New York County Clerk's Index No. 652044/14

Court of Appeals

of the

State of New York

TCR SPORTS BROADCASTING HOLDING, LLP,

Petitioner-Appellant,

– against –

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

Respondents-Respondents,

– and –

THE COMMISSIONER OF MAJOR LEAGUE BASEBALL,

Respondent,

– and –

THE BALTIMORE ORIOLES BASEBALL CLUB and BALTIMORE ORIOLES LIMITED PARTNERSHIP, in its capacity as managing partner of TCR Sports Broadcasting Holding, LLP,

Nominal Respondents-Appellants.

MOTION FOR LEAVE TO APPEAL WITH SUPPORTING EXHIBITS 1 -21

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PLEASE TAKE NOTICE, that upon the annexed Affirmation of Jonathan D. Schiller, Esq., dated February 10, 2021, the exhibits thereto, the accompanying Memorandum of Law, and all of the pleadings and proceedings herein, Appellants-Movants TCR Sports Broadcasting Holding, LLP, d/b/a Mid-Atlantic Sports Network, Baltimore Orioles Baseball Club, and Baltimore Orioles Limited Partnership, in its capacity as managing partner of MASN (collectively, "Appellants"), will move this Court at a motion term thereof, to be held at Court of Appeals Hall located at 20 Eagle Street, Albany, New York, on February 22, 2021 at 9:30 A.M., or as soon thereafter as counsel may be heard, for an Order (i) pursuant to CPLR 5602(a)(1)(i) and 22 NYCRR section 500.22, granting Appellants permission to appeal the October 22, 2020 order of the Supreme Court, Appellate Division, First Department ("2020 First Department Order") to the Court of Appeals; and (ii) granting Appellants such other and further relief that this Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE, that pursuant to Court of Appeals Rule (22 NYCRR) § 500.21(c), answering papers, if any, must be served and filed in the Court of Appeals, with proof of service, on or before the return date of the motion.

Dated: New York, New York
February 10, 2021

Respectfully submitted,

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STATE OF NEW YORK
COURT OF APPEALS

TCR SPORTS BROADCASTING HOLDING, LLP,

Appellant,

-against-

WN PARTNER, LLC; NINE SPORTS HOLDING, LLC; WASHINGTON NATIONALS BASEBALL CLUB, LLC; THE OFFICE OF 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.

New York County Clerk's
Index No. 652044/2014

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
February 10, 2021

By: Jonathan D. Schiller

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Appellants MASN and the Baltimore Orioles[1] respectfully move, pursuant to CPLR 5602(a)(1)(i) and 22 NYCRR section 500.22, for permission to appeal the October 22, 2020 order of the Supreme Court, Appellate Division, First Department ("2020 First Department Order," Ex. 1) to the Court of Appeals.[2]

PRELIMINARY STATEMENT

This is a motion for permission to appeal the 2020 First Department Order, which affirmed a $105 million judgment ("2019 Judgment," Ex. 2) against MASN and in favor of the Washington Nationals ("Nationals"). The 2019 Judgment confirmed an April 15, 2019 arbitration award ("Second Award," Ex. 3) issued by a Major League Baseball ("MLB") arbitration panel, MLB's Revenue Sharing Definitions Committee ("RSDC"). MLB's RSDC issued the Second Award following a July 13, 2017 order by the First Department ("2017 First Department Order"), which unanimously vacated MLB's previous arbitration award in this dispute ("First Award"), but by a vote of 2-1-2 remanded the proceedings back to MLB. *See* Ex. 4. Two Justices (Acosta, P.J. and Gesmer, J.) dissented from the 2017 First Department Order on the ground that MLB's evident partiality, bias, and

[1] The parties to this motion are Movant-Petitioner-Appellant TCR Sports Broadcasting Holding, LLP, d/b/a Mid-Atlantic Sports Network ("MASN"), Movants-Nominal Respondents-Appellants Baltimore Orioles Baseball Club and Baltimore Orioles Limited Partnership, in its capacity as managing partner of MASN (collectively, "Orioles" and together with MASN, "Appellants").

[2] References to "Ex." Refer to the Exhibits to the Affirmation of Jonathan D. Schiller in Support of Motion for Permission to Appeal, dated February 10, 2021, attached to this motion.

prejudgment of the issues in dispute would make a rehearing of the dispute before MLB fundamentally unfair to Appellants, and therefore the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.*, required this dispute to be reheard by arbitrators in a different and neutral arbitral forum outside the control of MLB. Ex. 4 at 39-74.

On November 19, 2020, Appellants served and filed a Notice of Appeal to this Court, pursuant to CPLR 5601(d), from the 2020 First Department Order, to seek review, pursuant to CPLR 5501(b), of the 2017 First Department Order which (i) is an order of the Appellate Division on a prior appeal in the action which necessarily affected the 2019 Judgment and 2020 First Department Order, which finally determined this special proceeding, and (ii) satisfies the requirements of CPLR 5601(a) because the 2017 First Department Order contains a dissent by two Justices on a question of law in favor of Appellants. Ex. 5 (Notice of Appeal).

On December 3, 2020, Respondent Nationals moved to dismiss Appellants' appeal. Ex. 6. Appellants submitted a comprehensive opposition to the Nationals' motion to dismiss the appeal on December 14, 2020. Ex. 7. Appellants' appeal, and the Nationals' motion to dismiss, are currently pending before this Court.

