# 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.*

## MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

MORRISON COHEN LLP
909 Third Avenue
New York, New York 10022
Tel.: (212) 735-8600
Fax: (212) 735-8708

QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, New York 10010
Tel.: (212) 849-7000
Fax: (212) 849-7100

*Attorney for Respondent WN Partner, LLC*

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Statutory Authorities**

**Other Authorities**

## INTRODUCTION

Respondent the Washington Nationals Baseball Club, LLC (the "Nationals") respectfully moves this Court for an order dismissing the putative appeal, purportedly under C.P.L.R. § 5601(d), by Appellants the Baltimore Orioles Baseball Club and Baltimore Orioles Limited Partnership (together, the "Orioles") and TCR Sports Broadcasting Holding, LLP (d/b/a "MASN") from the October 22, 2020 order of the Appellate Division, First Department to bring up for review a prior nonfinal Appellate Division order dated July 13, 2017, which remanded the parties to a new arbitration before a different panel of Major League Baseball's Revenue Sharing Definitions Committee (the "RSDC") (*see Matter of TCR Sports Broadcasting Holding, LLP v. WN Partner, LLC*, 187 A.D.3d 623 (1st Dep't Oct. 22, 2020); *Matter of TCR Sports Broadcasting Holding, LLP v. WN Partner, LLC*, 153 A.D.3d 140 (1st Dep't 2017), *appeal dismissed* 30 N.Y.3d 1005 (2017)). The RSDC conducted the new arbitration in December 2018 and issued its arbitration award in April 2019. In the subsequent C.P.L.R. Article 75 proceeding, Supreme Court confirmed the arbitration award, and entered judgment for the Nationals in December 2019. The First Department, in a 4-0 order, affirmed the Supreme Court judgment on October 22, 2020.

This is now the *third* time MASN and the Orioles have sought to appeal to this Court, purportedly as of right, to bring up for review the First Department's July

2017 order remanding the parties to a new arbitration before the RSDC. Each of the first two times, this Court dismissed the appeal for lack of jurisdiction. Specifically, when MASN and the Orioles appealed directly from the First Department's July 2017 order, this Court dismissed the appeal "sua sponte, upon the ground that the order appealed from does not finally determine the proceeding within the meaning of the Constitution." *TCR Sports Broad. Holding, LLP v. WN Partner, LLC*, 30 N.Y.3d 1005 (2017) (dismissing appeal). Then in 2019, when MASN and the Orioles again attempted to appeal as of right under C.P.L.R. § 5601(d) to bring up for review the Appellate Division's nonfinal July 2017 order after the new RSDC arbitration had been completed upon remand, this Court granted the Nationals' motion to dismiss the appeal, again on the ground that the order appealed from did "not finally determine the proceeding within the meaning of the Constitution." *Matter of TCR Sports Broadcasting Holding, LLP v. WN Partner, LLC, appeal dismissed* 2019 NY Slip Op 84723 (Nov. 25, 2019) (Motion No. 2019-545).

On this third attempted appeal to this Court, again purportedly as of right, the requirements of C.P.L.R. § 5601(d) once again have not been met. This Court, therefore, still lacks jurisdiction under the New York State Constitution to review the First Department's July 2017 order.

*First*, C.P.L.R. § 5601(d) requires that the prior nonfinal Appellate Division order to be brought up for review "necessarily affects" a subsequent final judgment.

This requirement is not satisfied where, as here, the Appellate Division order merely remands a case for a new plenary hearing.

This Court has consistently held that an Appellate Division order requiring a new plenary trial does not "necessarily affect" the final judgment that ensues from that new trial, because any legal issues that were raised in the prior appeal can be raised again and decided at the new trial (and then brought up for review in an appeal from the new final judgment). The same principle applies to the First Department's July 2017 order here remanding the parties to conduct a new RSDC arbitration. And, in fact, many of MASN's and the Orioles' arguments made on this appeal were considered (and rejected) by the RSDC on remand. The same arguments were then considered (and rejected) by Supreme Court in 2019 and the First Department in 2020. Because the July 2017 Appellate Division order merely remanded for a new arbitration before the RSDC, it does not necessarily affect the final judgment in this proceeding confirming the new April 2019 RSDC award.

*Second*, C.P.L.R. § 5601(d) also requires that the July 2017 Appellate Division order satisfy the requirements of C.P.L.R. § 5601(a), which requires "a dissent by at least two justices on a question of law in favor of the party taking such appeal." That requirement is not met here, because the July 2017 First Department order's two-justice dissent is not "on a question of law." C.P.L.R. § 5601(a). Rather, the dissent in the July 2017 First Department order was premised on a dispute of

fact, not a dispute of law. Indeed, the plurality and the dissent *agreed* on the well-established *legal* principle that in extraordinary circumstances, a court may exercise its equitable authority to reform an arbitration agreement and direct that a dispute be arbitrated in a forum other than the one agreed by the parties in the contract.

The plurality and dissent divided only on the *factual* question of whether the circumstances here justified directing the parties to arbitrate in a forum different from the one agreed by the parties in their contract. The plurality concluded that the circumstances here did not justify reforming the parties' agreement, and the dissent disagreed. Even to the extent the plurality and dissent could be said to have disagreed on applying the facts to the law, it is well established that this does not constitute a disagreement on a "question of law," which is the necessary requirement for this Court's jurisdiction. This Court, therefore, should dismiss MASN's and the Orioles' appeal as of right under C.P.L.R. § 5601(d).

## STATEMENT OF FACTS

### A. The Arbitration Agreement

In 2003, MLB decided to move the then-Montreal Expos to Washington D.C. On March 28, 2005, the Office of the MLB Commissioner, the Nationals, MASN (the regional sports network that until then had been televising only Orioles' games) and the Orioles entered an agreement ("The March 2005 Agreement") (Ex. 1) that, among other things, gives MASN the exclusive right to televise both Orioles and

Nationals games. The 2005 Agreement also provides that the Orioles have super-majority ownership, and complete control, of MASN, while the Nationals have a minority ownership stake. The 2005 Agreement is governed by Maryland law. *Id.* at 15.

The 2005 Agreement sets forth a fixed schedule of below-market fees that MASN would pay the Nationals from 2005-2011 for the right to broadcast Nationals games. *Id*. at 7. These below-market fees were a massive benefit to the Orioles: the lower rights fees meant higher profits for MASN, and the Orioles (as supermajority owners of MASN) received a supermajority of those profits. *Id*. at 9.

