APL-2020-00175; Motion No. 2020-913
New York County Clerk's Index No. 652044/14

Court of Appeals

of the

State of New York

TCR SPORTS BROADCASTING HOLDING, LLP,

Appellant,

– against –

WASHINGTON NATIONALS BASEBALL CLUB, LLC; WN PARTNER, LLC; NINE SPORTS HOLDING, LLC; THE OFFICE OF THE COMMISSIONER OF BASEBALL; and THE COMMISSIONER OF MAJOR LEAGUE BASEBALL,

Respondents,

– and –

THE BALTIMORE ORIOLES BASEBALL CLUB and BALTIMORE ORIOLES LIMITED PARTNERSHIP, in its capacity as managing partner of TCR SPORTS BROADCASTING HOLDING, LLP,

Appellants.

OPPOSITION TO MOTION TO DISMISS

BOIES SCHILLER FLEXNER LLP
Attorney for Appellants TCR Sports Broadcasting Holding, LLP, Baltimore Orioles Limited Partnership, and Baltimore Orioles Baseball Club
55 Hudson Yards
New York, NY 10001
Tel: 212-446-2300
Fax: 212-446-2350

Of Counsel:
JONATHAN D. SCHILLER
JOSHUA IRWIN SCHILLER
THOMAS SOSNOWSKI

STATE OF NEW YORK
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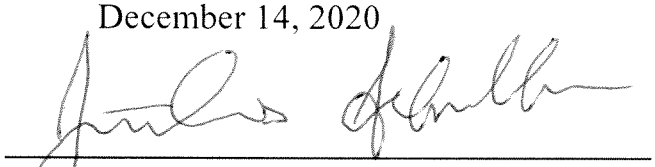
SECTION 500.1(f) DISCLOSURE

Pursuant to Section 500.1(f) of the Rules of the Court of Appeals, Appellants TCR Sports Broadcasting Holding, LLP, the Baltimore Orioles Baseball Club, and Baltimore Orioles Limited Partnership, in its capacity as managing partner of TCR Sports Broadcasting Holding, LLP, state as follows:

Appellant TCR Sports Broadcasting Holding, LLP, d/b/a Mid-Atlantic Sports Network ("MASN"), is a limited liability partnership formed pursuant to the laws of

the State of Maryland. MASN's current and only partners are Appellant Baltimore Orioles Limited Partnership ("BOLP"), Baltimore Orioles, Inc., and WN Partner LLC. BOLP is a limited liability partnership formed pursuant to the laws of the State of Maryland, and holds as an asset and operates Appellant Baltimore Orioles Baseball Club. In separate capacity, BOLP is the managing partner of MASN. The managing general partner of BOLP is Baltimore Orioles, Inc.

Dated: New York, New York
December 14, 2020

By: 

Jonathan D. Schiller
Joshua I. Schiller
Thomas H. Sosnowski
BOIES SCHILLER FLEXNER LLP
55 Hudson Yards
New York, NY 10001
Tel: (212) 446-2300
Fax: (212) 446-2350

Carter G. Phillips
Kwaku A. Akowuah
Tobias S. Loss-Eaton
Sidley Austin LLP
1501 K Street NW
Washington D.C. 20005

Counsel to Mid-Atlantic Sports Network, the Baltimore Orioles Limited Partnership, and the Baltimore Orioles Baseball Club

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Appellants Mid-Atlantic Sports Network ("MASN"), the Baltimore Orioles Limited Partnership and the Baltimore Orioles Baseball Club ("Orioles," and collectively with MASN, "Appellants") respectfully submit this Memorandum of Law in Opposition to the December 3, 2020 motion of Respondent Washington Nationals Baseball Club, LLC ("Nationals") to dismiss Appellants' appeal.

PRELIMINARY STATEMENT

This appeal seeks review, pursuant to CPLR 5601(d), of the First Department's July 13, 2017 Order (the "2017 First Department Order," Ex. 1).[1] The 2017 First Department Order unanimously affirmed vacatur of a June 30, 2014 arbitration award ("First Award") issued by Major League Baseball's ("MLB") Revenue Sharing Definitions Committee ("RSDC") because of MLB's evident partiality. Ex. 1 at 5. Yet, in a divided 2-1-2 decision that resulted in a two-Justice dissent, the First Department ordered the parties to arbitrate again before MLB's RSDC instead of, as the two-Justice dissent concluded was required by the Federal Arbitration Act ("FAA"), a different arbitral forum unaffiliated with MLB.

On that point, the 2017 First Department Order comprised *three* divergent understandings of the court's power to order rehearing in a different arbitral forum. The two-Justice plurality assumed that courts have the power to direct an arbitration

[1] References to "Ex." refer to the Exhibits to the Affirmation of Jonathan D. Schiller in Opposition to Motion to Dismiss Appeal, filed herewith.

to be reheard before a different forum, i.e., "to disqualify an arbitration forum," but held that "the circumstances cited by the dissent do not warrant the removal of the RDSC." Ex. 1 at 6, 24, 26. The one-Justice concurrence agreed with the plurality's result but on the separate legal ground that, absent a showing that the arbitration agreement was *procured by* fraud, duress, coercion or unconscionability, the court lacks the power to order rehearing in a different arbitral forum. Ex. 1 at 37-38.

By contrast, the two-Justice dissent (written by Presiding Justice Acosta and joined by Justice Gesmer), held that (1) the court has the power, after vacating an arbitral award, to order rehearing before a neutral and unbiased arbitral forum different from the forum stated in the arbitration clause, and (2) the "particularly egregious" circumstances presented in this case *required* the rehearing of the arbitration to be held in a forum outside of MLB, because a rehearing under the auspices of MLB would be fundamentally unfair as a matter of law. Ex. 1 at 39-74. Appellants submit that the dissent was correct, and that the 2017 First Department Order should be reversed on the law for the reasons set forth in the dissent.

Appellants first appealed to this Court to seek review of the 2017 First Department Order in July 2017, but the Court dismissed the appeal "upon the ground that the order appealed from does not finally determine the proceeding within the meaning of the Constitution." Ex. 2 at 4. Appellants participated in the second arbitration subject to a full reservation of their rights, including their rights under

CPLR 5601(d) to seek this Court's review of the 2017 First Department Order after the RSDC issued a new award. The RSDC issued a new award on April 15, 2019 ("Second Award"), Ex. 3, and, as Presiding Justice Acosta predicted in his dissent, the Second Award reached almost exactly the same result as the First Award. In May 2019, Appellants appealed from the Second Award under CPLR 5601(d) to seek review of the 2017 First Department Order. The Nationals moved to dismiss the appeal on the same two statutory grounds that the Nationals assert here, as well as the ground that the proceeding was not final. *See* Ex. 4. The Court dismissed the appeal "upon the ground that the arbitration award appealed from does not finally determine the proceeding within the meaning of the Constitution." Ex. 5 at 8.

The Supreme Court subsequently confirmed the Second Award, Ex. 6, and entered a final judgment confirming the Second Award, Ex. 7, which the First Department affirmed, Ex. 8. The proceeding is now final and Appellants' appeal satisfies all of the requirements of CPLR 5601(d). The two arguments the Nationals raise in their motion to dismiss lack merit and the Court should deny the motion.

First, the 2017 First Department Order "necessarily affects" the Second Award and the 2019 final judgment confirming the Second Award. If a majority of the First Department panel had accepted the two-Justice dissent's position, MLB's RSDC would not have presided over the second arbitration, the Second Award would have never been issued, and the judgment confirming the Second Award

would have never been entered. *See Siegmund Strauss, Inc. v. E. 149th Realty Corp.*, 20 N.Y.3d 37, 41-43 (2012); Karger, Powers of the New York Court of Appeals § 9:5, at 304-305, 311; *Oakes v. Patel*, 20 N.Y.3d 633, 644-45 (2013). This Court has held that an interlocutory order "denying [a] motion for change of venue" "necessarily affects" the final judgment because "reversal would inescapably [lead] to a vacatur of the judgment . . . and to the submission of the issue . . . to a court where venue might properly be laid." *Matter of Aho*, 39 N.Y.2d 241, 248 (1976).

The cases cited by the Nationals are inapposite. In those cases, unlike *Matter of Aho* and its progeny, the Court did not decide the issue of whether or not to remand *to a different forum.* Those cases do not govern the question of whether the 2017 First Department Order, in which the Justices divided over whether the dispute must be reheard *in a different arbitral forum* outside MLB, necessarily affects the subsequent final judgment confirming the Second Award issued by MLB's RSDC. The application of this Court's controlling precedent demonstrates that the 2017 First Department Order "necessarily affects the judgment." CPLR 5601(d).

