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

New York Supreme Court

Appellate Division—First Department

TCR SPORTS BROADCASTING HOLDING, LLP,

Petitioner-Appellant-Cross-Respondent-Respondent,

– against –

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

Respondents-Respondents-Cross-Appellants-Appellants,

(For Continuation of Caption See Inside Cover)

BRIEF FOR *AMICUS CURIAE* KENNETH R. FEINBERG, ESQ. IN SUPPORT OF APPELLANTS

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– and –

THE OFFICE OF COMMISSIONER OF BASEBALL and
THE COMMISSIONER OF MAJOR LEAGUE BASEBALL,

Respondents-Respondents-Cross-Appellants,

– and –

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

Nominal Respondents-Appellants-Cross-Respondents-Respondents.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Kenneth R. Feinberg, Esq. ("Mr. Feinberg" or "*Amicus*") has been at the forefront of utilizing arbitration and other types of alternate dispute resolution in the constructive resolution of some of the most complex and highly-charged issues of our time. He has served in the roles of arbitrator, mediator and Special Master in hundreds of disputes and settlements. Mr. Feinberg is the former Vice-Chair of the Committee on Alternate Dispute Resolution of the American Bar Association and is a recognized leader within the dispute resolution community. *See Stolt-Nielsen v. Animal Feeds Int'l Corp.*, 559 U.S. 662, 668 & n.1 (2010) (Ginsburg, J., dissenting).

Mr. Feinberg's experience spans the full spectrum of the alternate dispute field, from designing and administering claims resolution processes to acting as mediator and arbitrator. Mr. Feinberg has served as:

> One of three arbitrators selected to determine the fair market value of the original *Zapruder* film of the Kennedy assassination;
>
> One of two arbitrators selected to determine the allocation of legal fees in the Holocaust slave labor litigation;
>
> Special Master of the Federal September 11th Victim Compensation Fund of 2001 (appointed by the Attorney General of the United States);
>
> Administrator of the Gulf Coast Claims Facility following the BP oil spill (appointed by the Obama Administration and British Petroleum);

Fund Administrator of the GM Ignition Switch Compensation Program;

Special Master of the Terrorism Victim Compensation Fund at the Department of Justice;

Special Master for the Troubled Asset Relief Program ("TARP") Executive Compensation Act of 2009 (appointed by the Secretary of the Treasury).

Mr. Feinberg has acted as Distribution Agent responsible for the design, implementation and administration of settlement funds in high-profile litigations including: *United States Securities and Exchange Commission v. American International Group, Inc.*; *United States of America v. Computer Associates International, Inc.*; and *Latino Officers Association City of New York Inc. et al., v. The City of New York, et al.* On a pro bono basis, Mr. Feinberg has also been: Advisor to the Newtown-Sandy Hook Victim Compensation Fund; Administrator of the Aurora Victim Relief Fund following the Aurora, Colorado movie theatre shootings in 2012; and Administrator of the Hokie Spirit Memorial Fund following the Virginia Tech shootings in 2007.

Amicus has a strong interest in this current case because it raises fundamental questions concerning the integrity of arbitral proceedings and the role of the courts.

ARGUMENT

1. Arbitration and Its Acceptance as a Dispute Resolution Mechanism Rest Squarely Upon the Foundation of Neutrality and Fairness

It is because of *Amicus*' deep faith in the arbitration process that he urges the Court to preserve and protect the foundation of neutrality and fairness of the arbitral process in this case. He subscribes to Judge Kaye's observation that "efficient, effective [alternate dispute resolution] requires that courts know when they should step in, and when they should not." Judith S. Kaye, *New York* and *International Arbitration: A View from the State Bench*, 9 NYSBA N.Y. Dispute Resolution Lawyer 1, 24 (Spring 2016). When the arbitration is unquestionably partial to one party – as it is in this case – the courts must step in.

After being compelled by the facts to vacate the award rendered in the underlying arbitration based on a finding of *evident partiality*, Justice Marks reaffirmed the primacy of neutrality as the foundation of the arbitration process itself. As Justice Marks correctly observed:

> "Evident partiality is no minor issue. Indeed, it may well be that its opposite, neutrality, is so fundamental to any adjudicative process that trust in the neutrality of the adjudicative process is the very bedrock of the FAA. It is upon that foundation, and in great reliance upon it, that courts can defer to processes decided upon and designed by private contract. But without neutrality, where partiality runs without even the semblance of a check, the alternate process created does not warrant-and cannot be given-the great deference that arbitrators, and their awards, are bestowed by courts under the FAA." R.42.