The 2005 Agreement provided that, beginning in 2012, the rights fees paid to the Nationals would be determined for "successive five year period[s]" based on "the fair market value of the telecast rights." *Id*. at 7-8. If a dispute arose regarding rights fees, the 2005 Agreement provides for negotiation, then mediation, and then:

> 2.J.3. Appeal: In the event that the Nationals and/or the Orioles and [MASN] are unable to timely establish the fair market value of the Rights by negotiation and/or mediation … , then the fair market value of the Rights shall be determined by the Revenue Sharing Definitions Committee ("RSDC") using the RSDC's established methodology for evaluating all other related party telecast agreements in the industry.

*Id*. at 8. The Agreement provides that "[t]he fair market value of the rights established pursuant to" Section 2.J.3 "shall be final and binding on the Nationals and [MASN][.]" *Id*.

The RSDC is a panel of MLB Club owners and executives, with rotating membership appointed by the MLB Commissioner, that regularly hears disputes concerning revenue-sharing and related issues, including valuation of television broadcast rights. The RSDC does not normally follow a formalized arbitration model like that used by bodies such as the AAA (*see* Ex. 2 at 12), and the RSDC openly receives administrative support from MLB (Ex. 3 at 2). The March 2005 Agreement provides that in an arbitration, the RSDC is to determine the "fair market value" of the Nationals' telecast rights by applying "the RSDC's established methodology for evaluating all other related party telecast agreements in the industry." Ex. 1 at 8. As MASN acknowledged in Supreme Court, it "agreed to" and "ha[s] to live with" "whatever the structure [of the arbitration] [i]s, whatever Major League Baseball's role [i]s." Ex. 4 at 11.

### B. The 2012 Arbitration Before the RSDC

In late 2011, the Nationals and MASN were unable to agree on the fair market value of the Nationals' telecast rights for the forthcoming five-year period of 2012-2016. The parties waived mediation and submitted the dispute to the RSDC. Ex. 5 at 4-5. At the time, the RSDC was composed of executives from the New York Mets, the Pittsburgh Pirates, and the Tampa Bay Rays. *Id.* at 5. The Nationals were represented in the proceedings by Proskauer Rose LLP. *Id.* at 6.

The RSDC held a hearing on April 3, 2012 at MLB headquarters in New York City. As is customary, MLB personnel provided the RSDC with administrative and procedural support. *Id*. at 6, 16. The RSDC reached its determination by mid-2012, and the parties were told the approximate amount of rights fees that MASN owed the Nationals—an average of approximately $59.6 million per year (Ex. 2 at 19)—but the panel did not issue a formal written award until June 30, 2014 (Ex. 6 (First Award) at 20).

During the period between mid-2012 when the parties were made aware of the approximate amount of the RSDC award, and June 2014 when the RSDC issued the award, MLB arranged to advance the Nationals $25 million in order to facilitate ongoing settlement discussions. Ex. 5 at 7-8. The advance was meant to encourage the Nationals' participation in settlement discussions by addressing the shortfall in 2012 and 2013 between rights fees MASN had unilaterally decided to pay the Nationals and the amount of rights fees the RSDC had determined to award. *Id.* The terms of the advance stated that "if the RSDC issues a decision that covers 2012 and/or 2013, any payments from MASN otherwise due to the Nationals will be made first to the Commissioner's Office to cover" the advance, and "[a]ny excess amounts would go to the Nationals." Ex. 7 at 2.

### C. Vacatur of the First Award

The RSDC issued its initial award on June 30, 2014. The award was far closer to MASN's and the Orioles' proposed valuation than the valuation proposed by the Nationals. Nonetheless, MASN and the Orioles petitioned Supreme Court to vacate the award, and further sought an order compelling a new arbitration in a forum other than the RSDC. The Nationals cross-petitioned to confirm.

On November 4, 2015, Supreme Court (Marks, J.) granted MASN's and the Orioles' petition in part, ***solely*** on grounds related to the Nationals' arbitration counsel, Proskauer, having concurrently represented MLB and certain interests of the RSDC members. *TCR Sports Broad. Holding, LLP v WN Partner, LLC*, 2015 WL 6746689 (Sup. Ct. N.Y. Cnty. Nov. 4, 2015) (Ex. 5).

Supreme Court rejected the MASN's and the Orioles' other arguments in support of vacatur, including the argument that MLB's $25 million advance to the Nationals in 2013 created evident partiality. *Id*. at 18-20. Supreme Court concluded that "MASN and the Orioles have not demonstrated that the circumstances of the advance raise any serious questions about the fairness of the arbitration process" (*id*. at 20), explaining that "the Court cannot see how MASN or the Orioles were actually prejudiced by MLB's financial arrangement with the Nationals, even assuming there was insufficient disclosure of the precise nature of the arrangement" (*id*. at 19). Supreme Court further explained that "the advance was not undertaken in secret"

(*id*. at 20), noting that "MASN and the Orioles were aware that an advance would be made" (*id*. at 8).

Supreme Court also held MLB and the RSDC did not engage in any prejudicial misconduct, rejecting MASN's and the Orioles' claims that MLB improperly influenced the outcome of the proceedings. *Id*. at 16-17. Supreme Court explained:

> MLB provided the sort of support that the parties must necessarily have expected when they entered into the Agreement and there is no evidence that MASN and the Orioles had any expectation that the three Club representatives, when acting in their capacity as members of MLB's standing committee, would eschew assistance from MLB's support staff to the extent customary and appropriate.

*Id*. at 16. Supreme Court held "Petitioners have not shown any denial of fundamental fairness based on MLB's support role or the informality of the procedures used." *Id*. at 17. Supreme Court also rejected MASN's and the Orioles' argument that the RSDC's interpretation of the 2005 Agreement exceeded the scope of the arbitrators' authority or constituted manifest disregard of the law, and that MLB and the RSDC engaged in prejudicial misconduct by, among other things, denying the Orioles' discovery requests. *Id*. at 12-17.

Supreme Court also ***denied*** MASN's and the Orioles' request to remand the matter for rehearing before an arbitral body other than the RSDC and outside of MLB, explaining that if the Nationals retained new counsel who did "not

concurrently represent MLB or the individual arbitrators and their clubs," the parties could "return to arbitration before the RSDC, however currently constituted, pursuant to the parties' Agreement." *Id*. at 28-29 n.21.

In 2017, MASN and the Orioles appealed to the Appellate Division, First Department, from Supreme Court's denial of their request to remand the parties to a new arbitration in a forum other than the RSDC. The Nationals and MLB cross-appealed the vacatur of the original RSDC award.