Appellants make the present motion for permission to appeal to seek this Court's review of the *additional* issues of MLB's evident partiality, bias, and prejudgment of this dispute that occurred *after* the 2017 First Department Order remanded the proceeding to MLB. While Supreme Court and the First Department

rejected Appellants' challenges to MLB's post-remand conduct, and confirmed MLB's Second Award, they did so based on the two-Justice plurality in the 2017 First Department Order. Ex. 1 at 5; Ex. 8 at 15-21. For the reasons stated in Appellants' opposition to the Nationals' motion to dismiss appeal, the 2017 First Department Order is now final and is properly before this Court for review under CPLR 5601(d). Ex. 7 at 20-45. It is respectfully submitted that because of the close relationship between the additional issues that arose after the 2017 First Department Order and the issues raised by the Appellants' appeal as of right seeking review of that order under CPLR 5601(d), granting this motion for permission to appeal will provide the Court with a more complete review of this matter under CPLR 5501.

MLB's post-remand conduct raises issues of law of public importance in New York that warrant review, 22 NYCRR 500.22(b)(4), because they go to the core of the fairness and impartiality obligations that arbitrators and arbitral appointing authorities must adhere to. MLB's conduct, which Appellants submit was manifestly improper for an arbitrator or arbitral forum and unlawful under the FAA, included MLB's retaining a $25 million financial interest in the arbitration that MLB originally took in 2013. Ex. 9 at 1-2. The Nationals represented to the First Department at oral argument on March 31, 2017 that they would post a bond to eliminate MLB's financial interest. Ex. 4 at 30, 64. But the Nationals never posted a bond. Instead, they entered into a February 2018 agreement with MLB that

continued MLB's $25 million financial stake in the arbitration, and conditioned the Nationals' repayment of the $25 million to MLB on MLB's holding the RSDC hearing that the Nationals had requested. Ex 10 at 1. MLB's continued misconduct – including MLB's retention of a *financial interest* in the arbitration – is inconsistent with the FAA. This Court should grant review to confirm the commonsense notion that arbitral bodies cannot have *financial interests* in disputes pending before them. Review is also warranted to resolve the tension between the 2020 First Department Order's outlier decision, which permitted a financial interest, and contrary Appellate Division and Second Circuit rulings. While this issue is of great moment to the parties in this special proceeding, it is also an issue of public importance given the proliferation of arbitration agreements as a mechanism for dispute resolution and New York State's position as a global hub for arbitration proceedings.

The Supreme Court's entry of a $105 million money judgment on the Second Award raises an additional key issue regarding the power of a New York court, in proceedings to confirm an arbitration award, to calculate and award monetary damages to a party to an arbitration that were not actually calculated or awarded *by the arbitrators* in the award itself. Even though the MLB arbitrators here only issued a declaration, not a damages award, Ex. 3 at 48, the Supreme Court took the additional step of calculating and awarding damages to the Nationals that were not awarded in the Second Award. Ex. 2 at 2-3; Ex. 8 at 25; Ex. 11 at 3. This damages

award was not authorized by the FAA, or CPLR 7510 and 7511, and was an improper award by Supreme Court of damages that the arbitrators did not award. This error warrants vacatur of the 2019 Judgment even if the Second Award is confirmed.

BACKGROUND, PROCEDURAL HISTORY AND TIMELINESS OF THE MOTION

The background and procedural history of this case are set forth in detail in Appellants' December 14, 2020 Opposition to the Nationals' motion to dismiss Appellants' appeal. Ex. 7 at 6-17. Appellants summarize the relevant background and procedural history here and refer to their Opposition for additional detail.

MLB's RSDC issued the First Award on June 30, 2014. Ex. 12. On July 2, 2014, Appellants commenced this special proceeding seeking to vacate the First Award on the ground it was procured through bias, evident partiality, misconduct, fraud, corruption, and undue means, and was rendered beyond the scope of the arbitrators' authority and in manifest disregard of the law. Appellants also sought to have the matter remanded for a second arbitration before a different forum. The Nationals cross-moved to confirm the RSDC's award. Supreme Court vacated the First Award on November 4, 2015. Ex. 13. However, in a footnote to its order, and without citation to authority, Supreme Court stated that it lacked authority to disqualify MLB from presiding over any rehearing of the dispute. *Id.* at 28 n.21.

Appellants appealed 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. At oral argument before the First Department on March 31, 2017, in response to that court's concern over the financial arrangements between MLB and the Nationals, the Nationals' counsel promised the First Department that the Nationals would "post a bond to guarantee repayment of" $25 million that MLB paid to the Nationals pursuant to an August 2013 agreement that gave MLB the right to recover the $25 million out of the proceeds of a future RSDC award in the Nationals' favor. Ex. 4 at 30, 64; Ex. 9 at 1-2. The First Department issued the 2017 First Department Order on July 13, 2017, which unanimously affirmed the Supreme Court's vacatur ruling in a *per curiam* opinion, but by a vote of 3-2 with a two-Justice dissent, remanded the proceedings back to MLB for a new arbitration before new arbitrators. Ex. 4 at 5. The two-Justice plurality opinion relied on the Nationals' promise to "post a bond to guarantee repayment of the [$25 million] advance to MLB regardless of the outcome of the arbitration" in remanding the case to MLB. Ex. 4 at 30.