Second, Presiding Justice Acosta's two-Justice dissent was based on two questions of law. The question of the proper forum for rehearing of the arbitration produced three separate opinions totaling 68 pages: a two-Justice plurality, a one-Justice concurrence, and a two-Justice dissent. Neither the plurality nor the concurrence disputed the facts in the record identified as pertinent by the dissent.

Rather, all three opinions were in agreement on the facts, but disagreed sharply about what legal conclusion must follow under the FAA from those facts.

The plurality assumed that courts have the power to disqualify the contractually-designated arbitral forum on the ground that a rehearing before the designated forum would be fundamentally unfair, but concluded that "the circumstances cited by the dissent do not warrant the removal of the RSDC." Ex. 1 at 26. The concurrence, meanwhile, concluded that absent a showing that the arbitration agreement was *procured by* fraud, duress, coercion or unconscionability, courts lack the power under the FAA to disqualify the contractually-designated arbitral forum and require rehearing in a different arbitral forum. Ex. 1 at 37-38.

The dissent disagreed with the concurrence and the plurality on two questions of law. Contrary to the concurrence, the dissent concluded that courts have the authority to order an arbitration before an unbiased forum not named in the arbitration agreement where a "baseline" of "fundamental fairness" cannot be achieved before the contractually-designated forum. Ex. 1 at 41. The dissent's dispute with the concurrence over the court's "power to grant the relief sought" is "a question of law reviewable in" the Court of Appeals. *Dittmar Explosives, Inc. v. A. E. Ottaviano, Inc.*, 20 N.Y.2d 498, 503 (1967). Contrary to the plurality, the dissent held that, in this case, the court *must* exercise its authority to refer the matter to a neutral arbitral forum. Ex. 1 at 42. The dissent's dispute with the plurality over

whether the circumstances were sufficient to meet a legal standard is also a question of law reviewable in this Court. *In re Jamal S.*, 28 N.Y.3d 92, 96 (2016).

The Nationals' argument that the dissent's disagreements with the concurrence and the plurality were over questions of fact is predicated on their mischaracterizations of the 2017 First Department Order, including their selective quotations of the three opinions in the Order. The Nationals also mischaracterize this Court's decisions on what constitutes a reviewable question of law.

In addition, the procedural posture of this case confirms that the dissent was a dissent on a question of law. The Supreme Court and Appellate Division decided this case on the papers under CPLR 409(b), which makes a special proceeding "resolvable by the court on the papers as a matter of law, as if determining a motion for summary judgment." *Dandomar Co., LLC v. Town of Pleasant Valley Town Bd.*, 86 A.D.3d 83, 89 (2d Dep't 2011). A special proceeding cannot be decided under this summary determination procedure if there is a material dispute of fact. *Id.* This confirms that the disagreements among the Justices were on questions of law.

For the foregoing reasons, and those stated more fully stated below, the Court should deny the Nationals' motion to dismiss Appellants' appeal.

STATEMENT OF FACTS

A. The 2005 Settlement Agreement

The genesis of this dispute is a March 28, 2005 settlement agreement (the

"Settlement Agreement") entered among MASN, the Orioles, MLB, and the Nationals (then-owned by MLB). *See* Ex. 9. The purpose of the Settlement Agreement was to compensate the Orioles, in perpetuity, for the harm the Orioles would suffer in perpetuity from MLB's purchase and relocation of the Montreal Expos baseball team to Washington, D.C., in the middle of the Orioles' Home Television Territory, and 38 miles from the Orioles' location in Baltimore. Ex. 10 at 2-5. In the Settlement Agreement, MLB provided for the Orioles to be compensated in a "creative" way—through a supermajority share of the profits of a television network that televises both Orioles and Nationals games. *Id.* at 3.

Under the Settlement Agreement, the Orioles and MLB-owned Nationals licensed the rights to telecast all of their baseball games to MASN (formerly the Orioles' own sports television network, TCR, rebranded as MASN) in perpetuity. Ex. 9 § 2.D. The Settlement Agreement provides for MASN to pay the Orioles and Nationals equal annual cash payments for the license to telecast both teams' games ("rights fees"), *id.* § 2.J.3, and provides that the Orioles are entitled to a supermajority share of MASN's residual profits (its revenues remaining after payment of all expenses including rights fees) as compensation, *id.* § 2.N.

B. The Arbitration Clause in the 2005 Settlement Agreement

The Settlement Agreement set the dollar amount of MASN's rights fee payments to the Nationals and Orioles for the first seven years. Ex. 9 § 2.G. During

negotiations of the Settlement Agreement, the Orioles and MLB recognized that, after the seven year period, beginning in 2012, a dispute could arise regarding the amount of rights fees MASN must pay to the Nationals and the Orioles. Ex. 11 at 5-6; Ex. 12 at 8. The Orioles, MLB, and the Nationals (then-owned by MLB) agreed to arbitrate such a dispute and designated MLB's RSDC as the arbitral forum. Ex. 9 § 2.J.3. MLB's RSDC is a standing committee appointed by the Commissioner of Baseball and comprised of three high-level MLB executives. Ex. 13 at 2. Staffed and advised by MLB personnel, MLB lawyers and MLB consultants, the RSDC has no separate legal or practical existence. It is part of MLB itself. Ex. 14 at 1.

While Appellants agreed in 2005 to designate MLB's RSDC as the arbitral forum, Appellants retained two material and fundamental protections. First, section 2.J.3 of the Settlement Agreement requires MLB's RSDC to use a specific methodology to make its determination of the fair market value of the Orioles and Nationals rights fees: "the RSDC's established methodology for evaluating all other related party telecast agreements in the industry." Ex. 9 § 2.J.3. When the Settlement Agreement was signed in March 2005, the parties to it fully understood the meaning of the phrase "the RSDC's established methodology for evaluating all other related party telecast agreements in the industry" because there was only one methodology that had been used by the RSDC since the inception of MLB's Revenue Sharing Plan and RSDC. *See* Ex. 15 at 2-3. The parties agreed to utilize this methodology.

Second, Appellants retained the protections of the FAA, 9 U.S.C. § 1, *et seq.* The FAA's protections include the requirements that all arbitrations be free of corruption, fraud, and evident partiality, 9 U.S.C. § 10(a)(1)-(2), and that all arbitrations be free of misconduct that prejudices any party's rights or exceeds the arbitrators' powers, *id.* § 10(a)(3)-(4). The FAA's protections also include the Court's power to revoke or modify the arbitration agreement on any grounds that exist in law or in equity to revoke any contract. 9 U.S.C. § 2. Appellants bargained for and expected that a fair, neutral and unbiased MLB tribunal would apply the designated methodology if a dispute were to arise, and in the event the MLB tribunal was not fair, neutral or unbiased, the protections of the FAA would be available.

C. MLB Presides Over an Evidently Partial Arbitration

In January 2012, MASN applied the methodology required by the Settlement Agreement and determined that the fair market value of the Orioles and Nationals rights fees for 2012-2016 was, on average, approximately $40 million per team per year. The Nationals rejected MASN's calculation at a meeting where one of the Nationals' executives literally tore it to pieces, Ex. 16 at 8, and demanded an arbitration before MLB saying they "deserved more and would get more." *Id.*

The first RSDC arbitration commenced in the spring of 2012. MLB subjected Appellants to a fundamentally unfair and biased arbitration proceeding "that may be the poster child for everything that an arbitration should not be." Ex. 17, Brief of

Amicus Curiae Kenneth R. Feinberg, at 4. The record contains several signs of MLB's—the arbitral forum's—bias and partiality. MLB permitted its own law firm, Proskauer Rose, to concurrently represent the arbitrators or their business interests, MLB in dozens of other matters, and MLB's Commissioner, *at the same time that Proskauer (indeed, some of the same lawyers at Proskauer) were representing the Nationals against Appellants*. Despite Appellants' objections, MLB refused to disclose the extent and nature of these overlapping and conflicting relationships, or take any steps to correct this obvious unfairness. Ex. 18 at 29-43; Ex. 19 at 27-28

MLB also took a direct $25 million financial interest in the outcome of the arbitration. In August 2013, before the arbitration award had been issued, MLB loaned the Nationals $25 million. Ex. 20. MLB and the Nationals agreed between themselves (without telling Appellants) that if the RSDC issued a decision awarding the Nationals higher rights fees than MASN had paid the Nationals, then MLB would receive the first $25 million in proceeds due to the Nationals after the RSDC decision. *Id.* at 2. For MLB to be repaid its $25 million loan, its RSDC was required to render an award of at least $25 million. MLB—the arbitral forum—thus placed a bet on the outcome of a proceeding pending before its own arbitral body.