The First Department affirmed vacatur of the RSDC's 2014 award based solely on Proskauer's involvement in the proceedings. *See TCR Sports Broad. Holding, LLP v. WN Partner, LLC*, 153 A.D.3d 140 (1st Dep't 2017) (per curiam) (Ex. 8). The First Department also upheld Supreme Court's denial of the Orioles' and MASN's request to require new arbitration in a forum other than the RSDC. *Id*. at 5. Three Justices concurred in that result, holding that the parties must arbitrate in their contractually selected forum—the RSDC. *See id*. at 6-36 (plurality opinion of Andrias, J., joined by Richter, J.); *id*. at 37-38 (Kahn, J., concurring). Two Justices dissented. *Id*. at 39-74 (Acosta, J., joined by Gesmer, J., dissenting).

In rejecting MASN's and the Orioles' arguments for sending the matter to a different arbitral forum, the plurality assumed courts have "inherent power to disqualify an arbitration forum in an exceptional case." *Id*. at 6 (plurality); *see id*. at 24; *id*. at 25 n.3 (both similar). But the plurality concluded that "on the record before

us there is no basis, in law or in fact, to direct that the second arbitration be heard in a forum other than the industry-insider committee that the parties selected in their agreement to resolve this particular dispute, fully aware of the role MLB would play in the arbitration process." *Id*. at 6-7 (emphasis added); *see id*. at 24 (similar).

The plurality observed that the MASN, the Orioles, and the Nationals "expressly chose to carve out disputes over telecast fees for arbitration before the RSDC, an industry-insider committee with specialized knowledge," and that these "sophisticated parties, represented by experienced counsel," elected the RSDC knowing "full well how the RSDC operated." *Id*. at 27-28; *see id*. at 28 ("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.'") (quoting Ex. 4 at 11). And, "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*. at 28.

The plurality further explained that "there has been no showing of bias or corruption on the part of the members of the reconstituted RSDC." *Id*. at 7; *see id*. at 32-33 (similar). The plurality wrote that MASN's mere "[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*. at 7. And the plurality found it was "pure conjecture" to suppose that the new RSDC members would act as "puppets of MLB, rather than exercise [their] independent judgment." *Id*. at 30. 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 any event, "it is the RSDC, not MLB or its Commissioner that will render a final decision in this matter." *Id*. at 32.

In response to the dissent's reliance on MLB's $25 million advance to the Nationals, the plurality stated that "[t]o allow the Orioles to now use the advance, which maintained the status quo [during settlement negotiations], as a sword to disqualify the RSDC defies logic and mischaracterizes MLB's efforts to have the parties negotiate their differences without undue financial pressure on either side." *Id*. at 31. The plurality also noted 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*. at 30-31.

The plurality explained that "in certain limited circumstances a court has the power to remove an arbitrator pursuant to section 2 of the FAA if the arbitration

agreement itself 'is subject to attack under general contract principles.'" *Id*. at 34 quoting *Aviall, Inc. v. Ryder Sys., Inc*., 110 F.3d 892, 895 (2d Cir. 1997)). But the plurality found that here there were no factual grounds for contract reformation, because the three new RSDC members who would hear the new arbitration had not "shown themselves to be less than impartial." *Id.* at 34-35. Nor had the new RSDC members "demonstrated any bias in the matter" or any "impermissible conflict" between them and MASN or the Orioles. *Id*. at 35. And "MASN and the Orioles have not established that remand to the RSDC will be fundamentally unfair under the particular circumstances before [the court]." *Id*. at 25 n.3. "Thus, MASN and the Orioles have not made the extraordinary showing of grounds needed to reform the agreement or disqualify the RSDC," and "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." *Id*. at 35. Absent a such a showing, the court could not reform the contract. *Id*. at 36. And because "MASN and the Orioles have not and cannot show that the agreement is unenforceable under general contract principles," the FAA required that MASN be compelled to arbitrate in the RSDC pursuant to the Agreement. *Id*. at 35-36.

Justice Kahn reached the same conclusion as the plurality. *Id*. at 37-38 (concurrence). As she explained, "in the absence of an established ground for setting [an arbitration] agreement aside, such as fraud, duress, coercion or

unconscionability," the FAA requires that an agreement to arbitrate "must be judicially enforced according to its terms." *Id*. at 37. Justice Kahn found that no such grounds existed. *See id*. at 37-38. To the contrary, "the parties chose" the RSDC to decide this dispute, and "[n]ew arbitrators have been designated to hear the matter for the RSDC." *Id*. 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.

The dissent would have directed the parties to a different arbitral forum. *Id*. at 39-74 (dissent). The dissent expressly noted it had no dispute with the plurality on the applicable legal principle. Indeed, as the dissent observed, "the plurality … agrees that 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 RSDC.'" *Id*. at 67-68. The dissent likewise observed the plurality's "acknowledg[ment] that this Court may have the power to refer the matter to a neutral arbitral forum other than that chosen by the parties under the appropriate circumstances"—though the majority "cho[se] not to exercise that power here." *Id*. at 41.

The dissent, however, focused on whether the ***facts*** warranted invoking the court's equitable power of reformation to replace the RSDC with a different arbitral forum:

- Factual findings on bias: Whereas the plurality concluded (in accord with Supreme Court's findings, Ex. 5 at 12-20) that "there has been no showing of bias or corruption on the part of the members of the reconstituted RSDC," Ex. 8 at 7 (plurality); *see id.* at 32-33, 35, the dissent found that MASN "would be unable to obtain a fundamentally fair arbitration if the RSDC were to rehear the matter," *id*. at 60-62 (dissent).
- Factual findings on independence: Whereas the plurality (like Supreme Court, *see* Ex. 5 at 15-17) concluded that there was no evidence that on remand RSDC would act as "puppets of MLB, rather than exercise its independent judgment," Ex. 8 at 30 (plurality), the dissent found that "MLB retain[ed] its significant influence over the panel" and would dictate the result of the rehearing, *id*. at 65-66 (dissent).
- Factual findings on financial interest: While the plurality found that the Nationals' offer to post a bond resolved any possible issue stemming from MLB's $25 million advance to the Nationals, *id*. at 30-31 (plurality), the dissent found such a bond would be insufficient to eliminate bias concerns, *id*. at 64-65 & n.6 (dissent).

Evaluating the facts, the dissent would have found, contrary to the panel majority, that MASN "'made the extraordinary showing of grounds needed to reform the agreement or disqualify the RSDC.'" *Id*. at 68.