Appellants appealed the 2017 First Department Order to the Court of Appeals on July 14, 2017. In an order dated November 16, 2017, the Court of Appeals dismissed the appeal "on the ground that the order appealed from does not finally determine the proceeding within the meaning of the Constitution." Ex. 14 at 4.

Appellant also moved before the First Department for leave to appeal to the Court of Appeals from the 2017 First Department Order under CPLR 5602(b)(1). In an order dated and entered January 18, 2018, the First Department denied the motion for leave. Ex. 15 at 6. Proceedings resumed before MLB in February 2018.

Despite the Nationals' express representation to the First Department at oral argument on March 31, 2017 that the Nationals would "post a bond to guarantee repayment of" the $25 million, Ex. 4 at 30, 64, the Nationals never a bond. Instead, on February 9, 2018, the Nationals and MLB signed an *ex parte* agreement, pursuant to which the Nationals conditioned their payment of $25 million to MLB on MLB's RSDC holding a new arbitration hearing. Ex. 10 at 1. Thus, contrary to the Nationals' 2017 representation to the First Department at oral argument, MLB actually continued to have a $25 million financial interest in the arbitration: MLB's right to the $25 million was conditioned on MLB's holding the arbitration hearing requested by the Nationals. Predictably, MLB's arbitrators denied Appellants' request that they recuse from the dispute on May 10, 2018. Ex. 16 at 2.

In addition, during the proceedings on remand, and despite Appellants' repeated requests, neither MLB nor its arbitrators disclosed what MLB officials told its arbitrators about the issues in dispute. Ex. 16 at 3. Appellants requested that MLB's arbitrators make these disclosures under the FAA because the record demonstrates that MLB's officials, including its Commissioner, are partial to the

Nationals' positions in the dispute, and have even declared publicly that "sooner or later," MASN "will be required to pay" the rights fees set by MLB's arbitrators in the vacated First Award. *See, e.g.*, Exs. 17, 18. Yet MLB, while acknowledging that its officials were communicating with the arbitrators, Ex. 19 at 1, refused to disclose what MLB told its arbitrators about the issues in dispute. Ex. 16 at 3.

MLB's RSDC held a rehearing in November 2018 and issued the Second Award on April 15, 2019, which reached a result almost identical to the vacated First Award. *Compare* Ex. 3 at 1 (Second Award), *with* Ex. 12 at 19 (First Award).[3]

On August 22, 2019, Supreme Court confirmed the Second Award. Ex. 9. The Nationals served the order with notice of entry on August 22, 2019. Ex. 21 at 5. On September 20, 2019, Appellants served and filed a notice of appeal from the August 22, 2019 order. Ex. 22 at 1. On November 14, 2019, Supreme Court denied Appellants' motion for re-argument on the issue of whether the Second Award was a declaration or awarded monetary damages to the Nationals, though Supreme Court stated that question was "close." Ex. 22, Transcript at 6, 8, 11. On December 9,

[3] On May 14, 2019, Appellants served and filed a Notice of Appeal from the Second Award pursuant to CPLR 5601(d). On May 31, 2019, the Nationals moved to dismiss the appeal on the grounds that: (1) the two-Justice dissent in the 2017 First Department Order was not on a question of law, (2) the 2017 First Department Order did not necessarily affect the Second Award, and (3) the Second Award was not final. In an order dated and entered November 25, 2019, this 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. 20 at 8.

2019, Supreme Court entered the 2019 Judgment confirming the Second Award and awarding the Nationals monetary damages of $105,025,080.30. Ex. 23. Supreme Court stayed enforcement of the judgment pending appeal subject to MASN's deposit of the judgment into escrow. Ex. 24. On December 12, 2019, Appellants served the decision and order dated November 14, 2019 with notice of entry and the 2019 Judgment with notice of entry. Ex. 22 at 4; Ex. 23 at 4. On December 13, 2019, Appellants served and filed a notice of appeal from the order dated November 14, 2019 and a notice of appeal from the 2019 Judgment. Ex. 22 at 1; Ex. 23 at 1.

In a decision and order dated and entered on October 22, 2020, the First Department affirmed the 2019 Judgment. On October 22, 2020, the Nationals served the decision and order with notice of entry. Ex. 1 at 1. On November 19, 2020, Appellants served and filed a Notice of Appeal to the Court of Appeals, pursuant to CPLR 5601(d), from the 2020 First Department Order to seek review of the 2017 First Department Order on the basis of the two-Justice dissent. Ex. 5; *see* CPLR 5501(b).[4] On November 25, 2020, Appellants served and filed a Preliminary Appeal Statement with the Court of Appeals pursuant to 22 NYCRR 500.9.

On November 20, 2020, Appellants served and filed a Motion to the First Department for Reargument or Leave to Appeal to the Court of Appeals from the

[4] As explained above, the Nationals have moved to dismiss Appellants' appeal, which Appellants have opposed. Exs. 6, 7. Appellants' appeal, and the Nationals' motion, are pending.

2020 First Department Order. Ex. 25 at 1. In an order dated and entered January 7, 2021, the First Department denied the motion. On January 11, 2021, the Nationals served the order on Appellants with notice of entry. Ex. 26 at 1. Thus, this motion for permission to appeal is timely. CPLR 5513(b); 22 NYCRR 500.22(b)(2).

