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 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

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

The Nationals' and MLB's oppositions rest on the obviously false premise that the five Justices who heard this case and wrote three separate opinions, spanning 74 pages in total in a highly unusual 2-1-2 split, simply rendered that fractured decision to resolve "routine legal questions" by applying "well-settled" law to "the specific facts." MLB Opp'n at 1; Nationals Opp'n at 2. MLB and the Nationals come to this self-refuting position by largely ignoring (or mischaracterizing) the two-Justice dissent, collapsing the concurrence into the plurality and trying to reduce the legal question to whether generally applicable contract defenses support reformation.

But despite that effort at misdirection and obfuscation, this case is not about generally applicable contract defenses, as the Court knows full well. The Court divided on the role courts can and should play in safeguarding the procedural integrity of arbitrations and ensuring they are fundamentally fair. And the Order is long and fractured precisely because the questions presented are novel and critically important. They are precisely the kinds of questions that should not go unsettled. They should be decided in Albany, and the time to settle these questions is now.

MLB and the Nationals provide no legitimate reason to delay review, nor is there one, given that MASN and the Orioles will be able to appeal the Order, directly to the Court of Appeals and as of right, immediately after an RSDC arbitration con-

cludes. *See* CPLR § 5601(d). Until the Court of Appeals rules, the underlying business dispute cannot be resolved. The parties will instead be stuck in the "loop of partial arbitrations, vacaturs, and remands" against which Presiding Justice Acosta warned, *see* Order at 42, but which MLB now perversely embraces, *see* MLB Opp'n at 24.

The novel and unsettled legal questions on appeal will not change. No judicial or party resources will be conserved. No time will be saved. The court and the parties instead will be subjected to additional (and avoidable) litigation, procedural confusion and increased costs, and for what purpose? MASN and the Orioles will have been consigned to arbitrate in a forum that has been found to be evidently partial; that has a $25 million vested financial interest in ruling against MASN by virtue of the undisputed fact that MLB signed a contract saying it will recover those funds out of an award that favors the Nationals; and whose Commissioner has testified in this litigation that the prior award is substantively correct and publicly declared that MASN will have to pay the amounts stated in the vacated award "sooner or later."

Certification will thus advance judicial economy and spare the parties enormous time and expense by logically settling the question of the forum for the next round of arbitration *before* it occurs, not after. Certification would also send the crucial message that the courts of New York, one of the world's great centers of

arbitration, take seriously the need to safeguard fundamental fairness and the procedural integrity of all arbitrations in this State. This motion should be granted.

I.

As an initial matter, the oppositions reflect a basic misunderstanding of New York procedure. MLB and the Nationals offer arguments about *whether* the Court of Appeals should ever review the Order, but that question has already been resolved by the two-justice dissent in the Order. *See* Mot. at 26 n.5, 27. The Court of Appeals' determination that the Order is not presently final does not diminish that right. CPLR § 5601(d) speaks directly to that question by making clear that "a *direct appeal* may be taken to the Court of Appeals as of right, on the basis of the requisite [two-Justice] dissent, from the final determination of the … arbitration panel … for review of a prior nonfinal order," Karger, Powers of the NY Court of Appeals § 6:10 (Sept. 2016 update) (emphasis added).

Thus, if the parties to this case proceeded to a second arbitration, the *present* Order, *on the present record*, would become *immediately appealable as of right* to the Court of Appeals once the new award is rendered. Without citing any supporting authority at all, the oppositions wrongly assert that the Court of Appeals can only hear the appeal if the second arbitration proceeds and MASN and the Orioles successfully vacate the resulting award. MLB Opp'n at 24; Nationals Opp'n at 26-27. They also wrongly suggest that delay would somehow allow for a more "complete"

record. MLB Opp'n at 24. The Order, in its present form, will be appealed on the record that now exists.

Having ignored CPLR § 5601(d), neither MLB nor the Nationals offers even a single word about why that inevitable review should be delayed at the cost of years of business uncertainty and spiraling litigation. *See* Mot. at 25-27 (addressing the burdens that delay would impose on both the parties and the courts). Until the Court of Appeals decides the appeal, the underlying business dispute cannot be resolved for either the 2012-2016 period or the 2017-2021 period. There is no reason whatsoever for delay.