### D. MASN's and the Orioles' First Attempted Appeal to this Court.

On July 14, 2017, MASN and the Orioles noticed an appeal from the First Department's order. After soliciting letter briefs on the Court's jurisdiction to consider the appeal, this Court dismissed the appeal "sua sponte, upon the ground that the order appealed from does not finally determine the proceeding within the meaning of the Constitution." *TCR Sports Broad. Holding, LLP v. WN Partner, LLC*, 30 N.Y.3d 1005 (2017).[1]

MASN and the Orioles then moved the First Department for leave to appeal to the Court of Appeals, and the same panel that had rendered the underlying decision unanimously denied the motion. *TCR Sports Broad. Holding, LLP v. WN Partner, LLC*, 2018 WL 457101 (1st Dep't Jan. 18, 2018).

### E. The 2018 Arbitration Before the RSDC

In 2018, the parties then participated in a new arbitration of the 2012-2016 rights fee dispute before the RSDC. In that new arbitration, the Nationals were represented by counsel who had not participated in the original RSDC arbitration and who also did not concurrently represent MLB, any of the three RSDC members,

[1] Chief Judge DiFiore and Judge Garcia took no part in the decision. *Id*.

or their respective Clubs. None of the RSDC members in the new arbitration had participated in the original arbitration; the RSDC's rotating membership had changed with the passage of time.

The Orioles and MASN nonetheless repeatedly challenged the RSDC's continued role in the arbitration. *See, e.g.*, Ex. 9 at 4 (demanding that MLB and the RSDC "recuse themselves … from this dispute"). The RSDC declined those requests for recusal.

In the new arbitration the RSDC retained separate outside counsel to support the proceedings. The RSDC initially retained Joseph Shenker of Sullivan Cromwell. But after a complaint from the Orioles and MASN, Sullivan & Cromwell stepped aside, and the RSDC instead retained Gregory Joseph of Joseph Hage Aaronson LLC to assist in the proceeding.

After receiving extensive briefing from the parties and addressing numerous issues raised pre-hearing by the parties, the RSDC held a hearing over two days in November 2018. The RSDC issued its award on April 15, 2019. Ex. 10. In the award, the RSDC set forth detailed analysis of the 2005 Agreement and the evidence presented by the parties in order to identify "the RSDC's established methodology for evaluating all other related party telecast agreements in the industry." *Id*. at 10-12, 18-29. The RSDC then applied that methodology to the facts established by the evidence submitted at the hearing, and on that basis determined that the "fair market

value" of the Nationals' rights averaged $59.4 million annually over the 2012-2016 period. *Id*. at 29-48.

### F. Confirmation of the New RSDC Award

On April 15, 2019, the Nationals moved to confirm the RSDC's second award in Supreme Court, pursuant to C.P.L.R. § 7502(a)(iii). *See* Ex. 11. On August 22, 2019, Supreme Court issued its decision and order confirming the award (Ex. 12). Supreme Court rejected each of MASN's and the Orioles' arguments in support of vacatur. Supreme Court also rejected MASN's and the Orioles' request to be remanded to a new venue for another rehearing of the dispute.

Specifically, Supreme Court ruled MASN and the Orioles failed to establish "evident partiality" under the FAA. *Id.* at 15. Supreme Court rejected MASN's and the Orioles' argument that the Nationals' agreement to repay a $25 million advance made by MLB created a "glaring conflict of interest." *Id.* at 15-19. Supreme Court reasoned that the agreement "if anything *alleviated* the substantive concerns expressed by the Orioles in connection with the First Award – *i.e.*, that the loan purportedly gave MLB a financial stake in the *outcome* of the arbitration." *Id.* at 16 (emphasis in original). Supreme Court rejected MASN's and the Orioles' argument that the Nationals' agreement to repay MLB disincentivized the RSDC from acceding to MASN's and the Orioles' recusal demands. Noting that the parties agreed certain disputes would be heard by the AAA, Supreme Court observed the

RSDC was "mandated to be the forum under the 2005 Agreement," because the parties agree rights fees disputes "'shall be determined' by RSDC, full stop." *Id.* at 17-18.

Supreme Court further rejected MASN's and the Orioles' argument that there was evident partiality because the RSDC failed to disclose MLB's role in the proceedings or MLB's communications with the RSDC. *Id.* at 19-21. Supreme Court explained that the parties' agreement "expressly mandates that disputes regarding telecast rights would be resolved by the RSDC, which all parties understood is composed of *MLB-chosen* executives from other MLB teams – that is, 'industry insiders, with specialized expertise.'" *Id.* at 19 (emphasis in original; citing Ex. 8 at 36 (plurality); *see also id*. at 37-38 (concurrence) ("Here, the conduct of Major League Baseball and its representatives has been far from neutral and balanced. But this was the forum the parties chose, even avoiding the opportunity for a hearing before a panel of the American Arbitration Association and proceeding directly to the [RSDC]."). Citing the First Department's 2017 decision, Supreme Court rejected MASN's and the Orioles' argument that public statements made by the MLB Commissioner evinced bias:

> The plurality opinion in TCR II addressed similar allegations and found them insufficient to warrant removing the MLB-appointed RSDC from the arbitration process: "Nor does the fact that MLB has made certain public statements expressing the view that the RSDC acted within the scope of its authority in setting the rights fees, and that MASN would have to abide by that determination 'sooner or later,' warrant transfer

> to a new forum. Again, it is the RSDC, not MLB or its Commissioner that will render a final decision in this matter."

*Id.* at 21 (quoting Ex. 8 at 32 (plurality)). Supreme Court concluded "that public statements such as those referenced by the Orioles are insufficient to throw into doubt the fairness of a process that was handled and resolved by the RSDC with obvious thoroughness and care." *Id*.

Supreme Court also rejected MASN's and the Orioles' claim that they were denied the right to present their case under Section 10(a)(3) of the FAA, observing that "[e]ven a cursory review of the voluminous record in this case shows that these parties have suffered through many things over the course of seven years, but one of them was ***not*** the absence of an adequate opportunity to present their evidence and arguments." *Id.* at 22 (emphasis in original). And Supreme Court rejected MASN's and the Orioles' argument that the RSDC exceeded its powers under Section 10(a)(iv) of the FAA, explaining that "the RSDC obviously had the authority to consider the interpretation of relevant language in the agreement and the application of the facts to that language." *Id.* at 24.

Supreme Court also noted that it had "reviewed the Orioles' remaining arguments (mainly, sub-arguments of the above)," including the argument that the court should remand the parties to a new arbitral forum, "and found them to be without merit." *Id*.

In addition, Supreme Court determined the Nationals were entitled to prejudgment interest, Supreme Court ruled "[t]he Second Award constitutes a monetary 'sum awarded' upon which the court may grant interest." *Id*. The court explained: "The RSDC made its determination, which clearly was a monetary award of what 'shall be paid' to the Nationals, down to the single dollar, subject only to deducting the amount previously paid by MASN to the Nationals in respect of the rights fees." *Id*. at 25.