The Commissioner of Baseball delivered the First Award to the parties on June 30, 2014. *See* Ex. 21. The First Award was replete with legal and factual errors indicating a predetermined result. It even relied on documents that MLB had refused

to disclose to Appellants during the proceeding. Ex. 21 at 10. It set the teams' telecast rights fees for 2012-2016 at approximately $60 million per team per year, which was $20 million per team per year higher than the rights fees determined by (and paid by) MASN using the established methodology required by the Settlement Agreement. Ex. 21 at 19. The rights fee obligation imposed by the First Award eliminated virtually all of MASN's profits, thereby almost entirely eliminating the compensation MLB promised the Orioles when the parties signed the Settlement Agreement and threatening MASN's economic viability. Ex. 16 at 15-16.

The record in the vacatur proceedings in the Supreme Court established that MLB—the arbitral forum itself—played a central role in crafting the First Award. The Commissioner and his staff participated in the RSDC's deliberations, provided factual and legal analysis, acted as gatekeepers of materials that the parties asked to submit to the RSDC, *and drafted the First Award*. Ex. 22 at 2-3, 14; Ex. 23.

D. MLB Opposes Appellants' Motion to Vacate the First Award, and the MLB Commissioner Declares that MASN "Will Be Required to Pay" the First Award "Sooner or Later"

In July 2014, Appellants commenced a CPLR Article 75 special proceeding in the Supreme Court, New York County to vacate the First Award. Appellants' petition also asked the Supreme Court to disqualify MLB from presiding over any second arbitration, and to substitute a neutral, unbiased and independent arbitral forum outside of MLB's influence and control. MLB and the Nationals opposed the

vacatur petition and the Nationals cross-moved to confirm the award. Ex. 19 at 2.

MLB's bias and partiality were apparent in the vacatur proceedings. MLB actively litigated against Appellants and in favor of the Nationals. The MLB Commissioner, Robert Manfred, *made multiple public statements against Appellants* on the merits of the case. Immediately after the Supreme Court *granted* Appellants' motion for a preliminary injunction against enforcement of the First Award, the MLB Commissioner publicly declared that "I think the agreement's clear. . . . I think the RSDC was empowered to set rights fees. That's what they did, and I think sooner or later MASN is going to be required to pay those rights fees." Exs. 24, 25.

MLB Commissioner Manfred also personally filed three affidavits supporting the Nationals' litigation positions, and attacking Appellants' arguments as "false," "groundless," "baseless," "inaccurate," and "misleading." Ex. 26 at ¶¶ 11, 20, 38, 41; Exs. 13, 22. The Commissioner also declared (wrongly) that Appellants' position on the key issue in dispute, the established methodology that the Settlement Agreement requires to determine the fair market value of the telecast rights fees, "does not conform to the text" of the Settlement Agreement. Ex. 26 ¶ 40.

E. The Supreme Court Vacates the First Award

The Supreme Court vacated the First Award, holding that MLB's conduct "objectively demonstrate[d] an utter lack of concern for fairness of the proceeding" that was "completely inconsistent with basic principles of justice." Ex. 19 at 27. In

a footnote, however, Supreme Court held that it lacked authority to disqualify MLB from presiding over any rehearing of the dispute. Ex. 19 at 28 n.21. Appellants appealed the Supreme Court's denial of their motion to disqualify MLB, and the Nationals and MLB cross-appealed the denial of their cross-motion to confirm the arbitration award and the grant of Appellants' motion to vacate the award.

F. The First Department Unanimously Affirms the Supreme Court's Vacatur of the First Award, but Divides 2-1-2 on the Question of Whether MLB's RSDC May Rehear the Dispute

On July 13, 2017, the First Department unanimously affirmed the Supreme Court's vacatur ruling in a *per curiam* opinion joined by all five Justices. Ex. 1 at 5. However, the panel divided 2-1-2 on the question of the required arbitral forum for rehearing. That question produced three separate opinions in the 2017 First Department Order: a two-Justice plurality, a concurrence, and a two-Justice dissent.

The plurality opinion (Andrias and Richter, JJ.) assumed that courts have the power to disqualify the contractually-designated arbitral forum on the ground that a rehearing before that forum would be "fundamentally unfair," but disagreed with the dissent over the standards governing the exercise of that power. The plurality did not dispute the facts relied on by the dissent. Referring specifically to the facts cited by the dissent, the plurality concluded that "*the circumstances cited by the dissent* do not warrant the removal of the RSDC." Ex. 1 at 26 (emphasis added).

The concurrence (Kahn, J.) agreed with the plurality that the dispute could not

be removed from MLB. But the concurrence's conclusion rested on the legal conclusion that, absent a showing that the arbitration agreement was *procured by* fraud, duress, coercion or unconscionability, a 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." Ex. 1 at 37. The concurrence does not contain a dispute with the dissent on any fact. Its conclusion was based solely on a disagreement over the applicable law.

Presiding Justice Acosta, joined by Justice Gesmer, joined the unanimous opinion to the extent it held that the First Award must be vacated, but dissented on the required forum for rehearing. The dissent expressed clear disagreement with the *legal* standards applied by both the concurrence and the plurality. The dissent contended that the concurrence's legal conclusion that courts "lack[] the power to substitute an arbitral forum even in the most compelling circumstances" was "belied by the case law indicating that fundamental fairness is a requirement in any arbitration," and that the court has "inherent equitable power to dispense justice in every case that comes before it." Ex. 1 at 42. The dissent warned that requiring the parties to arbitrate again before a fundamentally unfair arbitral forum will likely result "in an endless loop of partial arbitrations, vacaturs, and remands." *Id.*

The dissent also disagreed with the plurality's view that "the circumstances cited by the dissent did not warrant the removal of MLB's RSDC." Citing the FAA

and the decisions of several courts, including this Court, the dissent concluded that courts "have the obligation, and the power, to ensure fundamental procedural fairness in an arbitration" when "the parties' chosen forum has shown itself to be unwilling to guarantee a baseline of impartiality." Ex. 1 at 42. Applying that legal standard to the record, the dissent concluded that "reformation of the agreement to require a rehearing not administered by MLB or the RSDC is warranted." *Id.* at 74. The dissent's conclusion that the Court *must* order rehearing before a neutral arbitral forum that is unaffiliated with MLB was based on several factors:

1. "MLB's apparent lack of concern for fairness at the first proceeding," *id.* at 61;

2. "MLB's refusal to address the Orioles' complaints of the unfairness created by Proskauer's multiple roles," *id.*;

3. "MLB's direct monetary stake in the outcome of the dispute as a result of its $25 million loan to the Nationals," *id.*;

4. "evidence that MLB has actively opposed MASN's claims by threatening sanctions for pursuing a judicial remedy, disparaging the claims, and making clear its view that MASN's reading of the [Settlement Agreement] is incorrect," *id.*;

5. "evidence that MLB has actively supported the Nationals' attempts to confirm the award and/or compel a rehearing before the RSDC," *id.*;

6. "MLB's continued defense of the original arbitration award which all members of this bench agree was affected by evident partiality," *id.*; and

7. "evidence of the current Commissioner's personal involvement in the prior arbitration, including the drafting of the vacated award and his publicly stated views about the dispute," *id.*

The dissent concluded that a rehearing before MLB, even with replacement RSDC arbitrators, would be fundamentally unfair to Appellants, and would therefore violate the protections afforded Appellants under the FAA. *Id.* at 41, 74.

In response to the plurality's central premise that MLB could preside over the rehearing because "the RSDC [conducting the second arbitration] is comprised of three new members," the dissent disagreed on the legal significance of that undisputed fact. The dissent concluded that this fact "does not change the analysis, because MLB retains its significant influence over the panel." Ex. 1 at 65. As the dissent observed, although the Commissioner does not vote, "his influence on the panel, including his ability to marshal and exclude evidence and draft an award, remains substantial." *Id.* This fact, too, was undisputed; the plurality agreed with the dissent that "MLB . . . [had] significant influence over the arbitration process" and that "MLB staff would provide administrative, organizational and legal support, including analyzing financial information and preparing draft decisions." Ex. 1 at 28. Based on these undisputed facts, the dissent stated that "[g]iven the Commissioner's public comments touching upon the merits of the dispute and telegraphing his support for the Nationals' position, it is highly unlikely that the RSDC would come to a different conclusion if it were to rehear the case." *Id.* at 65.