STATEMENT OF JURISDICTION

The Court has jurisdiction under CPLR 5602(a)(1)(i) to grant Appellants' present motion for permission to appeal because the order sought to be appealed from and reviewed (the 2020 First Department Order) is an order of the Appellate Division affirming a final judgment of Supreme Court "which finally determines the action and is not reviewable as of right." CPLR 5602(a)(1)(i); *see* Ex. 1. As noted above, the Court of Appeals also has jurisdiction of the appeal as of right from the 2020 First Department Order under CPLR 5601(d) to review the 2017 First Department Order, *see* CPLR 5501(b); Ex. 7, which raises issues that are closely related to the issues sought to be reviewed on this motion for leave to appeal.

STANDARD APPLICABLE TO MOTIONS FOR PERMISSION TO APPEAL TO THE COURT OF APPEALS

This Court grants leave to appeal in actions presenting questions that are unsettled, "novel," or of public importance. *See* 22 NYCRR 500.22(b)(4) (issues that "are novel or of public importance" or that "conflict with prior decisions" merit review); *Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder*, 72 N.Y.2d

174, 183 (1988) (granting leave to appeal the "novel and significant issues tendered for review"); *In re Shannon B.*, 70 N.Y.2d 458, 462 (1987) (granting leave to appeal so the Court could consider "the important issue" presented). This Court has also granted leave to appeal when a case presents issues of federal law, as interpreted by the New York courts, with significance and impact not only statewide, but also nationally. *See, e.g.*, *Guice v. Charles Schwab & Co.*, 89 N.Y.2d 31, 38 (1996) (leave granted to consider whether federal law preempted state-law claims).

This case—governed by the Federal Arbitration Act—is just such a case. The FAA governs any arbitration arising out of a "contract evidencing a transaction involving commerce," 9 U.S.C. § 2, and therefore controls judicial review of a vast sweep of arbitration agreements and awards. However, even though it creates substantive federal arbitration law, the FAA "does not create any independent federal-question jurisdiction." *Southland Corp. v. Keating*, 465 U.S. 1, 15 n.9 (1984). As a result, federal courts do not have jurisdiction to hear disputes governed by the FAA where, as here, diversity of citizenship is lacking, so state courts regularly decide FAA cases. *See Flanagan v. Prudential-Bache Securities, Inc.*, 67 N.Y.2d 500, 506 (1986) (New York state courts interpreting the FAA in light of novel or unsettled issues have "the same responsibility as the lower Federal courts").

Decisions of New York courts are particularly important in this regard because "the FAA was modeled after New York's arbitration law . . . and no

significant distinction can be drawn between the policies supporting the FAA and arbitration provisions of the CPLR." Ex. 4 at 58-59 (Acosta, P.J., dissenting) (quoting *Matter of Smith Barney, Harris Upham* & Co. *v Luckie,* 85 N.Y.2d 193, 205-06 (1995)); *see Hall St. Assocs., LLC v. Mattel, Inc*., 552 U.S. 576, 589 n.7 (2008) ("The text of the FAA was based upon that of New York's arbitration statute."). Indeed, federal courts applying the FAA look to "[c]ases applying New York arbitration law analogous to the FAA" both in general and on the specific issues presented by this appeal. *In re Arbitration Between Tempo Shain Corp. v. Bertek, Inc.*, No. 96-3354, 1997 WL 580775, at *2 (S.D.N.Y. Sept. 17, 1997). And New York court decisions interpreting the FAA are particularly important nationally given New York's role as a global financial and commercial center.

QUESTIONS FOR COURT OF APPEALS REVIEW

For the reasons stated in Appellants' opposition to the Nationals' motion to dismiss Appellants' pending appeal, this Court has jurisdiction under CPLR 5601(d) to review the questions of law raised by the two-Justice dissent from the 2017 First Department Order. *See* CPLR 5501(b); Ex. 7 at 20-45. The subsequent arbitration proceedings before MLB, which resulted in the Second Award, 2019 Judgment, and 2020 First Department Order, raise additional issues which independently warrant review by this Court by permission under CPLR 5602(a), including:

1. Does the Federal Arbitration Act prohibit an arbitral forum from entering into an agreement with one party to the arbitration that gives the arbitral forum a direct $25 million financial interest in holding the arbitration hearing?

2. Where a court has previously vacated an arbitral award because of the evident partiality of the arbitral forum and remanded the proceedings back to the same arbitral forum, and officials of the arbitral forum have previously publicly advocated and litigated, prior to remand, in favor of one party and against another party about the issues to be arbitrated, should the new arbitrators disclose the communications they had with officials of the arbitral forum about the dispute?

3. Assuming this Court determines that the Second Award should have been confirmed, the Court will be presented with an additional issue: where an arbitrator's authority under an arbitration provision is limited to issuing a declaration, and the arbitrators only issued a declaration, did not award any sum of monetary damages to any party, and did not set forth a formula by which to calculate damages, does the court have the power to perform its own calculation of damages the court deems are owed and then enter a money judgment on the award?

4. If the Court determines that Appellants do not have an appeal as of right under CPLR 5601(d) to obtain review of the 2017 First Department Order, then the Court should grant permission to review the two questions raised by Presiding

Justice Acosta's two-Justice dissent from the 2017 First Department Order, which "necessarily affect[]" the final judgment under CPLR 5501(a)(1):

> 4.1. 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
>
> 4.2. whether the legal standards governing the exercise of such power required its exercise under the circumstances presented here.