On December 9, 2019, following additional briefing and oral argument, Supreme Court entered judgment in favor of the Nationals in the amount of $99,203,339.14, plus statutory interest running from April 15, 2019 (the date of the RSDC's award) through the date of the judgment, in the amount of $5,821,741.16.

MASN and the Orioles appealed Supreme Court's confirmation of the RSDC's April 2019 award, and Supreme Court's monetary judgment, to the First Department. On October 22, 2020, the First Department affirmed both confirmation of the RSDC award, and the monetary judgment, in a unanimous 4-0 decision. The First Department held that MASN "failed to establish evident partiality in the RSDC in the second arbitration" or that "the RSDC otherwise violated its obligations, exceeded its powers or denied petitioner a fair hearing." Ex. 13 at 2. The First Department also specifically affirmed the monetary judgment entered by Supreme Court. *Id*.

### G. MASN's and the Orioles' Second Attempted Appeal to the Court of Appeals

One month after the Nationals moved to confirm the RSDC's 2019 award, MASN and the Orioles on May 14, 2019 noticed an appeal to this Court, seeking review of the First Department's 2017 decision. Ex. 14. On May 31, 2019, the Nationals moved to dismiss the appeal on grounds that this Court did not have jurisdiction under C.P.L.R. § 5601(d). Ex. 15. On August 27, 2019, the Nationals informed this Court of Supreme Court's August 22, 2019 decision confirming the RSDC's 2019 award. Ex. 16. On September 16, 2019, the Chief Clerk of this Court asked MASN and the Orioles whether they had appealed (or would appeal) the August 22, 2019 order of Supreme Court to the First Department and asked all parties to advise whether the inquest directed by Supreme Court would involve "ministerial or quasi-judicial action." Ex. 17. After receiving responses to the jurisdictional inquiry (Exs. 18 & 19), this Court on November 25, 2019 dismissed the Orioles' and MASN's appeal under C.P.L.R. § 5601(d), "on the grounds that the order appealed from does not finally determine an action within the meaning of the Constitution." Ex. 20.

### H. MASN's and the Orioles' Now Third Attempted Appeal to this Court.

On November 19, 2020, MASN and the Orioles filed in Supreme Court a new notice of appeal to this Court, purportedly pursuant to C.P.L.R. § 5601(d), from the

First Department's 2017 determination to remand the parties to a new arbitration before the RSDC. Ex. 29.

On November 25, 2020, MASN and the Orioles filed their Preliminary Appeal Statement with this Court. Ex. 30.[2]

At the same time, on November 20, 2020, MASN and the Orioles moved in the First Department seeking reargument of the First Department's unanimous October 22, 2020 order, which affirmed both confirmation of the RSDC's April 2019 award and the Supreme Court monetary judgment. Specifically, the request for reargument asserts that the First Department improperly affirmed the monetary judgment. MASN's and the Orioles' motion in the First Department also requested leave to appeal to this Court from the unanimous October 22, 2020 Appellate Division order. Ex. 21. On November 30, 2020, the Nationals filed their opposition to the motion.

---

[2] MASN and the Orioles assert that their appeal is to address: "Whether, as a matter of law, the two dissenting Justices of the Appellate Division correctly concluded that: (1) courts possess the power, after vacating an arbitral award (here unanimously) because of the evident partiality of the governing institution under whose auspices the arbitration was conducted, to order rehearing in a neutral and unbiased forum other than that stated in the arbitration clause, and (2) the legal standards governing such power required its exercise under the circumstances presented here." Ex. 30 at 5. As discussed at Argument Point II, *infra*, it is respectfully submitted that MASN and the Orioles mischaracterize the substance of the dissent, which in fact concurred with the plurality on the applicable and well-established legal standard, but disagreed with the plurality as to whether the unique factual circumstances here satisfied that standard.

## ARGUMENT

This putative appeal, purportedly brought as of right under C.P.L.R. § 5601(d), should be dismissed because this Court lacks jurisdiction under the N.Y. Constitution.

C.P.L.R. § 5601 provides, in relevant part:

> (a) Dissent. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, … from an order of the appellate division which finally determines the action, where there is a *dissent by at least two justices on a question of law* in favor of the party taking such appeal.
>
> . . .
>
> (d) Based upon nonfinal determination of appellate division. An appeal may be taken to the court of appeals as of right from a final judgment entered in a court of original instance, from a final determination of an administrative agency or from a final arbitration award, or from an order of the appellate division which finally determines an appeal from such a judgment or determination, where *the appellate division has made an order on a prior appeal* in the action *which necessarily affects the judgment, determination or award and which satisfies the requirements of subdivision (a) … except that of finality*.

C.P.L.R. § 5601 (emphases added).

Here, *first*, the July 2017 First Department order that MASN and the Orioles seek to bring up for review does not satisfy C.P.L.R. § 5601(d), because the order does not "necessarily affect[] the [RSDC's] award." In a long line of cases, this Court has consistently held that an order requiring a new plenary trial does not "necessarily affect" the judgment that ensues from that new trial, because any issues

raised by an order requiring a new trial can be raised again at the new trial itself (and then brought up for review in an appropriate appeal from the new final judgment).

The same principle applies here to the First Department's 2017 order remanding the parties to a new arbitration before the RSDC. At that new arbitration, MASN and the Orioles raised again many of the same issues that had been decided in the First Department's 2017 order—including whether the RSDC was the proper forum for the arbitration—and those issues were again addressed by the RSDC (which declined to recuse itself). Those issues have been raised and determined again in this proceeding, both at Supreme Court and before the First Department. Thus, the prior nonfinal July 2017 Appellate Division order merely remanding for a new arbitration before the RSDC does not necessarily affect the final judgment within the meaning of C.P.L.R. § 5601(d).

*Second*, the First Department's July 2017 order does not satisfy the requirement that there be a two-justice dissent "on a question of law." The fundamental basis for the dissenting opinion was not a dispute of law, but a dispute of fact. The plurality and the dissent *agreed* on the *legal* principle that in extraordinary circumstances, a court may exercise its equitable authority to reform an arbitration agreement and direct that a dispute be heard in a forum other than one identified in the contract. The plurality and dissent divided only on the *factual*

question of whether sufficient grounds existed to conclude that the RSDC would be biased on remand as to require such a reformation of the arbitration agreement.

The putative appeal should therefore be dismissed for lack of jurisdiction.