As the neutral charged with many of the nation's most high-profile dispute resolution programs, *Amicus* comes before this Court to support Justice Marks' recognition that neutrality and fairness are so fundamental to the integrity of the arbitral process that, when these bedrock principles are compromised, the arbitration must be vacated. To do anything less would encourage partiality and impropriety in arbitral proceedings and, therefore, undermine the public's confidence in alternative dispute resolution. When parties agree to arbitrate their disputes, they expect – and must be able to rely upon – the fundamental fairness and neutrality of the proceedings, the arbitrators and the forum.

Here, the record of these proceedings presents an arbitration that may be the poster child for everything that an arbitration should not be. At every turn, Major League Baseball ("MLB") and its Revenue Sharing Definitions Committee ("RSDC") ignored fundamental principles of arbitration fairness and neutrality. From the outset, MLB failed to take any action to address the blatant conflicts of interest caused by the concurrent representations of MLB's outside attorneys, who represented not only MLB (the forum) and the Commissioner, but also the arbitrators (or their Clubs or affiliated businesses) and the Nationals (a party) during the arbitral proceedings. R.35-36. The partiality caused by these concurrent and confidential attorney/client relationships undermined any semblance of integrity or fairness in the proceeding itself.

The record shows that the fairness of the proceedings was also undermined when MLB ignored the critically important distinction separating the arbitral forum from the arbitrators. In particular, MLB so intertwined itself in the decision-making process and deliberations of the panel that it, not the arbitrators, actually wrote the award. *See, e.g.*, R.2955-56 ¶¶ 15, 19; R.3081.

The RSDC acknowledges that it did not adhere to the limitations of the grant of authority set forth in the arbitration clause in the contract, which mandated that it shall apply a fixed methodology consistently applied to all other MLB Clubs. R.217, n.2. Significantly, the record reflects that MLB's former longtime media consultant, who developed that methodology for MLB, attested that the award "completely corrupt[ed]" the methodology, R.1180 ¶ 38 (Affidavit of Mark Wyche), thus, providing further evidence of a lack of fundamental fairness and integrity in the proceedings.

And, remarkably, the record also shows that MLB had a financial interest in the outcome of the arbitration by advancing $25 million to the Nationals, which was nonrecourse to that Club and could only be recouped by MLB if the RSDC rendered an award in excess of the amounts calculated under the contractual methodology. R.2918. As MLB's $25 million stake in the outcome of the arbitration remains an open debt, it unquestionably disqualifies MLB from acting as the arbitral forum in any rehearing of the dispute.

MLB and the RSDC are further and incurably compromised by actions taken after the award was vacated. The record reflects that the Commissioner repeatedly made public pronouncements chastising MASN's positions and expressing the predetermined view that, in any future proceeding, MASN could expect to receive the same result from the RSDC. R.3426; *accord* R.3427; R.3702-03. A reasonable person could only conclude that a rehearing under MLB's auspices, therefore, would be nothing more than a sham repeat of the earlier arbitration.

These and other facts in the record reveal such an extraordinary degree of partiality, financial interest and prejudgment, that basic principles of neutrality and fundamental fairness have been permanently compromised by the arbitrators and MLB.

2. Where the Forum Is Tainted By Partiality, A Financial Interest in the Outcome of the Dispute and Prejudgment of the Merits, It Should Be Disqualified and Replaced By a Neutral and Independent Forum

Although Justice Marks observed that the Court had the power to vacate the tainted award, he questioned whether the Court had the authority to direct the parties to a new and neutral forum that would provide a fair and level playing field. Justice Marks deferred to this Court to find that authority, which *Amicus* believes can be found under FAA Section 10(b) (9 U.S.C. § 10(b)) and equitable principles.

Where an arbitral award is vacated for partiality, bias or misconduct, the "[c]ourts have discretion" under Section 10(b) "to remand a matter to the same

arbitration panel or a *new* one." *See Sawtelle v. Waddell & Reed, Inc.*, 304 A.D.2d 103, 117 (1st Dep't 2003) (emphasis added); *see also Aircraft Braking Sys. Corp. v. Local 856*, 97 F.3d 155, 162 (6th Cir. 1996). That safeguard is equally, if not more, applicable where the forum, here MLB, has not only been found to be partial but also has a financial stake in the outcome of any future proceeding and has expressed a predetermined view of that outcome.