JUSTIFICATION FOR COURT OF APPEALS REVIEW

The procedural posture of this appeal gives rise to a particularly compelling justification for the Court to grant permission to appeal from the 2020 First Department Order. Specifically, Appellants submit that the 2017 First Department Order, which by a vote of 3-2 remanded proceedings to MLB's RSDC, is now properly before this Court for review as of right pursuant to CPLR 5601(d). Thus, this Court will already be hearing and deciding whether the 2017 First Department Order remanding the proceedings back to MLB (by a 3-2 vote) was proper.

In hearing and deciding Appellants' as-of-right appeal under CPLR 5601(d) seeking review of the 2017 First Department Order, the Court will need to become

familiar with the core agreements and facts of this case, including the underlying Settlement Agreement that contains the governing arbitration clause, the role and the conduct of MLB's RSDC, and MLB's agreement with the Nationals creating a $25 million stake in the arbitration. The Court will then need to decide whether the 2017 First Department Order remanding proceedings to MLB was proper. If the Court concludes that the First Department erred in ordering remand to MLB, then it need not address whether the additional issues that occurred during the second arbitration require vacatur of the Second Award. However, if the Court concludes that the First Department was correct to remand proceedings to MLB's RSDC, the Court should also review the conduct of MLB after the 2017 remand decision and during the second arbitration. Even if the 2017 First Department Order stands, the second arbitration presents additional fundamental issues of law going to the core of the impartiality and disclosure required in arbitrations conducted in New York.

1. Permission to Appeal is Warranted to Settle a Fundamental Question Regarding When, if Ever, an Arbitrator or Arbitral Forum May Take a Direct Financial Stake in an Issue Before it

At oral argument before the First Department in the initial 2017 appeal, the Nationals' lawyer promised the court that the Nationals would "post a bond to guarantee repayment of" MLB's $25 million advance to the Nationals "regardless of the outcome of the [second] arbitration." Ex. 4 at 30, 64. In the 2017 First

Department Order, the two-Justice plurality cited and relied on this promise when ruling that arbitration proceedings should be remanded to MLB's RSDC. *Id.* at 30.

But the Nationals did not post a bond. The post-remand record—the subject of this motion—demonstrates that, instead, the Nationals and MLB negotiated and signed a February 9, 2018 agreement that conditioned the Nationals' repayment of the $25 million to MLB on MLB's RSDC holding an arbitration hearing. Ex. 10 at 1. In sum, if MLB's RSDC did not conduct the second arbitration hearing, the Nationals were not required to repay the $25 million to MLB. Thus, MLB, the arbitral appointing authority, had a direct $25 million financial interest in the decision of its own arbitrators of whether to hold the hearing. MLB held that $25 million financial interest when Appellants sought recusal of MLB's arbitrators, which MLB's arbitrators predictably denied on May 10, 2018. Ex. 16 at 3. The Supreme Court and First Department blessed this $25 million financial arrangement.

This Court's review is warranted to confirm that an arbitrator or arbitral appointing authority cannot take a financial stake in a decision before the arbitrators, here, the decision of whether to recuse or to deny recusal and hold a hearing.

Review of this key conflict-of-interest question is particularly warranted because multiple analogous precedents all point in the opposite direction of the 2020 First Department Order. For example, in *Coty Inc. v. Anchor Const., Inc.*, 7 A.D.3d 438 (1st Dep't 2004), the First Department affirmed vacatur of an arbitration award

because the arbitrators involved themselves "in the parties' dispute over prepayment of arbitration fees, a matter in which the arbitrators had a direct financial interest." *Id.* at 439. And in *Pitta v. Hotel Ass'n of N.Y.C., Inc.*, 806 F.2d 419 (2d Cir. 1986), the Second Circuit held that the FAA prohibited an arbitrator from arbitrating a dispute over whether he had been validly dismissed as arbitrator, because the arbitrator had a financial incentive (beyond his hourly charges) to conclude that he had not been validly dismissed. The Second Circuit vacated the award and remanded the issue to be heard before a different, independent arbitrator. *Id.* at 423-24.

Coty and *Pitta*, the two most directly analogous precedents from New York state and federal courts on the issue of an arbitrator's financial interest, hold that an arbitrator cannot have a direct financial interest in a decision before the arbitrator, including whether to recuse. There is no state or federal case that Appellants are aware of permitting an arbitrator or an arbitral appointing authority to have a direct financial interest in any decision before it, including whether to recuse. The Court should grant review to resolve this conflict in authority and confirm that the FAA does not allow an arbitrator or arbitral appointing authority to have a direct financial interest in a decision before the arbitrator, including a recusal decision.

Indeed, the bright line rule indicated in *Coty* and *Pitta*—that an arbitrator or appointing authority may *never* have a direct financial interest in any matter before it—is the only sensible rule. In enacting the FAA, Congress struck a careful balance

between promoting private agreements to arbitrate on the one hand, and ensuring that arbitration, including all of the accompanying decisions by arbitrators prior to a hearing on the merits, meets a basic level of due process. The question of whether any financial interest is permitted in any circumstance (beyond a nominal financial interest in collecting arbitrator fees) is a central question that this Court should answer because it goes to the basic integrity of the arbitral process in New York.