## I. THIS COURT LACKS JURISDICTION BECAUSE THE PRIOR DECISION DID NOT "NECESSARILY AFFECT" THE RSDC'S AWARD

This Court lacks jurisdiction because the First Department's prior July 2017 nonfinal order did not "necessarily affect[]" the RSDC's new award within the meaning of C.P.L.R. § 5601(d). A prior nonfinal Appellate Division order only necessarily affects a final judgment, such that it is brought up for review on appeal from the final judgment, "if the result of reversing that order would *necessarily* be to require a reversal or modification of the final determination." Karger, Powers of the NY Court of Appeals § 9:5 (emphasis added). That would not be the case here. In fact, "[t]he rule is well established that an intermediate order of the Appellate Division reversing a decision and granting a hearing *de novo* before the original tribunal, does not necessarily affect the final decision of that tribunal after the new hearing, and may not be reviewed upon appeal from such final decision." *Daus v. Gunderman & Sons*, 283 N.Y. 459, 464 (1940). This Court has applied this rule consistently for decades. *See, e.g.*, *Barker v. Tennis 59th Inc.*, 65 N.Y.2d 740, 740-41 (1985) (dismissing appeal "*sua sponte*, upon the ground that the Appellate Division order granting a new trial … did not 'necessarily affect' the final judgment,

as required by CPLR 5601(d)"); *Miocic v. Winters*, 52 N.Y.2d 896, 897 (1981) (similar); *Town of Peru v. State*, 30 N.Y.2d 859, 860 (1972) (similar).

This Court reiterated this rule just two years ago, dismissing a putative appeal because "the prior nonfinal Appellate Division order here granting a new trial is not" an order that "necessarily affects" the subsequent final judgment. *Wintermute v. Vandemark Chem., Inc.*, 30 N.Y.3d 1041 (2017) (applying identical limitation in C.P.L.R. § 5602(a)(1)(ii)).

As Karger explains, "the general rule is that an order of the Appellate Division which directs a complete new trial or hearing without any limitations on its scope, ***is not classifiable as an order that necessarily affects the final determination rendered after the new trial or hearing***." Karger, *supra*, § 9.5 (collecting cases) (emphasis added). "Consequently, such an order is not reviewable on an appeal from the final determination under CPLR 5501(a)(1), ***and it cannot serve as the basis for a direct appeal under CPLR 5601(d)***." *Id.* (emphasis added).

The rationale for this rule is that at the new hearing, "new evidence can be introduced and 'every question of fact or law may be litigated anew,'" such that questions decided in the prior interlocutory decision may be raised again and reviewed in an appeal from the ensuing final judgment. *Id.* Therefore, a "nonfinal order is not considered to have necessarily affected the final determination if the questions decided by it could have been raised again" in subsequent stages of the

case. *Id.* In this situation, there is no need for the fiction of a "merger" to bring up issues decided in an earlier appeal, *cf. Buffalo Elec. Co. v. State*, 14 N.Y.2d 453, 460-62 (1964)[3], because the issues can be fully litigated in the ordinary course based on the final judgment and the appeals that ensue therefrom.[4]

There is no reason why the rule – "that an intermediate order of the Appellate Division reversing a decision and granting a hearing *de novo* before the original tribunal, does not necessarily affect the final decision of that tribunal after the new hearing, and may not be reviewed upon appeal from such final decision," *Daus*, 283

---

[3] *Buffalo Elec. Co. v. State*, 14 N.Y.2d 453 (1964) did not involve remand for a plenary new trial: both of the prior Appellate Division decisions there had restricted the scope of proceedings on remand. *See Buffalo Elec. Co. v. State*, 9 A.D.2d 372, 373 (4th Dep't 1959) (reversing and remanding for trial court specifically "to decide the underlying question of fact"); *Buffalo Elec. Co. v. State*, 17 A.D.2d 523, 526-27 (4th Dep't 1963) (reversing and remanding for lower court specifically "to pass upon the merits of the claimant's claim for damages or additional costs"). The Siegel treatise (N.Y. Practice §§ 527, 530 (6th ed.)), like *Buffalo Electric*, does not address a prior interlocutory order granting a plenary new trial. In contrast, the authoritative Karger treatise cited above does address that situation, and explains why dismissal is required in the circumstances here.

[4] "A different rule" applies where the Appellate Division's decision "so limits the scope of the new trial or hearing as to compel a certain result." Karger, *supra*, § 9:5. In that circumstance, the two decisions may fairly be treated as merged, and the "law of the case" doctrine would foreclose relitigating issues previously decided. *Long v. Forest-Fehlhaber*, 55 N.Y.2d 154, 158 & n.5 (1982). Therefore, "the consequent final determination is held to be necessarily affected by the prior order of the Appellate Division." Karger, *supra*, § 9:5. But that circumstance is not present here, since following the First Department's 2017 decision remanding the parties to the RSDC for rehearing, the Orioles and MASN were free to continue litigating – and did litigate – among other things, whether the RSDC is the appropriate forum for the arbitration.

N.Y. at 464 – should apply any differently where the remand is for a plenary proceeding in arbitration. Indeed, here, MASN and the Orioles raised, and the RSDC addressed, the question that the Appellate Division had addressed in its 2017 decision: specifically, whether the RSDC was the proper venue for the new arbitration. MASN and the Orioles pressed these issues before the arbitrators.[5] MASN and the Orioles then raised them again in Supreme Court when opposing Nationals' motion to confirm the RSDC's April 2019 award (Ex. 24 at 26-28), and again in the recent First Department appeal from Supreme Court's orders confirming the RSDC's 2019 award and entering judgment for the Nationals (Ex. 25 at 47-52).

To the extent MASN and the Orioles suggest that denial of their request to have the arbitration reassigned to the new venue must have affected the judgment, this does not create a basis for jurisdiction. Indeed, this Court recently held that a decision to deny a request for reassignment of a case to a new judge "does not 'necessarily' affect the judgment sought to be appealed from within the meaning of

[5] *See* Ex. 22 at 1 n.1 ("MASN and the Orioles continue the objections to this RSDC proceeding they have made in their correspondence, including their objections to the RSDC proceeding itself and their position that section 2.J.3 of the Settlement Agreement must be reformed to permit resolution of this dispute before a panel of arbitrators who are not affiliated with MLB."); Ex. 23 at 2 n.2 ("MASN and the Orioles continue their objections to this RSDC proceeding that they have made in their prior correspondence, including their objections to the RSDC proceeding itself and their position that section 2.J.3 of the Settlement Agreement must be reformed to permit resolution of this dispute before a panel of arbitrators who are not affiliated with MLB.").

