. BCR Safeguard Holding, LLC,* 85 A.D.3d 506, 508 (1st Dep't 2011) (frustration). There is no dispute that either of those doctrines would be available in an appropriate case.

Thus, as the dissent correctly observed, there is consensus that in principle, the Agreement "could be reformed if only MASN and the Orioles had 'made the extraordinary showing of grounds needed to reform the agreement or disqualify the

[7] Although MASN previously asserted that the courts had such power pursuant to 9 U.S.C. § 10(b), *see, e.g.*, MASN Br. 1, 34, its motion conspicuously omits any such argument.

RSDC.'" Affirmance Order at 67-68 (Acosta, J., dissenting) (quoting *id.* at 35 (opinion of Andrias, J.)).[8] The disagreement among the three opinions did not go to the theoretical availability of the *power* of a court to reform an agreement to arbitrate, but rather to the question whether the evidence in this case satisfied the applicable standard.

Because the Justices of this Court did not disagree about a court's *power* to reform an arbitration agreement, there is no "need for clarification and guidance from the Court of Appeals" as to this question. *Contra* MASN Mem. 15. This absence of disagreement fully addresses MASN's suggestion that "the trial courts will not know what rules to apply" when a party seeks to reform an arbitration agreement, *id.* at 16. There is no disagreement that courts should apply the general rules of contract law to decide such claims. No genuine controversy exists that warrants the Court of Appeals' review.

B. There Is No Need For Further Review Of The Question Whether Contract Reformation Is Required On The Facts Of This Case

With no controversy over the courts' general power to order reformation in an appropriate case, MASN is left to argue that review is needed here to determine whether the Agreement must be reformed *in the specific circumstances of this*

[8] The Nationals and MLB likewise agree that, in theory, an arbitration provision could be susceptible to reformation or invalidation on these grounds, though they demonstrated that (as the Court concluded) such relief is not available on the record in this case. *See* Nationals Br. 39-41; Nationals Reply 5-8; MLB Br. 62-63.

case. That narrow question also does not warrant further review, for it has no impact beyond this case.

1. MASN's brief proceeds as though MASN's own version of the facts had prevailed in this Court, disregarding that this Court *affirmed* Supreme Court's findings of fact—which favored the Nationals on every salient issue except those related to Proskauer's involvement in the arbitration. *See* R.26-42; Affirmance Order at 5; *see also id.* at 24-33 (opinion of Andrias, J.) (endorsing Supreme Court's findings). Any review by the Court of Appeals would be limited to the facts so found and affirmed, because the Court of Appeals "has no power to review or decide questions of fact ... on appeal from a nonfinal determination" such as the Affirmance Order. Arthur Karger, The Powers of the New York Court of Appeals § 10:6 & n.7 (Rev. 3d ed. 2005) (collecting authorities); *see* N.Y. Const. Art. 6, § 3(a) (with irrelevant exceptions, "[t]he jurisdiction of the court of appeals shall be limited to the review of questions of law"); CPLR § 5501(b) (codifying same); CPLR § 5713 (order granting leave to appeal must specify facts giving rise to decisive question of law).

When MASN's factual assertions are replaced (as they must be) by the findings actually rendered by Supreme Court and this Court, this case becomes entirely unremarkable. The grounds for "evident partiality" in the initial arbitration have now been cured by the Nationals' retention of new counsel; and

the RSDC now has all new members. *See* Affirmance Order at 29 (opinion of Andrias, J.); *id.* at 38 (Kahn, J., concurring); R.42-43 n.21. There is therefore no factual basis to conclude that the specter of an "evidently partial" new arbitration exists, *contra* MASN Mem. 24. And MASN—a "sophisticated part[y], represented by experienced counsel"—voluntarily and expressly chose to submit disputes such as this one to the RSDC, knowing "full well how the RSDC operated." Affirmance Order at 28-29 (opinion of Andrias, J.); *see id.* at 37-38 (Kahn, J., concurring) (noting that "the parties chose" to arbitrate before the RSDC and declining to compel them to another forum). Thus, the only question that could properly be presented to the Court of Appeals is exceedingly narrow: *whether a court must reform an arbitration agreement, as a matter of general contract law, where a prior award has been vacated* ***based on a defect that has since been cured***. MASN does not attempt to establish that this limited question, highly specific to this particular case, warrants the Court of Appeals' review.