Although arbitration is intended to "conserve the time and resources of the courts and the contracting parties," *Marracino v. Alexander*, 73 A.D.3d 22, 26 (4th Dep't 2010), it remains "*imperative* that the integrity of the process … be z*ealously safeguarded*." *Matter of Goldfinger v. Lisker*, 68 N.Y.2d 225, 231 (1986) (emphasis added). Arbitral proceedings must be fair and impartial, and meet the minimum standards for due process. *Bell Aerospace Co. v. UAW*, 500 F.2d 921, 923 (2d Cir. 1974) (arbitrator must "grant parties a fundamentally fair hearing"); *accord Bowles Fin. Grp., Inc. v. Stifel, Nicolaus & Co.*, 22 F.3d 1010, 1012-13 (10th Cir. 1994) (noting the "basic requirement that an arbitrator must grant the parties a fundamentally fair hearing"). A direct financial interest by an arbitral appointing authority in a decision —especially one, as here, that arises from an agreement between the appointing authority and *a party*—is inconsistent with basic fairness.

These principles are reflected in Section 10 of the FAA and the "confirmation and vacatur safety net" that it creates. *See Hoeft v. MVL Group, Inc.,* 343 F.3d 57,

63 (2d Cir 2003), *overruled on other grounds by Hall St. Assocs.*, 552 U.S. 576. Through Section 10 of the FAA, Congress "impressed limited, but critical, safeguards onto this process, ones that respected the importance and flexibility of private dispute resolution mechanisms, but at the same time barred federal courts from confirming awards tainted by partiality, a lack of elementary procedural fairness, corruption, or similar misconduct." *Id.* at 64; *In re Wal-Mart Wage & Hour Emp't Practices Litig.*, 737 F.3d 1262, 1268 (9th Cir. 2013) (parties in arbitration cannot waive the FAA's statutory grounds for vacatur because that would "frustrate Congress's attempt to ensure a minimum level of due process for parties to an arbitration" and leave parties "without any safeguards against arbitral abuse").

These non-waiveable FAA safeguards undergird the federal policy favoring arbitration. Indeed, it is only *because* these underlying safeguards exist that courts can defer to private agreements to arbitrate in the first place. *Hoeft*, 343 F.3d at 63 ("Thus, while we have spoken in broad terms of deference to private agreements to arbitrate, we have always done so with an awareness of the confirmation-and-vacatur safety net that hangs below."); *see also Goldfinger*, 68 N.Y.2d at 231 (explaining that it is imperative to "zealously" safeguard the integrity of the arbitral process "[p]recisely *because* arbitration awards are subject to such judicial deference").

At a minimum, the FAA's impartiality mandate, 9 U.S.C. § 10(a)(2), forbids arbitrators or arbitral appointing authorities from taking *a direct financial stake* in

an issue before the arbitrator—including the issue of whether to hold the hearing or whether to recuse. *See Commonwealth Coatings Corp. v. Cont'l Cas. Co.,* 393 U.S. 145, 147 (1968) (in enacting the FAA, Congress intended "to provide not merely for an arbitration *but for an impartial one*") (emphasis added); Ex. 13 at 28 (Marks, J.) ("neutrality of the adjudicative process is the very bedrock of the FAA ... [and] [i]t is upon that foundation, and in great reliance upon it, that courts can defer to processes decided upon and designed by private contract"); *Bowles*, 22 F.3d at 1013 (a fundamentally fair hearing requires proceedings before "*decisionmakers [that] are not infected with bias*.") (emphasis added); THOMAS H. OEHMKE, COMMERCIAL ARBITRATION § 36:01 (Revised Ed., Cumulative Supp. 2001) ("The notion of decision-making by *neutrals who are independent* is central" to arbitration; parties "have a right to be judged *impartially and independently*") (emphasis added).

The question of whether *any* direct financial interest is allowed is fundamental. It bears directly on the integrity of the arbitral process and public confidence in arbitration as an alternative forum of dispute resolution. The 2019 Supreme Court order, and 2020 First Department Order, which held that an arbitral appointing authority may, *in an agreement with one party, take a direct financial stake in an issue before the arbitrator*, disserves the policy interest in ensuring that arbitration is both fundamentally fair and is seen that way by the public—an interest that is particularly crucial given the ubiquity of arbitration agreements in modern

life. It would equally disserve New York's global reputation as one of the leading centers for business arbitration. New York has a unique and compelling interest in resolving the critical question of when, if ever, it is appropriate for an arbitral appointing authority to take any financial interest – much less a direct financial interest of $25 million – in a decision before its arbitrators. Indeed, if a judge had entered into such an arrangement with a party, it would be entirely inappropriate

2. Permission to Appeal is Warranted to Clarify Arbitrators' Disclosure Obligations when the Arbitral Forum Has Publicly Advocated in Favor of One Party and Against Another

The record here contains extraordinary *direct evidence* of partiality, bias and prejudgment by the arbitral body itself—MLB. Indeed, the MLB Commissioner himself has demonstrated evident bias and even outright hostility to MASN and the Orioles. The Commissioner has argued in favor of the Nationals' position on the key issue before the RSDC—how to interpret language in the parties' Settlement Agreement—strenuously (and wrongly) arguing that MASN's and the Orioles' interpretation of the contract "does not conform to its text." Ex. 27 at 15.

The Commissioner has also publicly accused MASN and the Orioles of "engag[ing] in a pattern of conduct designed to avoid [the Settlement Agreement] being effectuated." Ex. 28 at 1. The Commissioner has actively litigated against MASN and the Orioles in this dispute, personally filing three affidavits with Supreme Court arguing directly in favor of the Nationals' litigation positions and

attacking MASN's and the Orioles' arguments as "false," "groundless," "baseless," "inaccurate," and "misleading." Ex. 27 at ¶¶ 11, 20, 38, 41; Exs. 29, 30. Senior MLB officials who report to the Commissioner also personally filed affidavits in the Supreme Court proceedings in support of the Nationals. *See, e.g.*, Ex. 31.