Arbitration, a trusted means for dispute resolution, requires a change of forum under these circumstances. The fairness and integrity of the arbitral process is so fundamental that, regardless of the contractual designation of the arbitral forum, when that forum: (1) allows pervasive conflicts of interest to permeate the arbitration, (2) takes a financial interest in the outcome of the dispute, or (3) expresses a prejudgment opinion concerning the merits of the dispute, it should be deemed "unavailable" to resolve the dispute and should be replaced.

MLB's partiality, entanglements, public pronouncements, and financial interest have poisoned the choice of MLB as an impartial arbitral forum. Basic principles of fundamental fairness and due process embedded in the FAA require that the arbitration be reassigned to an independent and neutral forum. The mere appointment of another RSDC panel by MLB, still continuing to operate under its auspices, cannot cure these systemic ills. To the contrary, allowing a rehearing to be conducted under MLB's auspices would condone the kind of misconduct rejected

by the FAA and would undermine public confidence in arbitration as a trusted means of dispute resolution.

3. New York Has a Compelling Interest in Protecting the Integrity of Arbitration By Ensuring Proceedings Before Fair and Impartial Panels

New York, as the preeminent seat for arbitration in the United States, has a unique and compelling interest in protecting the integrity and independence of the arbitration process. *See* Theodore Eisenberg and Geoffrey Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 Cardozo L. Rev. 1475, 1478 (2009); *see also* Press Release, New York International Arbitration Center, *New York Tops Popularity Tanking as Seat for International Arbitration* (May 5, 2016), available at https://nyiac.org/nyiac-news/.

The general preference for New York as the site of arbitration is well recognized. New York Courts "have long encouraged arbitration, viewing the procedure as offering a speedy, flexible, inexpensive, and sophisticated means for resolving disputes." Geoffrey P. Miller, *Bargains Bicoastal: New Light on Contract Theory*, 31 Cardozo L. Rev. 1475, 1478 (2010). New York was the first state to legalize pre-dispute arbitration clauses and its initial arbitration statute, adopted in 1920, was the model for the Federal Arbitration Act. *Id.* New York is "widely recognized as having an established, well-developed, and stable body of commercial law that is ideally equipped to deal with disputes arising out of complex

transactions." Steven P. Younger, *More Reasons to Arbitrate in the Big Apple*, N.Y.L.J., Nov. 25, 2013. As a policy matter, New York Courts recognize "the important role arbitration plays in the resolution of commercial disputes." Judith S. Kaye, *New York and International Arbitration: A View from the State Bench*, 9 NYSBA N.Y. Dispute Resolution Lawyer 1, 24 (Spring 2016). It is no accident, therefore, why New York is home to the headquarters of several well-respected arbitration and alternative dispute resolution institutions, including AAA, the International Centre for Dispute Resolution (the global component of AAA), the New York International Arbitration Center, and the International Institute for Conflict Prevention & Resolution.

New York, therefore, has an exceptional interest in ensuring that its courts, like the federal courts, properly recognize and apply the authority granted by the FAA in order to protect the integrity and neutrality of arbitration. The arbitration at issue before this Court admittedly presents facts and circumstances unique to the parties and their contract. But *Amicus* maintains that this Court should assure the public and the arbitral community that, when the forum is as incurably biased as here, the courts should order substitute arbitrators under the auspices of a neutral and independent forum. Public confidence in arbitration as a means of alternative dispute resolution rests on such assurances.

CONCLUSION

Amicus urges this Court to exercise its curative power to direct the parties to a neutral dispute resolution forum and a new arbitration panel. *Amicus* is not suggesting that arbitration in this matter is inappropriate; to the contrary, *Amicus* continues to recognize the importance of arbitration as an alternative to conventional litigation. But the arbitration alternative must be beyond criticism in terms of its fairness and, indeed, the perception of fairness.

In this unique case, *Amicus* respectfully advances that this Court should order, or confirm that the trial court has authority to order, a new arbitration in a new forum removed from MLB's partiality, financial interest and predetermined opinions. The integrity of this arbitration proceeding, and arbitration generally as a dispute resolution mechanism, support such an order.

Dated: September 23, 2016
New York, NY

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APPELLATE DIVISION – FIRST DEPARTMENT
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Type. A proportionally spaced typeface was used, as follows:

Name of typeface:	Times New Roman
Point size:	14
Line spacing:	Double

Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service and this Statement is 2,186.

Dated: September 23, 2016
New York, NY

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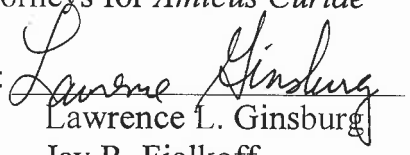
By: 
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