G. This Court Dismisses Appellants' 2017 Appeal from the First Department Order as Not Final Under the Constitution

MASN timely appealed from the 2017 First Department Order to this Court, based on the two-Justice dissent. After a jurisdictional inquiry, this Court held that the 2017 First Department Order was not then appealable as of right because it did not "finally determine the proceeding within the meaning of the Constitution." Ex. 2 at 4; *see* N.Y. Const. Art. VI § 3(b)(1). MASN then moved the First Department for permission to appeal which the First Department denied. Ex. 27 at 6.

H. MLB Conducts a New Arbitration and Issues the Second Award

Appellants therefore were required by the 2017 First Department Order to participate in a rehearing before MLB's RSDC that commenced in February 2018. Appellants participated in the rehearing subject to a full reservation of their rights.

Contrary to the Nationals' assertions, MLB's RSDC had no authority to review or revise the 2017 First Department Order. The RSDC cited the 2017 First Department Order, including the plurality's legal conclusions from the undisputed facts, as binding. When Appellants asked the RSDC to recuse itself during the second arbitration, the RSDC rejected this request. In so doing, the RSDC stated that it "review[ed] the remaining grounds articulated in [Appellants' recusal requests] in light of the ruling of the New York Appellate Division, First Department." Ex. 28 at 1; *see* Ex. 29 at 3; Ex. 30 at 1, Ex. 31 at 1. The RSDC did not suggest it had authority to review or revise the 2017 First Department Order.

The RSDC conducted a second arbitration and, on April 15, 2019, issued the Second Award. Ex. 3. As Presiding Justice Acosta predicted in his dissent from the 2017 First Department Order, the Second Award reached almost exactly the same result as the vacated First Award. *Compare* Ex. 3 at 48, *with* Ex. 21 at 19.

I. The Court of Appeals Dismisses Appellants' 2019 Appeal from the Second Award as Not Final Under the Constitution

After the RSDC issued the Second Award, Appellants appealed directly to this Court pursuant to CPLR 5601(d). The Nationals moved to dismiss the appeal, making the same two statutory arguments they make now, although in reverse order. Ex. 4 at 23-35. The Nationals also argued that the award was not "final" while confirmation proceedings were pending in Supreme Court. Ex. 4 at 36. This Court dismissed Appellants' appeal on *constitutional* finality grounds—without addressing the Nationals' *statutory* arguments for dismissal. Ex. 5 at 8.

J. The Supreme Court Enters a Final Judgment Confirming the Second Award and the First Department Affirms the Judgment

Appellants raised multiple grounds for vacatur of the Second Award, including that MLB had a $25 million direct financial stake in the proceedings, and that MLB refused to disclose to what MLB told the replacement RSDC arbitrators about the merits of the dispute. *See* Ex. 32. These issues, however, are not the subject of this CPLR 5601(d) appeal, which seeks review of the 2017 First Department Order remanding proceedings to the RSDC instead of a non-MLB

forum. They are the subject of a pending motion in the First Department for reargument or leave to appeal from that Court's October 22, 2020 order. Ex. 33.

In an August 22, 2019 order, the Supreme Court confirmed the Second Award. Ex. 6. It treated the 2017 First Department Order as a "binding holding[]" that controlled the question of the proper forum for the second arbitration. Ex. 6 at 8 n. 3. The court thus entered a final judgment confirming the Second Award. Ex. 7. Appellants appealed the 2019 final judgment to the First Department.

The First Department affirmed the final judgment in October 2020. Ex. 8. The 2020 First Department order relied on the 2017 First Department Order, stating that, in the prior appeal, "the Court found no basis for directing 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." Ex. 8 at 2. In sum, the Appellate Division treated the 2017 First Department Order's refusal to remand the matter to a neutral arbitral forum outside MLB as law of the case.

Appellants served and filed a timely notice of appeal from the First Department's October 2020 order, to seek review, pursuant to CPLR 5601(d), of the 2017 First Department Order. On December 3, 2020, the Nationals moved to dismiss the appeal and the Court issued a Jurisdictional Inquiry Letter stating:

> The Court will now examine its subject matter jurisdiction with respect to whether (1) the two-Justice dissent in the July 13, 2017 Appellate Division order is on a question of law (*see* CPLR 5601[a], [d]); (2) the July 13, 2017

> Appellate Division order "necessarily affects" the December 9, 2019 Supreme Court judgment (*see* CPLR 5601 [d]); and (3) a substantial constitutional question is directly involved to support an appeal as of right from the October 2[2], 2020 Appellate Division order.

Appellants address points (1) and (2) in this Memorandum of Law and provide justification for the Court to retain jurisdiction of this appeal under CPLR 5601(d). Appellants do not address point (3) because they are not relying on a substantial constitutional question in their appeal. For the reasons stated herein, the Court has jurisdiction pursuant to CPLR 5601(d) to hear Appellants' as-of-right appeal, and the Court should therefore deny the Nationals' motion to dismiss the appeal.

ARGUMENT

I. THE 2017 FIRST DEPARTMENT ORDER "NECESSARILY AFFECTS" THE SUPREME COURT'S 2019 FINAL JUDGMENT CONFIRMING THE 2019 SECOND AWARD

The Nationals argue that the Court lacks jurisdiction because the 2017 First Department Order—which denied MASN's request for a rehearing in a *wholly different arbitral forum* from MLB's RSDC—did not "necessarily affect[]" the 2019 final judgment confirming the 2019 Second Award that MLB's RSDC issued after the 2017 First Department Order remanded the case to it. Natl's Br. at 26-30.

The Nationals' position is foreclosed by the Court's recent decisions interpreting the phrase "necessarily affects." These leave no doubt that the First Department Order "'necessarily affects' the final judgment under any common sense

understanding of those words." *Oakes v. Patel*, 20 N.Y.3d 633, 644 (2013). The "necessarily affects" requirement is satisfied "'if the result of reversing [an] order would necessarily be to require a reversal or modification of the final [judgment]' and 'there shall have been no further opportunity during the litigation to raise again the questions decided by the [non-final] order.'" *Siegmund Strauss, Inc. v. E. 149th Realty Corp.*, 20 N.Y.3d 37, 41-42 (2012) (brackets in original) (quoting Karger, supra, § 9:5, at 304-305, 311). It logically follows that where an intermediate order denies a motion to remand to a different arbitral forum, that order "necessarily affects" the subsequent arbitration award of the original forum and subsequent final judgment confirming that award. Had the intermediate order disqualified the original arbitral forum, that forum could not have issued a subsequent final award at all, and a subsequent judgment confirming the award could never have been issued.

That straightforward conclusion is consistent with this Court's repeated holding that where an intermediate order denies a request for change of venue, the intermediate order necessarily affects a subsequent final decision by the original trial court. In *Matter of Aho*, 39 N.Y.2d 241 (1976), the Court held that an intermediate order denying a request for a change of venue in a proceeding to have an individual declared incompetent "necessarily affected" the final judgment issued by the original trial court. *Id.* at 248. The Court explained that "reversal of an order denying the motion for change of venue in any proceeding to determine competency would strike

at the foundation on which the final judgment was predicated," as "any such reversal would inescapably have led to a vacatur of the judgment declaring [the individual] incompetent and to the submission of the issue of incompetency to a court where venue might then properly have been laid." *Id.*; *accord Tyrone D. v. State*, 24 N.Y.3d 661, 666 (2015) (Supreme Court order denying a civilly committed individual's motion for change of venue in an annual review hearing from Oneida County to New York County "necessarily affected" a subsequent final order of Oneida County determining that individual "remained a dangerous sex offender"). This rule applies regardless of the merits of the subsequent final judgment.[2]

The same reasoning applies here. Reversing the 2017 First Department Order denying Appellants' motion to disqualify the RSDC "would strike at the foundation on which the final judgment" confirming the RSDC's Second Award "was predicated," *Aho*, 39 N.Y.2d at 248, because the 2017 Order *is* that foundation. Reversal would require "vacatur of" the final judgment confirming the Second Award and "submission of the issue" to a *wholly different arbitral forum*. *Id.* Thus, the 2017 First Department Order necessarily affects the RSDC's subsequent Second Award and the Supreme Court's subsequent judgment confirming that award.

[2] Although *Aho*, *Siegmund Strauss*, *Oakes, and Tyrone D.* dealt with the meaning of the phrase "necessarily affects" in the context of CPLR 5501(a)(1), this is the same phrase in CPLR 5601(d), and there is no indication it has any different meaning.