And after Supreme Court found that Appellants were likely to *succeed* on the merits of their first vacatur challenge to the award, the Commissioner declared publicly that MASN "will be required to pay" the rights fees set in the vacated first award "sooner or later." Exs. 17, 18. The Commissioner's desires were certainly fulfilled here. As Presiding Justice Acosta accurately predicted in his dissent, the Second Award reached almost exactly the same result as the First Award.

In short, the *authority that appointed the arbitrators*—MLB, including the Commissioner himself—is not neutral in this dispute, and has publicly prejudged the issues to be arbitrated. Thus, the proceedings on remand raised a question that the 2017 First Department Order did not address: What are the replacement RSDC arbitrators' disclosure obligations? There can be no serious dispute that statements or instructions by the MLB Commissioner or his staff to these arbitrators about the issues to be arbitrated could create an impression that the Commissioner or his staff are attempting to influence the proceedings. The MLB Commissioner appoints and removes the RSDC arbitrators at will and exercises broad powers over all MLB teams. Ex. 19 at 1; Ex. 30 at 2. The Commissioner's statements to the RSDC

arbitrators could plainly influence the arbitrators' deliberations. And the fact that the value MLB's arbitrators set forth in its second arbitral award was within 0.4% of the value set forth by the first, evidently partial MLB arbitral panel, at a minimum should raise serious suspicion about what the Commissioner told the second arbitral panel. *Compare* Ex. 12 at 19 (First Award), *with* Ex. 3 at 1 (Second Award).

Yet despite Appellants' repeated requests, neither MLB nor its arbitrators disclosed their communications with MLB officials about the dispute, Ex. 16 at 3, and Supreme Court and First Department held that this secrecy was permitted under the FAA. This appeal thus asks whether MLB's replacement arbitrators were required to disclose any communications they had with the MLB Commissioner or his staff, who appoint them and can remove them at will, about this dispute. The most analogous case, *Sanko S.S. Co. v. Cook Indus, Inc.*, 495 F.2d 1260 (2d Cir. 1973), supports a requirement that the RSDC arbitrators disclose the requested communications. In *Sanko*, the Second Circuit held that a party to an arbitration was entitled to a hearing to ascertain the full extent and nature of the relationships, both direct and indirect, between the arbitrator and the other party. *Id.* at 1264-65. The arbitrators were required to make this disclosure because the information about which disclosure was sought "could create an impression of possible bias." *Id.*

Here, the evidence demonstrates that the appointing authority, MLB, *is biased* in this dispute in favor of the Nationals, and against MASN and the Orioles. Indeed,

MLB has publicly advocated for and litigated in favor of the Nationals, and against MASN and the Orioles. To the extent the MLB Commissioner or his staff, which control the league and exercise plenary power of the RSDC and its members' teams, communicated with the arbitrators about this dispute, such a communication would, Appellants submit, "create an impression of possible bias" under *Sanko*.

This Court should have the opportunity to consider whether and when, in light of clear evidence of bias of the appointing authority itself, the arbitrators must disclose their communications with officials of that appointing authority.

3. Permission to Appeal is Warranted to Clarify Whether a Court May Enter a Money Judgment on an Arbitral Award when the Award Does Not Award Damages or Specify a Damages Formula

The confirmation proceedings before Supreme Court in this case also raise a fundamental issue regarding the Supreme Court's authority under the FAA, 9 U.S.C. § 11, and CPLR 7510 and 7511, to award money damages when the arbitrators could not and did not do so. Under both the FAA and CPLR, the court's authority to modify an arbitral award is highly circumscribed. The court can modify an award only in the defined set of circumstances expressly set forth by statute, which include "an evident material miscalculation of figures," 9 U.S.C. § 11(a); CPLR 7511(c)(1) (allowing modification of an arbitration award where "there was a miscalculation of figures"). Nothing in the FAA or CPLR gives a court any authority to calculate and award purported money damages that were not actually awarded by the arbitrators

in the arbitration award, either in a dollar figure or pursuant to a formula

The Second Award does not contain any damages award, because, as the arbitrators expressly stated in the award, the arbitrators lacked authority to award any remedy except a declaration as to the fair market value of the parties' telecast rights. Ex. 3 at 1, 16-17, 48. The arbitrators' observation follows directly from the text of the arbitration clause governing this dispute, which gives the arbitrators a very limited mandate to "determine 'the fair market value' of the rights licensed to MASN 'using the RSDC's established methodology for evaluating all other related party telecast agreements in the industry.'" Ex. 3 at 16 (quoting Ex. 34 at 8).