5602(a)." *JPMorgan Chase Bank, Nat'l Ass'n v. Caliguri*, 33 N.Y.3d 1046 (2019). Therefore, because the July 2017 prior nonfinal Appellate Division order does not necessarily affect the final Appellate Division order from which MASN and the Orioles have appealed, this Court lacks jurisdiction to entertain their appeal under CPLR 5601(d).

## II. THIS COURT LACKS JURISDICTION BECAUSE THE FIRST DEPARTMENT DISSENT IS NOT ON A QUESTION OF LAW

This appeal also should be dismissed for the independent, and compelling, reason that the First Department's 2017 order does not satisfy C.P.L.R. § 5601(a), which is expressly required to take an appeal as of right under C.P.L.R. § 5601(d). In particular, the two-Justice dissent in the July 2017 Appellate Division order is not "on a question of law."

For this Court to have jurisdiction, the double dissent must be based on a *pure* question of law. A dissent on a "mixed question of law and fact" is insufficient to confer jurisdiction under C.P.L.R. § 5601(a). *In re Daniel H.*, 15 N.Y.3d 883, 884 (2010) (collecting authorities); *see Matter of Robert S.*, 76 N.Y.2d 770, 559 N.Y.S.2d 979 (1990) (dissent on whether facts established probable cause raised unreviewable mixed question of fact and law); Karger, *supra*, § 6:5 ("mixed question of fact and law … would not be reviewable by the Court of Appeals"). Moreover, "[w]here it is equivocal whether a dissent rests upon disagreement in fact or law, the

dissent is not on a question of law within the meaning of CPLR 5601(a)." *Gillies Agency, Inc. v. Filor*, 32 N.Y.2d 759, 760 (1973); Karger, *supra*, § 6:5 (same).[6]

For jurisdiction purposes, the Court must "examin[e] the full record," *Merrill by Merrill v. Albany Med. Ctr. Hosp.*, 71 N.Y.2d 990, 991 (1988), and must ascertain whether the question in dispute is truly one of law. *See People v. Holland*, 18 N.Y.3d 840, 841 (2011); *see also* Karger, *supra*, § 6:5 ("The mere fact that a dissent may purportedly be addressed to questions of law is not conclusive.").

Here, the dissent in the First Department's July 2017 order to remand the matter to the RSDC for a new arbitration hearing and award is not "on a question of law." To the contrary, the plurality and the dissent expressly ***agreed*** on the relevant legal principle:

- The plurality assumed that courts have "inherent power to disqualify an arbitration forum in an exceptional case," Ex. 8 at 6 (plurality), and agreed that an arbitration agreement may be reformed "in certain limited

[6] This case is nothing like *Matter of Barnett*, 121 N.Y.S.3d 436, 438 (2020), where the Court was reviewing the legal question of what level deference to give to the fact finding of the Appeal Board, not disagreeing on facts or application of facts to the law. *See also Matter of Vega*, 35 N.Y.3d 131, 136 (2020) (same).

circumstances" where it "'is subject to attack under general contract principles,'" *id.* at 34 (quoting *Aviall*, 110 F.3d at 895).[7]

- The dissent noted that "[e]ven the plurality, while arguing that there is no legal basis for referring the matter to a new arbitral forum, agrees that 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 RSDC.'" *Id.* at 67-68 (quoting *id.* at 35 (plurality)); *see id.* at 41 (dissent noting "Justice Andrias's concurring opinion (the plurality) appears to acknowledge that this Court may have the power to refer the matter to a neutral arbitral forum other than that chosen by the parties under the appropriate circumstances").[8]

---

[7] The concurrence agreed that a court may determine not to enforce an arbitration clause (*e.g.*, by reforming it) where there is an "established ground" for doing so, "such as fraud, duress, coercion or unconscionability." *Id.* at 37 (concurrence).

[8] The underlying legal proposition applied by both the plurality and dissent – that § 2 of the applicable Federal Arbitration Act preserves courts' authority to invoke "generally applicable contract defenses," *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017) (citation omitted), and that the doctrine of reformation is one such "generally applicable" defense, *see, e.g.*, *Md. Port Admin. v. John W. Brawner Contracting Co.*, 492 A.2d 281, 288 (Md. 1985); *Chimart Assocs. v. Paul*, 66 N.Y.2d 570, 574 (1986) – is well established. Even the Nationals and MLB agree that an arbitration agreement could be reformed in an appropriate case—though such relief was properly denied on the record here. *See* Ex. 26 (Brief For Washington Nationals Baseball Club, LLC) at 39-41; Ex. 27 (Reply Brief For Washington Nationals Baseball Club, LLC) at 5-8; Ex. 28 (Brief for the Office of the Commissioner of Baseball and the Commissioner of Major League Baseball) at 62-63.

The dissent thus focused on the ***factual*** question of whether MASN and the Orioles had made the "extraordinary showing" that is necessary to invoke the court's power to reform the parties' agreement and remand the dispute to a different arbitral body. *Id.* at 68; *see also id.* at 41, 58, 60, 67, 74. The plurality ruled that MASN and the Orioles had not made this "extraordinary showing" and, thus, *affirmed* Supreme Court's factual findings, which favored the Nationals on every salient issue except those related to Proskauer's involvement in the first arbitration. *Id.* at 5 (per curiam); *see* Ex. 5; *see also* Ex. 8 at 24-33 (plurality endorsing Supreme Court's findings). Noting that the parties freely elected an inside-MLB body to hear the dispute (*see id.* at 28 [plurality]; *id.* at 37-38 [concurrence]), that the Nationals' retention of unconflicted counsel would cure the grounds for Supreme Court's "evident partiality" finding (*id.* at 29 [plurality]), and that the three RSDC members that issued the June 2014 arbitration award were replaced by new panelists on the RSDC (*id.*; *id.* at 38 [concurrence]), a majority of the Appellate Division panel concluded that the Orioles and MASN had not demonstrated that the RSDC would be impermissibly biased or conflicted, or that the new arbitration would otherwise have been unfair. *See id.* at 5 (per curiam); *id.* at 7, 32-33, 35-36 (plurality); *id.* at 37-38 (concurrence finding that the Orioles and MASN had not proven an "established ground" for reformation).

The dissent merely disagreed with that *factual* conclusion. The dissent would have concluded that MASN and the Orioles had shown that they "would be unable to obtain a fundamentally fair arbitration if the RSDC were to rehear the matter" (*id.* at 60 [dissent]), and that they had thus "'made the extraordinary showing of grounds needed to reform the agreement or disqualify the RSDC.'" *Id.* at 68 (quoting *id.* at 35 (plurality)).