The Nationals' 39-page motion to dismiss does not mention *Matter of Aho*, even though Appellants cited it in their 2019 opposition to the Nationals' motion to dismiss the appeal, which made the same argument the Nationals make here. Ex. 34 at 7, 35-37. Nor do the Nationals acknowledge *Tyrone D*, *Siegmund Strauss*, or *Oakes*, all of which Appellants cited in their 2019 opposition. *Id.* at 6, 35-36, 40.

The Nationals instead contend that this case falls under a general rule that a non-final Appellate Division order "granting a *de novo* hearing before the original trial court does not necessarily affect" the subsequent, final decision of the trial court and thus is not reviewable on appeal from the final decision. Nat'ls Br. 26 (quoting *Daus v. Gunderman & Sons*, 283 N.Y. 459, 464 (1940)). But in all of the cases on which the Nationals rely, the issue was whether to have a new trial in the "original tribunal" where the former trial was held, and did not involve the transfer of the action to a different forum. *Daus*, 283 N.Y. at 464; *see Wintermute v. Vandemark Chem., Inc.*, 30 N.Y.3d 1041 (2017); *Barker v. Tennis 59th Inc.*, 65 N.Y.2d 740, 740-41 (1985); *Miocic v. Winters*, 52 N.Y.2d 896, 897 (1981); *Town of Peru v. State*, 30 N.Y.2d 859, 860 (1972). Likewise, *JPMorgan Chase Bank, Nat'l Ass'n v. Caliguri*, 33 N.Y.3d 1046 (2019), Nat'ls Br. 30, involved the Appellate Division's affirmance of the denial of a motion to transfer the action to a Justice *of the same court* who had heard the prior action, and is therefore inapposite. Where, as here,

the question is whether to *move* a proceeding to a *different forum*, the *Matter of Aho* line of cases controls, and the cases cited by the Nationals are inapplicable.

With respect to the second prong of the definition of "necessarily affects" set forth in this Court's decision in *Siegmund Strauss*, the Nationals selectively quote the Karger treatise, Nat'ls Br. 26-27, but Karger supports Appellants' position here. As Karger explains, "[t]he reviewability of a prior nonfinal order on an appeal from a final determination is subject to an additional general limitation that there shall have been no further opportunity during the litigation to raise again the questions decided by the nonfinal order." Karger, supra, § 9:5 at 311. "Under that limitation, the nonfinal order is not considered to have necessarily affected the final determination if the questions decided by it could have been raised again." *Id.* "The reason therefor is that when such a complete new trial or hearing is ordered, new evidence can be introduced and 'every question of fact or law may be litigated anew,' even though the trial court may be influenced by the views expressed in the Appellate Division's opinion." *Id.* at 312 (quoting *Halpern v. Amtorg Trading Corporation*, 292 N.Y. 42, 47 (1944)). But MLB's RSDC clearly had no authority in the second arbitration to review or revise the 2017 First Department Order.

The Nationals argue that Appellants "raised, and the RSDC addressed, the question that the Appellate Division had addressed in its 2017 decision" in the second arbitration before the RSDC. Nat'ls Br. 29. Manifestly, that is not accurate.

Neither MLB's reconstituted RSDC nor the Supreme Court could review or revise the 2017 First Department Order's 3-2 decision that the FAA did not require rehearing before a different arbitral forum. To be sure, Appellants asked the MLB and the RSDC to recuse themselves during the second arbitration. The RSDC rejected this request, however, stating that it "review[ed] the remaining grounds articulated in [Appellants' recusal requests] in light of the ruling of the New York Appellate Division, First Department." Ex. 28 at 1. When Appellants renewed their recusal request, the RSDC again rejected Appellants' arguments because the "First Department ha[d] already rejected" them. Ex. 29 at 3; *see* Ex. 30 at 1, Ex. 31 at 1.

There is a world of difference between (unsuccessfully) asking an arbitrator to exercise his discretion to recuse himself and obtaining a mandatory court order disqualifying the arbitral forum under the FAA. Only the former was possible in the second arbitration—the 2017 First Department Order conclusively ruled out the latter. Indeed, in confirming the Second Award, the Supreme Court applied the 2017 First Department Order as a "binding holding[]" decisively resolving the forum question. Ex. 6 at 8 n.3. The ruling in the 2017 First Department Order that MLB's RSDC should not be disqualified as an arbitral forum after the vacatur of the First Award could not be "litigated anew" before the Supreme Court in the proceeding to confirm the RSDC's almost identical Second Award. The fact that Appellants

preserved their objections to the 2017 First Department Order in footnotes (Nat'ls Br. 29 & n.5) does not mean that ruling was, or could be, "litigated anew."

Simply put, unlike an Appellate Division order remanding to the same court for a complete *de novo* trial or hearing, in which every question of fact or law may be litigated anew, the 2017 First Department Order's 3-2 decision that the FAA does not require the rehearing to be held before a forum outside of MLB could not be reopened or revisited in the second arbitration or the confirmation proceedings. Both the RSDC and the Supreme Court acknowledged as much. Nor could the 2017 First Department Order be reviewed on the 2020 appeal to the First Department from the 2019 Supreme Court judgment confirming the Second Award. The only tribunal with authority to review the legal issues decided in the 2017 First Department Order is this Court, which has jurisdiction under CPLR 5601(d) to hear this appeal.

Because the "result of reversing [the 2017 First Department Order] would necessarily be to require a reversal or modification of the final judgment," and Appellants had "no further opportunity" to challenge the 2017 First Department Order's decision to remand the arbitration to the RSDC, the 2017 First Department Order "necessarily affect[ed]" the 2019 judgment confirming the Second Award. *Siegmund Strauss*, 20 N.Y.3d at 42 (quoting Karger § 9:5, at 304-305, 311).

II. PRESIDING JUSTICE ACOSTA'S TWO-JUSTICE DISSENT FROM THE 2017 FIRST DEPARTMENT ORDER IS A DISSENT ON A QUESTION OF LAW UNDER CPLR 5601(a)

Under CPLR 5601(d), the prior nonfinal Appellate Division order must satisfy the requirements of CPLR 5601(a) or 5601(b)(1), except for finality. Appellants submit that, but for the lack of finality, the 2017 First Department Order satisfies the requirements of CPLR 5601(a), which provides that a party has the right to appeal to the Court of Appeals "where there is a dissent by at least two justices on a question of law in favor of the party taking such appeal." The "statutory dissent requirement" of CPLR 5601(a) "must be viewed 'in a practical, not literal, sense.'" Karger, supra, § 6:4, at 201 (quoting *Christavo v. Unisul-Uniao de Coop. Transf. de Tomate Do Sul Do Tejo*, 41 N.Y.2d 338, 339 (1977)). "[I]n order to be given the effect of a 'dissent' within the purview of CPLR 5601(a), the position taken by the minority Justices must be such as to call for a change in the disposition made by the majority Justices." Karger, supra, § 6:4, at 201 (citing *Christavo*, 41 N.Y.2d at 339); *accord* Siegel & Connors, New York Practice § 527, at 1007 ("The posture of the two-justice dissent must be such as would turn the case the appellant's way."). Here, Presiding Justice Acosta's two-Justice dissent would grant relief—the disqualification of the RSDC and remand to a non-MLB arbitral forum—that the other three Justices would deny to Appellants, and therefore clearly constitutes a dissent under CPLR 5601(a).

The Nationals do not deny that two-Justice dissents in cases in which there

was no majority qualify for review under CPLR 5601(a) and 5601(d).[3] Section 5601(a) merely requires a "dissent by at least two justices," without differentiating between 3-2 and 2-1-2 split opinions. This Court has repeatedly entertained an appeal as of right under the two-Justice dissent rule embodied in CPLR 5601(a) when the Appellate Division order was the subject of a plurality decision. *See, e.g.*, *Kaur v. New York State Urban Dev. Corp.*, 15 N.Y.3d 235, 252 (2010) (citing CPLR 5601(a)); *Deas v. Levitt*, 73 N.Y.2d 525, 528-29 (1989) (same). The imperative for Court of Appeals review is, if anything, stronger in 2-1-2 decisions, such as this one, where each opinion represents a different view of the law and the two-Justice dissent disagreed with both the plurality's and the concurrence's legal determinations.

As explained in detail below, Presiding Justice Acosta's dissent disagreed with the concurrence and plurality on two questions of law:

> (1) whether courts possess the power, after vacating an arbitral award, to order rehearing in a neutral and unbiased forum other than that stated in the arbitration clause on the ground that a rehearing before the original forum would be fundamentally unfair, even absent a showing that the arbitration agreement was procured by fraud, duress, coercion or unconscionability; and
>
> (2) whether the legal standards governing the exercise of such power required its exercise under the circumstances presented here.