The arbitrators therefore did not award damages, either in a specific dollar amount or in a formula. Ex. 3 at 48. The Second Award's *determination* of "the fair market value of MASN's rights" is *not* a damages award. It is a "determin[ation]" of fair market value, which is the *only* thing the arbitrators had authority to decide. Ex. 3 at 1, 16-17, 48. And because it was undisputed that the rights-fee determination would need to be offset against other payments to determine how much money would eventually change hands, the rights-fee determination *cannot* be a damages award. Ex. 3 at 17. Supreme Court was prohibited from "perform[ing] a calculation of the Nationals' damages," Ex. 1 at 5, and Supreme Court exceeded its powers under the FAA and CPLR when it improperly awarded a remedy—$105

million in monetary damages—that the arbitrators could not and did not award.[5]

The distinction between the Second Award and the sole authority cited in the 2020 First Department Order further supports review of this issue. In the sole case cited by the First Department, *Morgan Guaranty Trust Co. v. Solow*, 114 A.D.2d 818, 821 (1st Dep't 1985), it was undisputed that the arbitrators *had* the authority to award money damages. Nothing in the FAA, CPLR, or *Morgan Guaranty* authorizes a Court to *imply* a formula into an award that (i) was issued by an arbitrator that lacked authority to award damages and was merely a determination, and (ii) does not expressly set forth a formula for the calculation of damages.

Supreme Court's award of damages and entry of a money judgment in this case is unprecedented – it is new law holding that a court can *imply* a damages calculation formula into the award if it determines that damages are appropriate. That novel and important remedy has not been sanctioned by any case in New York or elsewhere. It is also flatly inconsistent with the narrow authority granted in the FAA, 9 U.S.C. § 11, and CPLR 7510 and 7511, which gives the court the power to

[5] The Nationals never sought money damages in the arbitration. The Nationals sought "interest, costs, and litigation expenses"—all of which the arbitrators stated they lacked authority to award, Ex. 3 at 17 & n.9—but the Nationals did not seek a remedy of monetary damages. The Nationals did not submit to the arbitrators a proposed calculation of damages, a prayer for relief, or an ad damnum statement. Rather, the Nationals only asked for a determination about the "fair market value" of the Rights. Ex. 35 at 47; Ex. 36 at 56; Ex. 37 at 35. The "fair market value" of the Rights is not a damages figure, including because—as the arbitrators expressly recognized—past rights fees and past profit distributions must offset the higher rights fees. *See* Ex. 3 at 17.

modify an arbitration award to correct "a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award" or address something that makes the award "imperfect in a matter of form, not affecting the merits of the controversy." The Court should review this important issue.

4. If the Court Determines that Appellants Do Not Have the Right to Review of the 2017 First Department Order, the Issues Raised by Presiding Justice Acosta's Dissent Merit Review by Permission

For the reasons stated in Appellants' December 14, 2020 opposition, this Court has jurisdiction under CPLR 5601(d) to review the 2017 First Department Order, and thus Appellants' pending appeal-by-right is proper. Ex. 7 at 20-45.

But if the Court decides that review of the 2017 First Department Order does not lie as of right, the Court should grant permission to appeal the 2020 First Department Order, which will permit the Court to review the issues that divided the Justices 2-1-2 in the 2017 First Department Order. The three separate opinions in that Order, totaling 67 pages, demonstrate the need for this Court's review.

As Presiding Justice Acosta explained, the conduct of the arbitral body, MLB, and its arbitration panel, the RSDC, was heavily biased and partial in favor of the Nationals and against Appellants. MLB's improper conduct included, among other things: (1) MLB's taking a direct $25 million financial interest in the arbitration; (2) the MLB Commissioner making several public statements on the merits in favor of the Nationals and against Appellants, including that "sooner or later" Appellants

"will be required to pay" the First Award to the Nationals; and (3) MLB's actively litigating in favor of the Nationals and against Appellants, and seeking to enforce MLB's arbitration award despite it threatening the financial viability of MASN and potentially the Orioles. *See generally* Ex. 4 at 39-74 (Acosta, P.J., dissenting).

MLB's and the Nationals' primary defense of MLB's conduct is that by agreeing to so-called "industry-insider" arbitration before MLB, Appellants essentially forfeited their rights under the FAA to an arbitration free from partiality, bias, or prejudgment. But nothing in the FAA or the cases applying it suggests that agreeing to arbitrate before an industry panel negates the FAA's protections against partiality, bias, and prejudgment, including the FAA's well-recognized prohibition of an arbitrator or arbitral body having a *direct financial interest* in the arbitration. On the contrary, federal appellate courts recognize that these basic statutory protections cannot be waived. *See Wal-Mart Wage & Hour Litig.*, 737 F.3d at 1268.

This fundamental issue of arbitration law split the Appellate Division evenly, 2-2, in the 2017 First Department Order. The plurality (Andrias and Richter, JJ.) ruled that, despite MLB's clear misconduct in the arbitration that required vacatur of its First Award, the parties' agreement to an "industry-insider" arbitration panel required the arbitration to be reheard before MLB. Ex. 4 at 6, 27. The dissent (Acosta and Gesmer, JJ.) sharply disagreed, holding that a rehearing before MLB would be fundamentally unfair to Appellants, and that the FAA required a rehearing

before an arbitral forum unaffiliated with MLB. The one-Justice concurrence (Kahn, J.) broke the 2-2 split by ruling that, even though "the conduct of Major League Baseball and its representatives has been far from neutral and balanced," Ex. 4 at 37, the court lacked the authority to order rehearing anywhere except MLB, a ruling that no other Justice joined and that conflicts with ample case law, cited by the dissent.

The division among the Justices in the 2017 First Department Order, on legal issues concerning the fundamental fairness and impartiality of arbitrations in New York, a key international center for arbitration, demands this Court's intervention.

CONCLUSION

The Court should grant Appellants' motion for permission to appeal the 2020 First Department Order, and should consolidate the appeal with the pending appeal (APL 2020-00175) seeking review of the 2017 First Department Order.

Dated: New York, New York
February 10, 2021

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