This disagreement over whether the evidence here satisfied the standard for contract reformation does not present a pure question of law over which this Court has jurisdiction under C.P.L.R. § 5601(a). It is instead a dispute over what facts may be inferred from the evidence: the majority of the First Department found that the RSDC would not be impermissibly biased against the Orioles and MASN upon remand, while the dissent thought that the evidence established such bias.[9] The Appellate Division dissent's mere factual disagreement regarding the weight and inferences to be drawn from the evidence of purported bias establishes that the dissent is *not* on a pure question of law necessary to bring this appeal within this Court's jurisdiction under C.P.L.R. § 5601(d). *See, e.g., Heary Bros. Lightning Prot. Co. v. Intertek Testing Servs., N.A., Inc.*, 4 N.Y.3d 615, 618 (2005) ("A 'weight of the evidence' determination is a factual one that we have no power to review")

[9] The majority was correct, as Supreme Court and First Department confirmed in 2019 and 2020 after the new RSDC proceeding.

(citing *Cohen v. Hallmark Cards*, 45 N.Y.2d 493, 498-500 (1978)); *Kolchins v. Evolution Markets, Inc.*, 31 N.Y.3d 100, 106 (2018) ("a question of fact arises" in a contract case where there is "evidence from which differing inferences may be drawn"); *see also* Karger, *supra*, § 13:2 ("The basic principle is that a question of fact is presented if there is a conflict either in the evidence or in the inferences which can reasonably be drawn from the evidence. … In addition, though the facts may not be in dispute, a question of fact arises if the inferences from those facts may reasonably lead to differing conclusions.") (collecting cases; footnotes omitted). Indeed, 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." *Westinghouse, Church, Kerr & Co. v. Remington Salt Co.*, 189 N.Y. 515, 515-16 (1907).

*Froehlich v. New York State Dep't of Corr. & Cmty. Supervision*, 35 N.Y.3d 1031 (2020), is directly on point. In *Froehlich*, this Court dismissed an appeal because "the two-justice dissent at the Appellate Division is not on a question of law." *Id.* at 1032. There, the dispute concerned whether a scuffle between the petitioner, a prison security guard, and a prisoner satisfied the Department of Corrections' definition of assault, which was "an intentional physical act of violence directed toward[] an employee by an inmate or parolee." *Froehlich v. New York*

*State Dep't of Corr. & Cmty. Supervision*, 179 A.D.3d 1408, 1410-11 (3rd Dep't 2020) (majority); *id*. at 1411 (dissent). The majority held that the prisoner was "combative," but not that he "directed any intentional physical act of violence toward [the guard]". *Id.* at 1411.

The two-justice dissent explained that "the facts of the matter are not in dispute," but found that, during the scuffle, "additional officers, including petitioner, intervened and attempted to physically restrain the combative inmate, during the course of which petitioner sustained injuries to his neck, back and shoulder." *Id.* at 1411-12 (dissent). The dissent added: "Respondent does not dispute that petitioner was injured during this altercation and, in our view, the inmate's acts against, among other officers, petitioner constituted an 'assault,' as that term is defined by respondent." *Id.* (dissent). Thus, the dissent concluded: "Accordingly, we believe that respondent's decision lacked a rational basis and was arbitrary and capricious." *Id*. at 1412 (dissent).

Similarly, in *A.V. v. Presentment Agency,* 34 N.Y.3d 1024 (2019), this Court dismissed an appeal "upon the ground that the two-Justice dissent at the Appellate Division is not on a question of law (see CPLR 5601[a])," where the majority reasoned that the lower court did not abuse its discretion in placing a minor on probation but the two-justice dissent held "*under the circumstances of this case*, the court improvidently exercised its discretion when it adjudicated A.V. a juvenile

delinquent and imposed probation," *In re A.V.*, 173 A.D.3d 556, 557, 561 (1st Dep't 2019) (emphasis added).

At most, it might be said that the dissent in the July 2017 Appellate Division order here raised a *mixed* question of law and fact, *i.e.*, one concerning "application of th[e] facts to the applicable legal principles." *People v. Guay*, 18 N.Y.3d 16, 23 (2011); *accord U.S. Bank N.A. ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 966 (2018) (mixed question is one "ask[ing] whether 'the historical facts … satisfy the [legal] standard'") (quoting *Pullman-Standard Co. v. Swint*, 456 U.S. 273, 289 n.19 (1982)). But this Court also lacks jurisdiction over such mixed questions of law and fact. For example, the question whether an inculpatory statement was "sufficiently attenuated from [an] earlier un-Mirandized statement" to be admitted into evidence is a "mixed question" that is unreviewable in this Court. *In re Daniel H.*, 15 N.Y.3d at 884. So is the question whether the facts are sufficient to establish probable cause. *See Matter of Robert S.*, 76 N.Y.2d 770; Karger, *supra*, § 6:5 n.11 (explaining same).

The same is true of a question such as whether the facts in this case were sufficient to warrant reforming the arbitration agreement. Answering that question required only application of the law on which all 5 Justices of the Appellate Division agreed to the particular facts in the proceeding to confirm or vacate the June 2014 arbitration award. *See Guay*, 18 N.Y.3d at 23. It is *not* a pure question of law, as

would be required for this Court to exercise jurisdiction over MASN's and the Orioles' purported C.P.L.R. § 5601(d) appeal as of right. In any event, this Court lacks jurisdiction under C.P.L.R. § 5601(a) even if it is merely "*equivocal* whether [the] dissent rests upon disagreement in fact or law." *Gillies*, 32 N.Y.2d at 760 (emphasis added); Karger, *supra*, § 6:5. Thus, this Court should dismiss this purported C.P.L.R. § 5601(d) appeal for lack of jurisdiction.

## CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the purported appeal by MASN and the Orioles should be dismissed for lack of jurisdiction.

DATED: New York, New York
December 3, 2020

Respectfully submitted,

By:

QUINN EMANUEL URQUHART
& SULLIVAN LLP
Stephen R. Neuwirth
Patrick D. Curran
Joe Kiefer
Kathryn D. Bonacorsi
51 Madison Avenue, 22nd Floor
New York, New York 10010
(212) 849-7000
stephenneuwirth@quinnemanuel.com
patrickcurran@quinnemanuel.com
joekiefer@quinnemanuel.com
kathrynbonacorsi@quinnemanuel.com

MORRISON COHEN LLP
David B. Saxe
Gayle Pollack
909 Third Avenue
New York, New York 10022
212-735-8600
dsaxe@morrisoncohen.com
gpollack@morrisoncohen.com

*Attorneys for Respondent*
*Washington Nationals Baseball Club, LLC*