Instead, MASN attempts to relitigate factual arguments that have been previously rejected. For example, while MASN contends that the new arbitration will be "controlled by MLB," Mem. 24, Supreme Court and this Court have both rejected MASN's contention that "that MLB improperly controlled or influenced the arbitration process, or usurped the arbitrators' decision-making function," R.30-31; Affirmance Order at 5. And with regard to the new arbitration, the

plurality specifically found that MASN's contention that the RSDC would act as "puppets of MLB, rather than exercise its independent judgment, is pure conjecture." Affirmance Order at 30 (opinion of Andrias, J.); *see also id.* at 7 (MASN's assertion that "MLB will dictate the outcome of the second arbitration" is mere "[s]peculation"). And, in any event, the RSDC "was the forum the parties chose," *id.* at 37 (Kahn, J., concurring), and MASN made that choice knowing that "MLB staff would provide 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," *id.* at 28 (opinion of Andrias, J.). Indeed, as the plurality observed, "MASN's counsel acknowledged during proceedings before the motion court that MASN 'bought into whatever the structure was, whatever [MLB]'s role was; we agreed to that, we had to live with that.'" *Id.* (quoting R.3286); *see id.* at 35-36 ("MASN and the Orioles have not established that MLB, whose staff are required to treat each Club 'fairly and equitably,' would wield any improper or unforeseen power over a newly constituted RSDC arbitration panel")

The RSDC's independence defeats any complaint about MLB's alleged "$25-million financial stake in the outcome" or purported "prejudg[ment] [of] the merits," MASN Mem. 24. As Justice Andrias observed, "it is the RSDC, not MLB or its Commissioner that will render a final decision in this matter." Affirmance

Order at 32 (opinion of Andrias, J.). Moreover, the Nationals have vitiated any possible concern stemming from the $25 million advance by committing to post a bond for the full amount. *See id.* at 30. Thus, as it would be presented to the Court of Appeals, this case does not implicate any concerns about "fundamental fairness," and therefore does not bear on "public confidence in arbitration." *Contra* MASN Mem. 19-24. Instead, the case boils down to the uninteresting question as to whether an arbitration should go forward where there is no evidence that the arbitrators would be biased. That issue certainly does not warrant the Court of Appeals' review.

2. MASN also cannot establish any conflict of authority—indeed, MASN *admits* its inability to identify "any authorities that directly address" the question presented. Mem. 18.

MASN's lead case, *Pitta v. Hotel Association of N.Y.C.*, 806 F.2d 419 (2d Cir. 1986), did not invoke either the general contract-law reformation power or any freestanding rule of arbitration law, but rather applied a *specific contractual provision* requiring replacement of the arbitrator if he was "incapable of acting"—which he was in that case, since the dispute concerned his own ongoing employment as arbitrator. *Id.* at 421, 423-25.

The result in *Hooters of America, Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999), likewise turned on the specifics of the arbitration agreement at issue: The

employer was required by the contract to establish an arbitration system, and it breached that obligation by "creating a sham system" in which "one party to the proceeding so control[led] the arbitral panel" that the resulting proceeding was "unworthy even of the name of arbitration." *Id.* at 940. None of these facts is present here: the parties' Agreement did not charge the Nationals or MASN with creating an arbitration system, but rather directed that the proceeding would take place before the RSDC—and MASN has admitted that it "agreed to" and "had to live with" "whatever the structure was, whatever Major League Baseball's role was." R.3286. Unlike in *Hooters*, MASN's adversary (the Nationals) has no "control[]" over the arbitrators (the RSDC), and there is no factual basis to conclude that the arbitration will be a "sham." *Contra Hooters*, 173 F.3d at 940.