II.

MLB and the Nationals also mischaracterize the Order in attempting to evade further review. Incredibly, the Nationals assert that this is an "uninteresting," "garden-variety," fact-bound case that presents no significant disagreement as to the law and carries no implications beyond it. Nationals Opp'n at 3, 20; *see also* MLB Opp'n at 19 (similar). Those head-in-the-sand assertions will surely come as a surprise to this Court, which wrote three separate opinions expressing three different views of the governing legal standards and their application to this case. The depth of those opinions, and the varying lines of authority on which each rests, bears witness to the Court's recognition that this case presents significant legal questions and that their decision is of broader import.

The issue is not—as MLB and the Nationals misleadingly seek to frame it—whether under the FAA "the courts retain their preexisting authority to reform or to set aside an arbitration clause" under general contract principles. *See* Nationals Opp'n at 14. The issue is whether a court has the remedial power to order rehearing in a different forum when the arbitral forum has demonstrated "an utter lack of concern for fairness of the proceeding that is so inconsistent with basic principles of justice that [its] award must be vacated." R.41 (Marks, J.) (internal quotations and citations omitted).

This issue runs to the FAA's very foundation, and in particular, to the balance it strikes between deferring to private agreements to arbitrate, on the one hand, and the role of the courts in zealously safeguarding the integrity and fairness of the arbitral process on the other. Questions about that interplay, and where fundamental fairness demands that a line be drawn, arise in any number of settings.[1] And it is obviously important to the conduct of arbitration in this State for litigants and judges to have clear guidance on what standards apply when they do. All three *amici* who filed briefs in this Court addressing the issue of where the rehearing should occur—

[1] Questions of this form have arisen in numerous contexts—in employment, *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 940-41 (4th Cir. 1999), in labor disputes, *Aircraft Braking Sys. Corp. v. Local 856, UAW*, 97 F.3d 155, 162 (6th Cir 1996); *Pitta v. Hotel Ass'n,* 806 F.2d 419, 424-25 (2d Cir. 1986), in commercial disputes, *Aviall, Inc. v. Ryder Sys., Inc.*, 110 F.3d 892, 895 (2d Cir. 1997); *Matter of Excelsior 57th Corp. (Kern)*, 218 A.D.2d 528, 531 (1st Dep't 1995); *Rabinowitz v. Olewski,* 100 A.D.2d 539, 540 (2d Dep't 1984), and, as here, in professional sports, *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1067 (2d Cir. 1972); *Morris v. New York Football Giants, Inc*., 150 Misc.2d 271, 278 (Sup. Ct., New York Cnty. 1991).

including the *amicus* who supported the Nationals—declared that this case "raises fundamental questions concerning the integrity of arbitral proceedings and the role of the courts." Feinberg Amicus Br. at 2; *see also* Smith Amicus Br. at 2-3 (emphasizing "the principle of fundamental fairness" and "public confidence in courts and arbitrators"); Milonas Amicus Br. at 2 (describing this as the "important legal issue raised by this appeal"). That assessment of the importance of this case is clearly correct.

III.

In addition to claiming (implausibly) that the issue is unimportant, MLB and the Nationals advance the equally implausible view that the Court's three separate opinions all stand for the same proposition of law. The Nationals say all five Justices agreed that FAA § 2 provides the sole, controlling legal standard here, Nationals Opp'n at 14-15, while MLB asserts that "[t]he only difference between the plurality and concurring opinions is the level of specificity at which they decided the question," MLB Opp'n at 14-15.

The concurrence cannot be brushed aside in that fashion. If Justice Kahn agreed with the plurality regarding the governing legal standard, she would not have written that she concurred "in the result reached by the plurality …, *but I do so on different grounds*." Order at 38 (emphasis added). There would have been no need

for her to write separately to explain that the Court "may not order that the arbitration take place in a forum other than the one selected by the parties." *Id.*

Likewise, Justice Acosta's lengthy and thorough dissent did not rely solely or even primarily on FAA § 2. He explained that there are three convergent sources of such authority: "[S]ection l0(b) of the FAA," which gives courts "discretion to remand a matter to the same arbitration panel or a new one"; the "statutory [reformation] power under [FAA] § 2"; and the "inherent discretion of the courts to fashion the appropriate remedy." Order at 54, 59. He repeatedly emphasized the courts' inherent remedial authority, which is preserved and codified in FAA § 10(b). *See id.* (noting the federal courts' "broad discretion in fashioning appropriate relief" under the FAA (quoting *Aircraft Braking Sys.*, 97 F.3d at 162)). And he specifically disputed Justice Kahn's statement of the controlling legal standard. *Id*. at 42.