[3] The Court's December 3, 2020 Jurisdictional Inquiry Letter does not state that the Court will examine the two-Justice dissent requirement in CPLR 5601(a).

The two-Justice dissent is therefore "a dissent by at least two justices on a question of law in favor of the party taking such appeal." CPLR 5601(a).

A. The Two-Justice Dissent's Conclusion that the Court Has the Power to Order Rehearing Before a Different Arbitral Forum on Grounds of Fundamental Unfairness is a Dissent on a Question of Law

The dissent's sole disagreement with the concurrence is on a dispositive question of law: the power of the court to grant a remedy. Whether the court has "power to grant the relief sought" is "a question of law reviewable in" this Court, which is empowered to determine "the existence of the power." *Dittmar Explosives, Inc. v. A. E. Ottaviano, Inc.*, 20 N.Y.2d 498, 503 (1967); *Hirschfeld v. Hirschfeld*, 69 N.Y.2d 842, 843-44 (1987) (Court had authority to "determin[e] whether the courts below had the power to deny discovery and, if so, whether that discretionary power was abused"); *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988) (review extends to "determining whether the lower court's discretionary powers were exceeded").

Here, the dissent and the concurrence disagreed on such a question of law: whether the court had the "power to grant the relief sought." *Dittmar*, 20 N.Y.2d at 503. The concurrence agreed with all the other justices in vacating the original RSDC award. But the concurrence differed from both the dissent and the plurality on the legal question of whether a court has power to order a rehearing before a different arbitral forum on fundamental fairness grounds, absent a showing that the arbitration clause was *procured by* fraud, duress, coercion, or unconscionability.

The dissent answered that legal question affirmatively. The dissent explained, correctly, that courts "have the obligation, and the power, to ensure fundamental procedural fairness in an arbitration" when "the parties' chosen forum has shown itself to be unwilling to guarantee a baseline of impartiality." Ex. 1 at 42. The dissent traced this power to two statutory sources. First, Section 2 of the FAA, 9 U.S.C. § 2, grants courts power over arbitration agreements "upon such grounds as exist at law or in equity," which includes the "inherent equitable power to reform the contract and refer the matter to a neutral arbitral forum." *Id.* at 54. The dissent specifically cited the equitable doctrine of frustration of purpose, explaining that where the arbitral forum's "pervasive bias" has "frustrate[d] the parties' intent," "reformation of the agreement to require a rehearing not administered" by the same forum "is warranted." *Id.* at 74. Second, the dissent explained that section 10 of the FAA, 9 U.S.C. § 10(b), "explicitly permits courts 'in their discretion' to 'direct a rehearing' once an arbitral award is vacated." Ex. 1 at 72 (brackets in original omitted) (quoting 9 U.S.C. § 10(b)). The dissent held that these two FAA provisions, sections 2 and 10(b), each provide courts with the "power to order an arbitration in a new forum where the parties' only selected forum is too biased to fairly arbitrate the dispute." *Id.* at 70. Under both provisions, the dissent stated, the applicable test for ordering a new arbitral forum was whether MLB's conduct "frustrate[d] the parties' intent to submit their dispute to a fundamentally fair arbitration." *Id.* at 74.

Justice Kahn's concurrence reached the opposite legal conclusion. According to the concurrence, courts lack the power to replace the chosen arbitral forum on fundamental fairness grounds. The concurrence agreed with the dissent (and the plurality) that "the conduct of Major League Baseball and its representatives has been far from neutral and balanced." Ex. 1 at 37. But the concurrence concluded that it did not matter, because courts "may not order that [an] 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. Contrary to the dissent, the concurrence concluded that the court's power to reform arbitration clauses was categorically limited to "an established ground for setting such agreement aside, such as fraud, duress, coercion or unconscionability," *i.e.*, *grounds stemming from infirmities in the arbitration clause's execution,* rather than solely fundamental unfairness arising *post-execution*. *Id.* Because the concurrence believed itself to be legally powerless to order the relief sought by Appellants, the concurrence refused to grant it, thus deciding the remedial question against Appellants by a 3-2 vote.

The dissent disagreed strongly with the concurrence's narrow conception of judicial power. As the dissent stated: "The concurrence would render this Court impotent to do anything other than vacate an arbitral award and remand it to the same forum for a subsequent arbitration . . . even where the parties' chosen forum has shown itself to be unwilling to guarantee a baseline of impartiality." *Id.* at 42.

The dissent stated that the concurrence made a "mistake" by concluding that courts do not have the power to reform arbitration agreements to prevent fundamental unfairness that arises *after* the execution of the arbitration agreement. *Id.*

The concurrence and the dissent thus diverged on a textbook legal question: the court's "power to grant the relief sought." *Dittmar*, 20 N.Y.2d at 503. That dispute on a question of law raised by the two-Justice dissent in response to the decisive concurrence satisfies CPLR 5601(a) and, therefore, CPLR 5601(d).

B. The Two-Justice Dissent's Conclusion that the Court Must Order Rehearing of the Arbitration Before an Arbitral Forum Unaffiliated with MLB is a Dissent on a Question of Law

The second question of law raised by the dissent comes in its disagreement with the plurality. Unlike the concurrence, the plurality assumed that a court has the power to disqualify an arbitration forum in certain cases. However, the plurality held the court could not, in this case, exercise any such power. Critically, the plurality *did not in any way dispute* the dissent's recitation of the facts. Instead, the plurality concluded that, as a matter of law, "*the circumstances cited by the dissent* do not warrant the removal of the RSDC." Ex. 1 at 26 (emphasis added).

1. A Disagreement on Whether the Facts in the Record Require a Particular Result is a Disagreement on a Question of Law

When dissenting Justices agree with their fellow Justices on the underlying facts in the record, but disagree on whether those facts *require* a particular result, this Court has repeatedly found a two-Justice dissent on a question of law under

CPLR 5601(a). Such a dispute is a question of law because it concerns the scope and threshold of the relevant legal standard. For example, in a case where the issue was whether a search was reasonable, the Court held it had jurisdiction under CPLR 5601(a) where the "the dissent did not disagree on facts or inferences" that were "material" and instead disagreed "as to whether the search of respondent's shoes was justified, as a matter of law." *In re Jamal S.*, 28 N.Y.3d 92, 96 (2016).

The Court has likewise entertained appeals as of right under CPLR 5601(a) where the majority held that a given set of facts was "insufficient as a matter of law" to grant relief and the dissent disagreed, *Domen Holding Co. v. Aranovich*, 1 N.Y.3d 117, 122 (2003), and where a two-justice dissent disputed whether a party to a contract was "entitled to recover damages" for breach. *Kenford Co. v. County of Erie*, 73 N.Y.2d 312, 318 (1989). The Court has jurisdiction in these cases because they turn on what legal result is dictated by a fixed set of facts in the record. As the Court has explained: "The state of facts under which the question arises is undisputed, *and it becomes a question of law as to what is the proper legal inference to be drawn from the undisputed facts*, and the decision of that question is reviewable in this court." *In re McGraw's Estate*, 111 N.Y. 66, 114 (1888) (emphasis added).

Relatedly, the Court has held that it has jurisdiction to decide cases that concern the sufficiency of the evidence as a matter of law. *See, e.g.*, *Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493, 498-99 (1978) ("The Appellate Division

decision . . . was based on the legal issue whether there was sufficient evidence to support the factual finding that Hallmark acted knowingly."); *Valdez v. City of New York*, 18 N.Y.3d 69, 74-75 (2011) (the Court accepted the appeal as of right based on a two-justice dissent on a question of law where "[t]hree justices concluded that plaintiff failed to establish a special relationship because the proof was inadequate to support a [justifiable reliance] finding" and "[t]he two dissenting justices reasoned that there was sufficient evidence of justifiable reliance and would have sustained the liability verdict"); *People v. Schreiner*, 77 N.Y.2d 733, 738 (1991) ("Although this Court is not empowered to review questions of fact, we may examine the legal sufficiency of the evidence purporting to support that determination. Whether evidence is legally sufficient to sustain the findings of a trial court concerning the admissibility of a confession presents a question of law for this Court's review."). So, as this Court's practice guide explains, a dissent on "on *sufficiency* (not weight) of the evidence to support [a] finding" is a dissent on a question of law. *New York Court of Appeals Civil Jurisdiction & Practice Outline* § I.A.1.a, p. 3 (Sept. 2020).