MASN's remaining cases also do not establish any conflict. The cited statements in *First National Oil Corp. v. Arrieta*, 2 A.D.2d 590, 593 (1st Dep't 1956), and *Hyman v. Pottberg's Executors*, 101 F.2d 262, 266 (2d Cir. 1939), were both *dicta*—neither case found evident partiality, and the Second Circuit in *Hyman* declined even to speculate as to "whether the court has power to appoint" new arbitrators in such a circumstance (*see id.*). The decisions in *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064 (2d Cir. 1972), and *Morris v. New York Football Giants, Inc.*, 150 Misc. 2d 271 (Sup. Ct., N.Y. Cnty. 1991), "simply manifest the FAA's directive that an agreement to arbitrate shall not be enforced

when it would be invalid under general contract principles." *Aviall, Inc. v. Ryder Sys., Inc.*, 110 F.3d 892, 896 (2d Cir. 1997); *see Aviall, Inc. v. Ryder Sys., Inc.*, 913 F. Supp. 826, 834 (S.D.N.Y. 1996) (similar as to *Morris*). Those same "general contract principles" apply here, but (unlike in *Erving* and *Morris*) the facts are insufficient to require reformation.

Finally, in *Rabinowitz v. Olewski*, 100 A.D.2d 539 (2d Dep't 1984), the court ruled under New York arbitration law (not the FAA) that a court could disqualify an entire group of arbitrators based on an "appearance of bias" that pervaded all of them. *Id.* at 540. But mere *appearance* of bias is insufficient under the FAA even for vacatur of an arbitral award that has already issued, R.31; R.38; *U.S. Elecs., Inc. v. Sirius Satellite Radio, Inc.*, 17 N.Y.3d 912, 914 (2011), and likewise would not satisfy the heavy burden required to justify contract reformation under general common-law principles. Moreover, whereas in *Rabinowitz* all of the potential arbitrators had received the "highly inflammatory letter" giving rise to the appearance of bias, *see* 100 A.D. 2d at 539, the new arbitration in this case will be decided by an entirely new set of RSDC members (as to whom MASN obviously has established no bias). *Rabinowitz* is inapposite, and gives rise to no conflict.[9]

---

[9] Indeed, to the extent *Rabinowitz* has any significance here, it is to show that removal of an arbitrator is permissible, if at all, only where there is demonstrable evidence of bias on behalf of the arbitrators. As the plurality found, Affirmance

3. Review also is not warranted because MASN's position is clearly incorrect on the merits. For one thing, MASN's arguments all center around arbitration, rather than the general law of contracts. But any such argument is foreclosed by the U.S. Supreme Court's recent holding that the States cannot adopt "legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" *Kindred Nursing*, 137 S. Ct. at 1426 (quoting *AT&T Mobility*, 563 U.S. at 339).

MASN's position, moreover, would inject doubt into the question whether arbitration agreements—particularly agreements among sophisticated commercial entities—will be enforced in this State. As the plurality noted, "the FAA permits parties to select arguably partial arbitrators," and "'does not fasten on every industry the model of the disinterested generalist judge.'" Affirmance Order at 26-27 (opinion of Andrias, J.) (quoting *Sphere Drake Ins. Ltd. v All Am. Life Ins.* Co., 307 F.3d 617, 620 (7th Cir 2002)); *see also id.* at 37-38 (Kahn, J., concurring). But MASN's requested holding would signal that even a conscious selection of inside-industry arbitrators might not be enforced in New York or may expose the results of an arbitration to a barrage of attacks based upon arguments of evident partiality. Such a holding would "create undue uncertainty within this industry, and others,

---

Order at 25 n.3, this case is factually distinct from *Rabinowitz* because MASN has made no showing that the RSDC is a biased or fundamentally unfair forum.