There was no "unanim[ity]" here. *See* Nationals Opp'n at 15. In part, the Court's sharp divide reflects how this case arrived at this Court. For the better part of four years, MLB and the Nationals contested that courts have any part of the power that they now claim is well settled and uncontroversial. MLB and the Nationals persuaded the trial court that ordering rehearing in a different forum was *categorically* "outside of its authority." R.42 n.21; MLB Opp'n to Vacatur Pet. at 24 ("courts lack the authority to order arbitration in a forum other than the one to which the parties agreed"); Nationals Opp'n to Vactur Pet. at 25 (similar). Yet now they

pretend this case merely concerns the application of "the legal requirements governing contract reformation." MLB Opp'n at 13-14; *see also id.* at 15-16; Nationals Opp'n at 16-17.

Not so. The fundamental question presented here is whether, after vacatur, the courts have a power, arising under FAA § 10(b) or otherwise, to safeguard the procedural integrity and fundamental fairness of arbitral proceedings. The dissent said yes. Order at 54. The concurrence said no. *Id*. at 38. The plurality said maybe. *Id.* at 6, 24 & n.3. That division squarely presents a novel legal question that warrants immediate Court of Appeals review.

IV.

This Court's three separate opinions also disagreed on the *extent and application* of that power. MASN's and the Orioles' second proposed question thus asks, if courts do have the power to order rehearing in a different and unbiased forum, whether it was an abuse of discretion as a matter of law not to exercise that power here. Mot. at 5. It is well settled that "whether there has been an abuse of discretion *is a question of law, not fact*," even though that inquiry naturally requires the court to "look at the facts." *People v. Jones*, 24 N.Y.3d 623, 629 (2014) (internal quotations and citations omitted) (emphasis added); *accord Barasch v. Micucci*, 49 N.Y.2d 594, 598 & n.1 (1980). MLB's contrary contention, *see* MLB Opp'n at 16, is simply wrong.

Similarly, there is no substance to the Nationals' claim that MASN is attempting to relitigate "factual findings" that the Court of Appeals lacks jurisdiction to review. Nationals Opp'n at 17. The Nationals' recitation of so-called "factual findings" is actually a stream of characterizations and legal conclusions. *See* Nationals Opp'n at 17-20. The facts central to the Court of Appeals' review are undisputed. These include: (i) the RSDC is an MLB committee, whose members are appointed by the MLB Commissioner, that is staffed by MLB personnel with "access to highly proprietary and confidential information" who provide all administrative, legal and organizational support to the RSDC, MLB Opp'n at 3, 12; (ii) MLB executed an agreement tying its recovery of a $25 million payment to the Nationals to an award in the Nationals' favor and that the $25 million remains unpaid, R.2918, R.2844; (iii) MLB's Commissioner made public statements regarding the eventual outcome of this dispute, testified to his legal opinion that MASN and the Orioles are wrong about the central question of contract interpretation in this dispute, and openly criticized the Orioles for allegedly thwarting the Settlement Agreement, R.3426, R.3181 ¶ 40, R.3702; and (iv) that (as the plurality and the dissent both observed) "MLB would have significant influence over the arbitration process," Order at 28; *accord id.* at 61-65. What is truly disputed here is the *legal significance* of these facts—whether they compel the conclusion that this dispute must be arbitrated outside of

MLB's purview. There is no barrier, practical or otherwise, to the Court of Appeals' review of that question.

V.

MLB's and the Nationals' remaining arguments are unavailing. They consist primarily of an effort to relitigate the merits of the underlying Order and are beside the point. The question now before this Court is not whether the Order was correct, but whether the questions it presents are fit for immediate review by the Court of Appeals, *before* the parties are relegated to arbitrate again in an evidently partial forum. The answer to that question is yes. The motion for leave to appeal should be granted.

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