The Nationals' cited authorities confirm this rule. *See Heary Bros. Lightning Prot. Co. v. Intertek Testing Servs., N.A.*, 4 N.Y.3d 615, 618 (2005) (holding that "[s]ufficiency . . . of the evidence," as opposed to "weight of the evidence," is "a ruling of law that this Court is empowered to review"); Karger, supra, § 6:5 at 206 ("[A] dissent based on a duly raised question of law, such as the alleged insufficiency

or conclusiveness of the evidence as a matter of law, would provide the basis for an appeal as of right."). In short, when a two-justice dissent expresses no disagreement on the facts in the record, but disagrees on whether those facts require a particular legal conclusion, the dissent raises a question of law that is reviewable by this Court under CPLR 5601(a). That is the case here. The plurality, concurrence, and dissent agreed on the facts. Their disagreement stemmed from whether that set of facts met the legal standard that requires the court to order rehearing of the arbitration in a forum outside of MLB. That is a question of law reviewable by this Court.

2. The Plurality and Dissent Agreed on the Relevant Facts, but Disagreed on the Legal Conclusion They Required

Presiding Justice Acosta's dissent concluded that, in the circumstances of this case, "reformation of the agreement to require a rehearing not administered by MLB or the RSDC is warranted." Ex. 1 at 74. The dissent's conclusion that the Court *must* exercise its power to order the parties to re-arbitrate their dispute before a neutral body independent of MLB was based on the following material factors:

1. "MLB's apparent lack of concern for fairness at the first proceeding," Ex. 1 at 61;

2. "MLB's refusal to address the Orioles' complaints of the unfairness created by Proskauer's multiple roles," *id.*;

3. "MLB's direct monetary stake in the outcome of the dispute as a result of its $25 million loan to the Nationals," *id.*;

4. "evidence that MLB has actively opposed MASN's claims by threatening sanctions for pursuing a judicial remedy, disparaging the claims, and

making clear its view that MASN's reading of the [Settlement Agreement] is incorrect," *id.*;

5. "evidence that MLB has actively supported the Nationals' attempts to confirm the award and/or compel a rehearing before the RSDC," *id.*;

6. "MLB's continued defense of the original arbitration award which all members of this bench agree was affected by evident partiality," *id.*; and

7. "evidence of the current Commissioner's personal involvement in the prior arbitration, including the drafting of the vacated award and his publicly stated views about the dispute," *id.*

Based on this set of facts, which the plurality opinion did not dispute, the dissent held that referring the matter once again for arbitration before MLB's RSDC would be "fundamentally unfair" and therefore impermissible. *Id.* at 39.

Contrary to the Nationals' selective quotation and inaccurate summaries of the plurality and dissent, a careful reading of both opinions shows that the plurality and dissent *did not disagree* on the facts in the record. Rather, as the plurality itself stated, the plurality disagreed on whether "the circumstances cited by the dissent . . . warrant the removal of the RSDC." *Id.* at 26. In the plurality's view, these circumstances were insufficient as a matter of law because "something overt, some misconduct on the part of an arbitrator[]" was necessary for the court to order rehearing before a forum unaffiliated with MLB. *Id.* at 30 (quoting *Astoria Med. Grp. v. Health Ins. Plan of Greater New York*, 11 N.Y.2d 128, 137 (1962)).

The dissent *agreed* ("that may be true") that the replacement arbitrators "have not shown any bias" but stated that the plurality's focus on that issue "misses the

point." *Id.* at 65-66. In the dissent's view the question of whether the dispute could be reheard by the RSDC did not require a showing that the *new RSDC members* were overtly biased—a showing that both opinions agreed was not present here. Rather, the dissent held that the dispute could not be reheard before the RSDC because "*the arbitral forum selected by the parties*," MLB, "is tainted by the appearance of bias, which permeates the entire arbitral forum." Id. at 66 (emphasis added).

Thus, the Justices did not disagree on whether the new arbitrators were biased, but whether that issue was "salient." *Id.* Likewise, the Justices agreed that the MLB had "significant influence" over the proceedings, *id.* at 28, 40, but disagreed on whether the MLB's influence and bias sufficed to frustrate the parties' intent, when those issues concern "MLB, not the arbitrators," *id.* at 35; *see id.* at 62.[4]

The plurality emphasized that its disagreement was legal, not factual, when it warned of the policy consequences that would flow from the dissent's position. *Id.* at 36. Policy considerations are a concern when stating the law, not when finding facts. *Cf. Espinal v. Melville Snow Contrs, Inc.*, 98 N.Y.2d 136, 138 (2002) ("As

[4] Nor did the plurality and dissent disagree on the fact that the Nationals, during oral argument before the First Department, had offered to post a bond to guarantee repayment of the $25 million loan (a promise that they never fulfilled). Contrary to the Nationals' contention, this was not a factual dispute. The dissent explains that its quarrel is not solely with whether the bond would eliminate the "indicium of bias" caused by MLB's loan; it was that posting the bond "would not overcome the *other* procedural infirmities" constituting extraordinary circumstances that required a rehearing before a neutral arbitral forum as a matter of law. Ex. 1 at 64-65 n.6

we have often said, the existence and scope of a duty is a question of law requiring courts to balance sometimes competing public policy considerations.").

This case thus presents the same circumstances as this Court's decision in *In re Jamal S.* In that case, the majority and dissent had agreed on the basic legal principle that, in "appropriate cases," "law enforcement officers are authorized to employ reasonable measures to guard against a detainee's self-infliction of harm," but the two opinions split over what the "appropriate case" standard required, *i.e.*, whether the facts supported a determination that the search of respondent's shoes was reasonable. *Matter of Jamal S.*, 28 N.Y.3d at 95. The Court held that the majority-dissent disagreement "was on a question of law and we have jurisdiction over this appeal" under CPLR 5601(a). 28 N.Y.3d at 96. That is the case here.

3. The Authorities Cited in the Nationals' Motion are Inapposite

The Nationals assert that the Court lacks jurisdiction under CPLR 5601(d) because it cannot review cases where facts are applied to law. Nat'ls Br. 31, 37. This argument is seriously mistaken. The Nationals' memorandum of law not only ignores the contrary teaching of cases like *Cohen*, *Valdez*, *Schreiner*, and *Heary*, which squarely hold that sufficiency of the evidence questions are reviewable questions of law, but also mischaracterizes other authorities quite significantly.

For example, the Nationals assert that this Court has "long recognized that the specific question whether a party 'failed to prove facts sufficient to entitle it to the

reformation of the contract under the evidence presented to the court . . . present[s] an issue of fact decisive' such that there is 'nothing for [this Court's] consideration.'" Natl's Br. 30 (ellipsis and brackets introduced in Nationals' submission) (quoting *Westinghouse, Church, Kerr & Co. v. Remington Salt Co.*, 189 N.Y. 515, 515-16 (1907)). The Nationals' treatment of *Westinghouse*, however, is unfaithful to the opinion. Their tailored quotation actually creates a brand new statement, never written by this Court. It does so by splicing together *different parts of the Court's opinion* that, in the original, are separated by several lengthy sentences, and discuss different issues. In the nearly 200 words omitted by the Nationals (as concealed through their use of ellipsis), the Court of Appeals made clear that the legal "question" (the one highlighted by the Nationals) did not accurately describe the decision below: "The trial court did not adopt as a matter of law the conclusion *embodied in the certified question*." *Westinghouse*, 189 N.Y. at 515-16 (emphasis added). Having rejected the question as an inaccurate statement of the decision below, the Court then determined that the decision below was *not "*dispose[d] of" on the law but instead "based upon and warranted by certain findings of fact." *Id.*

Thus, the *Westinghouse* case only stands for the simple proposition that a case where the court does not "*dispose of the issue as one of law*" is instead an "issue of fact decisive." The far different statement attributed to this Court by the Nationals is a contrivance. The Nationals' description of the opinion is simply incorrect.

Similarly, the Nationals mischaracterize the Karger treatise when they contend that cases that may be characterized as involving applying the law to the facts presents a "mixed question of law and fact." Nat'ls Br. 37. Karger does not say that. It explains that "weight of the evidence" is a fact question and identifies certain criminal and juvenile delinquency matters that typically fall within that rule. Karger § 6:5 n.11 (citing, *e.g.*, *In re Daniel H.*, 15 N.Y.3d 883 (2010) (juvenile delinquency proceeding)). But Karger also repeatedly emphasizes, consistent with *Cohen*, *Valdez*, *Schreiner*, and *Heary*, that the "insufficiency or conclusiveness of the evidence as a matter of law, would provide the basis for an appeal as of right." Karger, sup § 6:5, at 206; *id.* § 13.2 ("A question of law is presented . . . by a party's claim that the facts in his favor are conclusively established as a matter of law by the uncontroverted evidence or by the only reasonably possible inferences from the evidence."). The Nationals confuse evidentiary *sufficiency* of the evidence with *weight* of the evidence. *Cf. Civil Jurisdiction & Practice Outline* § I.A.1.a, p. 3.