that have chosen to use panels composed of industry insiders, with specialized expertise, to arbitrate complex disputes," *id.* at 36 (opinion of Andrias, J.), and would threaten New York's place as a premier forum for commercial arbitration, *see* Milonas *Amicus* Br. 13-14.[10]

4. Finally, as a majority of the panel correctly concluded, the standards for contract reformation are not met here. MASN "ha[s] not made the extraordinary showing of grounds needed to reform the agreement," and "cannot show that the agreement is unenforceable under general contract principles." Affirmance Order at 35 (opinion of Andrias, J.). Instead, this case is marked by "the absence of an established ground for setting [the] [A]greement aside." *Id.* at 37 (Kahn, J., concurring). Reformation requires clear proof "not only that [a mutual] mistake or fraud exists, but exactly what was really agreed upon between

---

[10] To the extent MASN seeks the Court of Appeals' review of the general contract-law standards for determining whether reformation is available in a given case, that issue also does not merit review. MASN does not attempt to identify any conflict or uncertainty in the general law of reformation. And leave to appeal on this issue would in any event be inappropriate, because the Agreement is governed by *Maryland* law. R.210. While New York and Maryland law are similar (*see* Nationals Br. 41 n.13; Nationals Reply 5-7), there is no reason for New York's highest court to make pronouncements on another State's law—particularly given that the Court of Appeals has already dismissed the appeal because the Affirmance Order "does not finally determine the proceeding within the meaning of the Constitution." Thorn Aff., Ex. 3.

the parties." *Chimart*, 66 N.Y.2d at 574.[11] But MASN has not established either mistake or fraud here. Nor has MASN shown that the parties "really agreed" to arbitrate anywhere but in the RSDC.

To the contrary, the parties expressly *disclaimed* any agreement outside the four corners of the written contract, R.210, and the Agreement specifically carves out rights-fee disputes for decision by the RSDC *alone*, R.203. As the plurality noted, this was a "conscious choice" made by "sophisticated parties" that were "represented by experienced counsel" and were fully aware of MLB's role in RSDC proceedings. Affirmance Order at 28 (opinion of Andrias, J.). Indeed, MASN has acknowledged that it "'bought into whatever the structure was, whatever [MLB]'s role was; we agreed to that, we had to live with that.'" *Id.* (quoting R.3286). Thus, as Justice Kahn found, the RSDC "was the forum the parties chose," and absent facts not present here that choice must be honored and enforced. *Id.* at 37-38 (Kahn, J., concurring). The Court of Appeals' review is not necessary to resolve this issue.

***

MASN identifies no basis to authorize another appeal in this case. The parties' actual dispute turns on contested factual questions that are unique to this

---

[11] *See, e.g.*, *Md. Port Admin. v. John W. Brawner Contracting Co.*, 492 A.2d 281, 288 (Md. 1985); *Hearn v. Hearn*, 936 A.2d 400, 410 (Md. Ct. Spec. App. 2007) (similar under Maryland law).

case and which would be outside the Court of Appeals' jurisdiction. Nothing in this case merits further review, and the motion therefore should be denied.

II. ANY REVIEW SHOULD AWAIT FINAL DETERMINATION OF THE DISPUTE

Any further review of *this* case should wait until the arbitration has been finally determined. The constitutional finality rule that mandated the Court of Appeals' dismissal of MASN's first attempted appeal, *see* Thorn Aff. Ex. 3; N.Y. Const., Art. VI, § 3(b), flows from "the need to conserve judicial resources by generally applying a strict policy against piecemeal appeals in a single litigation." Karger, *supra*, § 3:1. There is no reason to disregard that policy in this case.

In particular, MASN's suggestions that the new RSDC members are biased, or that the arbitrators will be subject to improper control by MLB, can only fairly be decided *after* the arbitration is complete. As the plurality observed, "[a]n attack on the impartiality of the arbitrators 'must be based on something overt, some misconduct on the part of an arbitrator[s],'" Affirmance Order, at 30 (opinion of Andrias, J.), and the FAA "'does not provide for judicial scrutiny of an arbitrator's qualifications to serve, other than in a proceeding to confirm or vacate an award, which necessarily occurs after the arbitrator has rendered his service.'" *Aviall*, 110 F.3d at 895 (citation omitted). At present, MASN's assertion that the RSDC arbitrators will be less than impartial is "pure conjecture." Affirmance Order at 30

(opinion of Andrias, J.). The Court of Appeals should not be asked to review this case based upon MASN's rank speculation.

MASN fails in its attempts to justify immediate review and thus to further delay the RSDC's final determination of this dispute, which concerns rights fees for a time period that ended in 2016. There is, for example, no "procedural confusion," *contra* MASN Mem. 25: This Court reversed Supreme Court's denial of the Nationals' motion to compel arbitration, so the clear next step is a new RSDC arbitration. After an award issues, the parties would proceed in orderly fashion to any necessary confirmation/vacatur proceedings. Those proceedings will "bring the parties ... closer to resolving the underlying business dispute," *contra id.*, by moving the case towards a final award. A "*third* arbitration" is not likely, *contra id.* at 27, because that would require vacatur of the second arbitration award—a speculative outcome with no grounding in fact. Thus, even if review were needed, there is no reason to conduct it at this premature stage.

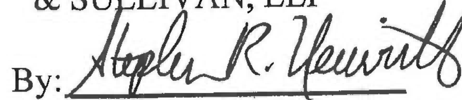
CONCLUSION

The motion should be denied.

DATED: New York, New York
November 29, 2017

Respectfully submitted,

QUINN EMANUEL URQUHART
& SULLIVAN, LLP

By: 

Stephen R. Neuwirth
Sanford I. Weisburst
Julia J. Peck
Cleland B. Welton II
51 Madison Avenue
New York, New York 10010
212-849-7000

Attorneys for Respondents – Respondents – Cross-Appellants – Appellants The Washington Nationals Baseball Club, LLC

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

TCR SPORTS BROADCASTING HOLDING, LLP,

Petitioner – Appellant
Cross-Respondent – Respondent,

-against-

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

Respondents – Respondents –
Cross-Appellants – Appellants,

THE OFFICE OF THE 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.

Index No. 652044/2014

AFFIDAVIT OF SERVICE BY FEDEX

Cleland B. Welton II, an attorney duly admitted to practice in the State of New York, affirms, pursuant to CPLR Rule 2106 and subject to the penalties of perjury, that on November 29, 2017, I served a true and correct copy of the MEMORANDUM IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS in this action upon the

following parties, by transmission via overnight courier (Federal Express) to their respective counsel as specified below:

Benjamin R. Nagin
Sidley Austin LLP
787 Seventh Avenue
New York, NY 10019
Attorney for Nominal Respondents – Appellants – Coss-Respondents – Respondents The Baltimore Orioles Baseball Club and Baltimore Orioles Limited Partnership

Rachel W. Thorn
Cooley LLP
1114 Avenue of the Americas
New York, NY 10036-7798
Attorney for Petitioner – Appellant – Cross-Respondent – Respondent TCR Spots Broadcasting Holding, LLP

Charles S. Fax
Rifkin Weiner Livingston LLC
2002 Clipper Park Road Unit 108
Baltimore, Maryland 21211
Attorney for Nominal Respondent – Appellant – Cross-Respondent – Respondent Baltimore Orioles Limited Partnership, in its capacity as managing partner of TCR Spots Broadcasting Holding, LLP

Jonathan D. Lupkin
Lupkin & Associates PLLC
26 Broadway, 19th Floor
New York, NY 10004
Attorney for Respondents – Respondents – Cross-Appellants The Office of the Commissioner of Baseball and the Commissioner of Major League Baseball

Dated: New York, New York
November 29, 2017

Cleland B. Welton II