Actual cases of mixed law and fact are ones where the Court is called on to examine the underlying evidentiary record and make determinations regarding the facts or weight of evidence in the record. *People v. Evans*, 83 N.Y.2d 934, 935 (1994). The Nationals attempt to expand this definition to include any case where a legal standard is applied to undisputed facts, a definition that would turn this Court's decision in *Jamal S.* on its head. Unsurprisingly, the Nationals create this new

definition from a misleading quotation to *People v. Guay*, 18 N.Y.3d 16 (2011), which did not address a jurisdictional question under CPLR 5601(a) or (d). *See* Nat'ls Br. 37. What the Nationals leave out from their misleading description of the *Guay* case is that *Guay* addressed the standard for reviewing "juror qualification decisions"—a "discretion[ary]" issue on which the Court cannot "substitute its judgment"—"when the Appellate Division adopts a trial court's factual findings." *Guay* 18 N.Y.3d at 22-23. Because the Court was reviewing a discretionary choice that involved examining the jurors, it "present[ed] a mixed question of law and fact" that the Court could not "overturn unless there is no record support for the trial court's conclusion." Nowhere does *Guay* disclaim this Court's review power over the application of facts to legal principles as a general matter.

Indeed, if the Nationals' view were correct, which it is not, it is unclear how the Court of Appeals could *ever* review a legal question. Courts decide legal issues in the context of concrete disputes by applying law to fact; they do not issue "advisory opinion[s]." *Matter of N.Y.S. Law Enf't Emps.*, 64 N.Y.2d 233, 241 n.2 (N.Y. 1984). If the Court of Appeals could never review the application of law to fact, it would be unable to review countless decisions resolving legal questions.

The Nationals also cite several decisions in criminal matters and juvenile delinquency proceedings. Those decisions, such as *Matter of Daniel H.*, 15 N.Y.3d 883, 884 (2010), involved issues such as "whether a defendant's inculpatory

statement is attenuated from his prior un-Mirandized statement," which is by definition, a "mixed question of law and fact." Karger, supra § 6:5 & n.11 (discussing *Daniel H.*). The fact-focused nature of that disagreement was underscored by the dissent's opening words of the dissent in the First Department in *Daniel H.*: "I would remand for a new fact-finding hearing." *Matter of Daniel H.*, 67 A.D.3d 527, 530 (1st Dep't 2009) (Moskowitz, J., dissenting). The Nationals also cite *Matter of Robert S.*, 76 N.Y.2d 770 (1990), a juvenile delinquency case concerning whether the evidence supported a finding of "probable cause," 159 A.D.2d 358, 359 (1st Dep't 1990), which this Court has generally described as presenting "a mixed question of law and fact." *People v. Oden*, 36 N.Y.2d 382, 384 (1975). Moreover, the majority and dissent below in *Robert S.* disagreed about whether available evidence supported the factual finding that one officer had told another to make an arrest—a strictly factual issue, not a legal issue on agreed facts. 159 A.D.2d at 359-362. *Matter of A.V.*, 34 N.Y.3d 1024 (2019), another juvenile delinquency case cited by the Nationals, is similarly inapposite. In *Matter of A.V.*, unlike the present case, the majority and dissent disagreed sharply about what facts the Family Court found. 173 A.D.3d at 559-60 (Gesmer, J., dissenting).

An Article 78 case cited by the Nationals, *Froehlich v. New York State Dep't of Corr. & Cmty. Supervision*, 35 N.Y.3d 1031 (2020), is also inapposite. In *Froehlich*, the issue was whether a correctional facility's determination that an

officer was not injured by a parolee's "assault" was arbitrary, capricious, or irrational," a far different standard of review than the one applicable in this appeal. .*See Froehlich*, 179 A.D.3d at 1409-10. The majority and dissent disagreed on what facts the record established: The majority saw no "record evidence" that "the parolee directed an intentional physical act of violence toward" the officer, *id.* at 1410, while the dissent, citing different evidence, concluded that the "combative" parolee "act[ed] against" the officer, *id.* at 1412 (Egan Jr., J.P., dissenting). This is a factual dispute, not a legal one—and it bears no resemblance to this case. Again, the plurality here concluded that the "circumstances cited by the dissent," which it did not dispute, "do not warrant the removal of the RSDC." Ex. 1 at 26. This disagreement in the present case on a question of law—an important one in an era where so many disputes wind up in arbitration—should be reviewed here.

The Nationals cite *Gillies Agency, Inc. v. Filor*, 32 N.Y.2d 759 (1973) for the proposition that where it was "equivocal" whether a dissent "rest[ed] upon disagreement in fact or law," the dissent is not on a question of law within the meaning of CPLR 5601(a). Nat'ls Br. 38. But in *Gillies*, the majority below issued a "No opinion" affirmance and the brief three sentence dissent referred to both factual and legal issues. *Gillies*, 41 A.D.2d 566, 566 (1973). Thus the Appellate Division in *Gillies* provided the Court with no basis for determining the crux of their disagreement. In the present case, the three Appellate Division opinions explained

their legal reasoning, and the plurality specifically noted that it was relying on "the circumstances cited by the dissent" for the plurality's contrary legal conclusion.

C. New York's Rules Governing Summary Proceedings Confirm That the Material Facts Were Not in Dispute, and that the Disagreements Among the Justices Were on Questions of Law

In a special proceeding like the one commenced by Appellants in the Supreme Court to vacate the first arbitration award, "[t]he court shall make a summary determination upon the pleadings, papers and admissions *to the extent that no triable issues of fact are raised*." CPLR 409(b) (emphasis added). Issues under CPLR 409(b) are decided "on the papers as a matter of law, as if determining a motion for summary judgment." *Dandomar Co., LLC v. Town of Pleasant Valley Town Bd.*, 86 A.D.3d 83, 89 (2d Dep't 2011). The Nationals do not, and cannot, argue that summary judgment decisions are unreviewable under CPLR 5601(a) or CPLR 5601(d). *See Kriz v. Schum*, 75 N.Y.2d 25, 31 (1989) (appeal as of right from summary judgment decision). If CPLR 3212 summary judgment holdings as a matter of law qualify for an appeal as of right under CPLR 5601(a) and CPLR 5601(d), then so do summary determinations pursuant to CPLR 409(b). *See Matter of Kickertz v. New York Univ.*, 25 N.Y.3d 942 (2015) (appeal as of right).

If material facts had been disputed in this proceeding, neither the Supreme Court nor the Appellate Division could have resolved those disputes on the papers; a hearing would have been required. CPLR 410; *see, e.g.*, *Matter of Rambusch*, 143

A.D.2d 605, 606 (1st Dep't 1988) (holding that Supreme Court "erred in making factual determinations where triable issues of fact were raised by the conflicting affidavits"). But no hearing was held. Thus, the Appellate Division justices *could not* have disagreed on any material facts in this case. The only questions before the justices, and the only ones they decided, was whether the undisputed facts required a certain result—the removal of the MLB arbitral forum—as a matter of law.

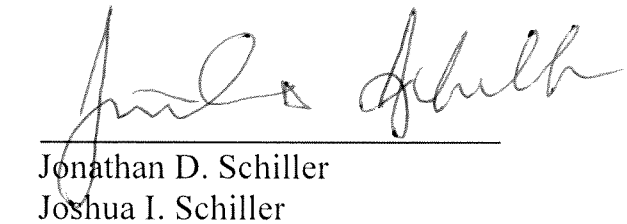
Notably, Appellants made this point in their 2019 opposition to the Nationals' motion to dismiss appeal, Ex. 34 at 33-34, but the Nationals' current motion to dismiss Appellants' appeal does not acknowledge or address this point.

CONCLUSION

For the foregoing reasons, the Court should deny the Nationals' motion to dismiss the appeal and should issue a briefing schedule letter

Dated: New York, New York
December 14, 2020

Respectfully submitted,

By: 

Jonathan D. Schiller
Joshua I. Schiller
Thomas H. Sosnowski
BOIES SCHILLER FLEXNER LLP
55 Hudson Yards
New York, NY 10001
Tel: (212) 446-2300
Fax: (212) 446-2350

Carter G. Phillips
Kwaku A. Akowuah
Tobias S. Loss-Eaton
Sidley Austin LLP
1501 K Street NW
Washington D.C. 20005

Counsel to Mid-Atlantic Sports Network, the Baltimore Orioles Limited Partnership, and the Baltimore Orioles Baseball Club